

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

As mandated by section 214 of the Fair and Accurate Credit Transactions Act (“FACT Act”), Pub. L. No. 108-159 (Dec. 6, 2003), the FTC’s Affiliate Marketing Rule, 16 CFR Part 680 (“Affiliate Marketing Rule” or “Rule”), specifies disclosure requirements for certain affiliated companies. On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).¹ 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 Bureau (“CFPB”) most of the FTC’s rulemaking authority for the affiliate marketing provisions of the Fair Credit Reporting Act (“FCRA”),² on July 21, 2011.³

The FTC retains rulemaking authority for the Affiliate Marketing Rule solely for 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.⁴ In addition to its rulemaking authority and enforcement role for those auto-industry provisions, the FTC shares enforcement authority with the CFPB over affiliated entities otherwise covered by the provisions of CFPB Regulation V subpart C (“CFPB Rule”).

The FACT Act, Affiliate Marketing Rule, and CFPB Rule require covered entities to provide consumers with notice and an opportunity to opt out of the use of certain information before sending marketing solicitations. The Affiliate Marketing 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 marketing 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 opt out. 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.

¹ Pub. L. 111-203, 124 Stat. 1376 (2010).

² 15 U.S.C. 1681 *et seq.*

³ Dodd-Frank Act, at section 1061. This date was the “designated transfer date” established by the Treasury Department under the Dodd-Frank Act. *See* Dep’t of the Treasury, *Bureau of Consumer Financial Protection; Designated Transfer Date*, 75 FR 57252, 57253 (Sept. 20, 2010); *see also* Dodd-Frank Act, at section 1062.

⁴ *See* Dodd-Frank Act, at section 1029 (a), (c).

The Affiliate Marketing Rule’s disclosure requirements are subject to the provisions of the Paperwork Reduction Act, 44 U.S.C. Chapter 35 (“PRA”). The Rule does not include recordkeeping or reporting 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.

(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* 81 Fed. Reg. 54,088 (Aug. 15, 2016). No relevant 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 Rule and the FTC's shared enforcement of the CFPB Rule.

(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. Non-GLBA Entities

Based, in part, on industry data regarding the number of businesses under various industry codes, staff estimates that 958,894 non-GLBA entities under FTC jurisdiction have affiliates and would be affected by the Rule.⁵ Commission 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. Thus, an estimated 191,779 non-GLBA business families may send the 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 prospective requested three-year PRA clearance period, comprised of a projected 7 hours of managerial time, 2 hours of technical time, and 5 hours of clerical assistance. Non-GLBA entities, however, will give notice only once during the

⁵ This estimate is derived from an analysis of a database of U.S. businesses based on June 2015 SIC codes for businesses that market goods or services to consumers, which included, among others, 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 FTC jurisdiction as well as businesses that do not use data or information subject to the rule. To the resulting sub-total (5,824,739), staff applies a continuing assumed rate of affiliation of 16.75 percent, *see* 81 Fed. Reg. at 54,090 n.11, thus, 975,644 (businesses in a family tree of at least two members), 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 958,894 (975,644 – (100,000 x 16.75%).

clearance period ahead. Thus, average annual burden for non-GLBA families during the prospective three-year clearance period would approximate 894,969 hours.⁶ Associated average annual labor cost would total \$35,626,785.⁷ These estimates include the start-up burden and attendant costs, such as determining compliance obligations.

B. GLBA Entities

Entities that are subject to the Commission's GLBA privacy notice regulation already provide privacy notices to their customers.⁸ 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 would be 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.⁹ Staff further estimates that 3,350 GLBA entities under FTC jurisdiction would be affected.¹⁰ Allowing for increased familiarity with procedure, however, the 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 hour of technical time) during the remaining two years of the clearance. Thus, average annual burden for GLBA families during the prospective three-year clearance period would approximate 15,633 hours.¹¹ Associated average annual labor cost would total \$818,059.¹²

⁶ $191,779 \times (14 \div 3)$.

⁷ 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 OCCUPATIONAL EMPLOYMENT AND WAGES —MAY 2015, U.S. Department of Labor, released March 30, 2016, Table 1 ("National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2015"): <http://www.bls.gov/news.release/ocwage.htm>. The respective private sector hourly wages for these classifications are \$55.30, \$41.43, and \$17.47. 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 \$557.31. This subtotal is then multiplied by the estimated number of non-GLB business families projected to send the affiliate marketing notice (191,779) to determine cumulative labor cost burden for non-GLBA entities (\$106,880,354). Averaged over a three-year clearance period this amounts to \$35,626,785 per year.

⁸ 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.

⁹ As stated above, no clerical time is included in the estimate because the notice likely would be combined with existing GLBA notices.

¹⁰ Based on the previously stated estimates of 100,000 GLBA business entities 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.

¹¹ $3,350 \times (14 \div 3)$.

