

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 disclosure provisions for which the Federal Trade Commission (“FTC” or “Commission”) seeks renewed OMB clearance implement section 214 of the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”), Pub. L. No. 108-159 (2003), and Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), Pub. L. 111-203, 124 Stat. 1376 (2010).

The FACT Act amended the Fair Credit Reporting Act (“FCRA”), in part, to allow 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. The latter section 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 FTC, 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’s disclosure requirements are subject to the provisions of the Paperwork Reduction Act, 44 U.S.C. Chapter 35 (“PRA”). The Rule generally provides that, if a company communicates certain information about a consumer (eligibility information) to an affiliate, the affiliate may not use it to make or send solicitations to him or her unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and s/he does not. Additionally, where a 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 provides model disclosures that covered entities may use. The Rule does not include recordkeeping requirements.

The Dodd-Frank Act substantially changed the federal legal framework for financial services providers. Among the changes, the Dodd-Frank Act transferred to the Consumer Financial Protection Board (“CFPB”) most of the FTC’s rulemaking authority for the affiliate marketing provisions of the FCRA on July 21, 2011. The Commission, however, retains rulemaking authority under FCRA over any motor vehicle dealers described in Section 1029(a) of the Dodd-Frank Act that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.

On December 21, 2011, the CFPB issued its interim final FCRA rule, Regulation V. The affiliate marketing provisions, subpart C, became effective on December 30, 2011, and are codified at 12 C.F.R. 1022.20. Regulation V does not affect the pre-existing requirements of the FCRA. Additionally, the FTC shares enforcement authority with the CFPB for provisions of Regulation V that apply to other entities. Thus, the FTC and CFPB have overlapping enforcement authority.

Contemporaneous with the issued interim final rule, the CFPB and FTC had each submitted to OMB and received its approval for, the agencies' respective burden estimates reflecting their overlapping enforcement jurisdiction, with the FTC supplementing its estimates for the enforcement authority exclusive to it regarding the class of motor vehicle dealers noted above. The discussion below continues that analytic framework, as appropriately updated or otherwise refined for instant purposes.

NOTE: "Rule" when used below references the FTC's Affiliate Marketing Rule. "Rules" refer collectively to the FTC Rule and subpart C of the CFPB's Regulation V.

(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.

(4) Efforts to Identity 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 ("GLBA"), 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 FTC Act. The Commission's Rule implements these requirements by providing model notices while affording small businesses (and all other regulated businesses) some flexibility in choosing the specific content. Staff believes that the model notices will help eliminate much of the administrative and legal costs that businesses might incur in seeking to comply with the Rule. In addition, the Rule provides an affiliate some flexibility in choosing how to deliver notification. Among other ways, and depending on the circumstances, an affiliate may provide required notification by hand-delivery or by postal 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 FTC Act.

(7) Circumstances Requiring Collection Inconsistent with Guidelines

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

(8) Public Comments/Consultation Outside the Agency

The Commission most recently sought public comment on the PRA aspects of the Rule, as required by 5 C.F.R. 1320.8(d). See 78 Fed. Reg. 52,918 (Aug. 27, 2013). No comments were received. The Commission is providing a second opportunity for public comment while seeking OMB approval to extend the existing PRA clearance for the notice provisions of the Rules.

(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

The Commission estimates its share of PRA burden hours as follows:

A. Number of Respondents

FTC staff estimates that approximately 1,174,347 non-GLBA entities and 16,750 GLBA entities under FTC jurisdiction have affiliates and would be affected by the Rule. Staff further estimates an average of 5 businesses per family or affiliated relationship, and believes that the affiliated entities will choose to send a joint notice, as permitted by the Rule. Accordingly, an estimated 234,869 non-GLBA and 3,350 GLBA business families are subject to the Rule. Additionally, the Commission estimates that there are 1,021 non-GLBA and 9,190 GLBA motor vehicle dealerships.¹ Applying the same average of 5 businesses per family or affiliated relationship, there are approximately 204 non-GLBA and 1,838 GLBA motor vehicle dealership families covered by the Rule.