¹² Year 1: $3,350 \text{ GLBA families} \times [(\$55.30 \times 5 \text{ hours}) + (\$41.43 \times 1 \text{ hour})] = \$1,065,066$. Years 2 and 3: $3,350 \text{ GLBA families} \times [(\$55.30 \times 3 \text{ hours}) + (\$41.43 \times 1 \text{ hour})] = \$694,556$ each. Annualized: $(\$1,065,066 + \$694,556 + \$694,556) \div 3 = \$818,059$.

Before attribution to the FTC of its apportioned share of PRA burden estimates, the cumulative average annual burden for both non-GLBA and GLBA for the prospective three-year clearance period is 910,602 burden hours and \$36,444,844 in labor costs. GLBA entities are already providing notices to their customers so there are no new capital or non-labor costs, as this notice may be consolidated into their current notices. For non-GLBA entities, the Rule provides for simple and concise model forms that institutions may use to comply. Thus, any capital or non-labor costs associated with compliance for these entities are negligible.

C. FTC Share of Burden: 460,205 hours; \$18,472,938, labor costs

To calculate the total burden attributed to the FTC, staff first deducted from the total annual burden hours those hours attributed to motor vehicle dealers, which are in the exclusive jurisdiction of the FTC. Staff estimates that there are 62,750 motor vehicle dealerships subject to the Rule.¹³ Of these, staff estimates that 10% are non-GLBA entities (6,275), and 90% are GLBA entities (56,475). Applying an assumed rate of affiliation of 16.75%, staff estimates that there are 1,051 non-GLBA and 9,460 GLBA motor vehicle dealerships in affiliated families. Staff further assumes there are an average of 5 businesses per family or affiliated relationship, leaving approximately 210 non-GLBA and 1,892 GLBA motor vehicle dealership families, respectively.

Staff further estimates 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. The cumulative average annual burden for the non-GLBA and GLBA motor vehicle dealership families is 9,809 hours.¹⁴

To calculate the FTC's total shared burden hours, staff deducted from overall estimated burden hours (910,602 hours) the hours attributed to motor vehicle dealerships (9,809 hours), leaving a total of 900,793 hours to split between the CFPB and the FTC. The resulting shared burden for the CFPB is half that amount, or 450,396 hours. To calculate the total burden hours apportioned to the FTC, staff added to the shared sub-total (450,396 hours) the hours separately attributed to motor vehicle dealers (9,809 hours), which yields for the FTC an apportioned burden estimate of 460,205 hours.¹⁵

Staff used the same approach to estimate the shared costs for the FTC. Staff estimated the costs attributed to motor vehicle dealers as follows: non-GLBA business families have

¹³ This figure consists, in part, of 62,750 car dealers (based on industry data for the number of franchise/new car and independent/used car dealers) (81 Fed. Reg. 33,255 at 33,257 n9 (May 25, 2016) (FTC Prescreen Opt-Out Rule PRA analysis)).

¹⁴ (210 non-GLBA business families x 4.666667 average hours = 980 hours, annualized) + (1,892 GLBA business families x 4.666667 average hours per family = 8,829 hours, annualized) = 9,809 hours, annualized. To minimize rounding differences in overall totals vis-à-vis the OMB database ROCIS and to help maintain consistency with it, 4.666667 is used for these calculations.

¹⁵ The minor variance between this figure and the resulting figure in ROCIS (460,208) is due to rounding error.

\$35,626,785 in annualized labor costs,¹⁶ and GLBA business families have \$818,059 in annualized labor costs,¹⁷ for cumulative annualized costs of \$36,444,844.

To calculate, on an annualized basis, the FTC's cumulative share of labor cost burden, staff deducted from overall total labor costs (\$36,444,844) the labor costs attributed to motor vehicle dealerships (\$501,032), leaving a net amount of \$35,943,812 to split between the CFPB and the FTC. The resulting shared burden for the CFPB is half that amount, or \$17,971,906. To calculate the total labor costs for the FTC, staff added the costs associated with motor vehicle dealers (\$501,032), resulting in a total cost burden for the FTC of \$18,472,938.

(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 \$150,000 per year. This estimate is based on the assumption that one full attorney work year 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 reduced 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. 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.¹⁸

(16) Plans for Tabulation and Publication

Not applicable.

¹⁶ 191,779 non-GLBA business families x combined rate of \$557.31 (*see supra* note 7) ÷ 3 = \$35,626,785.

¹⁷ *See supra* note 12.

¹⁸ 3,350 GLB business families – 1,892 GLB motor vehicle dealership families = 1,458 GLB business families to split 50:50 between the agencies, i.e., 729 non-motor vehicle GLB business families. Adding back to the FTC the apportionment for motor vehicle dealership families (1,892) totals 2,621 GLB business families for the FTC share. Previously, the FTC showed 2,594 such entities in its ROCIS totals.

(17) Display of Expiration Date for OMB Approval

Not applicable.

(18) Exceptions to Certification

Not applicable.