¹ See 78 Fed. Reg. at 52,920.

B. FTC Share of Burden Hours: 560,609 hours

FTC staff assumes that non-GLBA business families will spend 14 hours in the first year and 0 hours thereafter to comply with the Rule, while GLBA business families will spend 6 hours in the first year, and 4 hours in each of the following two years.² The cumulative average annual burden for both non-GLBA entities (1,096,055 hours) and GLBA entities (15,633 hours) for the prospective three-year clearance period is 1,111,688 hours.

To calculate the FTC's total shared burden hours, staff deducted from the total burden hours (1,111,688 hours) those attributed to motor vehicle dealership families (9,529 hours), leaving a total of 1,102,159 hours to split between the CFPB and the FTC. The resulting shared burden is 551,080 hours. For the FTC, staff added the burden hours associated with motor vehicle dealers (9,529 hours), resulting in a total burden of 560,609 hours.

C. FTC Share of Labor Costs: \$21,173,214

FTC staff assumes that for non-GLBA entities, management (7 hours), technical staff (2 hours), and clerical staff (5 hours) will handle Rule compliance. Staff further assumes that for GLBA entities, management (5 hours) and technical staff (1 hour) will be necessary to execute the required Rule notice, with 5 hours of managerial and 1 hour technical labor in the first year, and 3 hours of managerial and 1 hour technical labor in ensuing years. The hourly wages for these classifications are \$52.20, \$38.55, and \$16.54, respectively.³ Multiplying each occupation's hourly wage by the associated time estimate yields an accumulative average annual labor cost burden of \$41,888,066 (\$41,117,733 for non-GLBA entities and \$770,333 for GLBA entities).⁴

To calculate the FTC's total shared labor costs, staff deducted from the total costs (\$41,888,066) those attributed to motor vehicle dealerships (\$458,362), leaving a total net amount of \$41,429,704 to split between the CFPB and the FTC. The resulting shared burden for the CFPB is half that amount, or \$20,714,852. To calculate the FTC burden hours for the FTC, staff added the costs associated with motor vehicle dealers (\$458,362), resulting in a total cost burden for the FTC of \$21,173,214.

² In both cases, this amounts to 4.666667 hours, annualized, based on a three-year PRA clearance.

³ These amounts are drawn from OCCUPATIONAL EMPLOYMENT AND WAGES —MAY 2012, U.S. Department of Labor, Bureau of Labor Statistics, released March 29, 2013, Table 1 (“National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2012”): <http://www.bls.gov/news.release/ocwage.t01.htm>. 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.

⁴ Annualized over the course of a three-year PRA clearance.

D. Capital/Non-Labor costs: \$0

Assumption: Capital and other non-labor costs should be minimal, at most, since the Rule has been in effect several years, with covered entities now equipped to provide the required notice.

Based on staff's review of industry data and its experience in this area, we have no information to suggest that these figures are not still valid.

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

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 notices that they may use to comply. 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 \$225,000 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 from businesses that market goods or services to consumers in certain industries. It has also corrected its prior calculations based on the continuing assumed rate of affiliation (16.75%). Additionally, although the estimated number of GLBA business entities and families remain the same as the prior estimate, staff slightly refined the calculation to arrive at the net number of GLB business entities subject to the FTC's jurisdiction.⁵

(16) Plans for Tabulation and Publication

Not applicable.

⁵ 3,350 GLB business families – 1,838 GLB motor vehicle dealership families = 1,512 GLB business families to split 50:50 between the agencies, i.e., 756 non-motor vehicle GLB business families. Adding back to the FTC the apportionment for motor vehicle dealership families (1,838) totals 2,594 GLB business families for the FTC share. Previously, the FTC showed 2,584 such entities in its ROCIS totals.

(17) **Display of Expiration Date for OMB Approval**

Not applicable.

(18) **Exceptions to Certification**

Not applicable.