

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 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.

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.

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).

(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 initial and annual privacy notices 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. However, to the extent that financial institutions are excused from the annual privacy notice requirement under the FAST Act, these entities may need to send a separate affiliate marketing notice and opt-out notice to consumers.⁵

(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 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 the notifications. 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 FACT 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).

⁵ *See* Fixing America's Surface Transportation Act ("FAST Act"), PL 114-94, 129 Stat. 1312, Section 75001 (Dec. 4, 2015) (amending 15 U.S.C. § 6803 to excuse financial institutions from the annual notice requirement if they meet certain criteria, and nothing has changed since the initial privacy notice).

(8) Public Comments/Consultation Outside the Agency

The Commission recently sought public comment on the PRA aspects of the Rule, as required by 5 C.F.R. 1320.8(d). *See* 84 FR 51163 (Sept. 27, 2019). 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 FTC is seeking clearance for the PRA burden associated with motor vehicle dealers subject to the FTC Rules.⁶ The Commission estimates its share of PRA burden as follows:

Annual Hours Burden: 9,170 hours

Staff estimates that there are approximately 54,753 franchise/new car and independent/used car dealers in the U.S.⁷ Applying an assumed rate of affiliation of 16.75%, staff estimates that there are approximately 9,171 motor vehicle dealerships in affiliated families that may be subject to the Rule's affiliate sharing obligations. Staff further estimates an average of 5 businesses per family or affiliated relationship, and anticipates that affiliated entities will choose to send a joint notice as permitted by the Rule. Therefore, staff estimates that approximately 1,834 business families are subject to the Rule. Staff assumes that all or nearly all motor vehicles subject to the Rule's provisions are also subject to the Commission's Privacy of Consumer Financial Information Rule under the Gramm-Leach-Bliley Act (16 CFR 313)

⁶ While the FTC shares enforcement authority with the Federal Reserve System, Commodity Futures Trading Commission, National Credit Union Administration, Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation for the Consumer Financial Protection Bureau's counterpart affiliate sharing rule, Regulation V (Subpart C), 12 CFR 1022.21, the CFPB has assumed 95% of the burden associated with its own rule. *See* Consumer Financial Protection Bureau, *Agency Information Collection Activities: Submission for OMB Review; Comment Request*, 82 FR 32,686 (2017); CFPB Supporting Statement, *Fair Credit Reporting Act (Regulation V)*, 12 CFR 1022, OMB Control Number: 3170-0002 (2017). In addition, the CFPB has estimated that the burden associated with Regulation V's affiliate sharing provisions is *de minimis*.

⁷ This figure is based on estimates by the National Automobile Dealers Association and the National Independent Automobile Dealers Association. *See NADA Data 2018: Annual Report; NIADA.com.*

(“Privacy Rule”). Entities that are subject to the Commission’s GLBA privacy notice regulation already provide privacy notices to their customers. Absent an exception, financial institutions must provide an initial privacy notice at the time the customer relationship is established and then annually so long as the relationship continues. 15 U.S.C. § 6803. Staff’s estimates assume that in all or nearly all cases covered institutions will choose to incorporate the affiliate marketing opt-out notice into the initial and annual GLBA privacy notices.

Staff estimates that the 1,834 covered motor vehicle business families will spend on average about 5 hours per year to comply with the Affiliate Sharing Rule beyond their separate obligations under the Privacy Rule, yielding a total annual hours burden of **9,170 hours**. Staff’s estimates take into account the time necessary to determine compliance obligations; create the notice and opt-out, in either paper or electronic form; and disseminate the notice and opt-out. Staff believes that the availability of model disclosures and opt-out notices will simplify the compliance review and implementation processes, thereby significantly reducing the compliance burden.

Annual Labor Cost: \$367,588 per year

Staff estimates the associated labor cost by adding the hourly mean private sector wages for managerial, technical, and clerical work and multiplying that sum by the estimated number of hours. As shown in the table below, estimated hours spent for each category are 2, 2, and 1, respectively. The private sector hourly wages for these classifications are \$50.11, \$41.51, and \$17.19, respectively.⁸ Multiplying each occupation’s hourly wage by the associated time estimate yields the annual labor cost burden per respondent, which is then multiplied by the estimated number of respondents to determine the cumulative annual labor cost burden: **\$367,588 per year**.

Hourly wage and labor category	Hours per respondent	Total hourly labor cost	Number of respondents	Approx. total annual labor costs
\$50.11 Management Employees	2	\$100.22	1,834	\$183,803
\$41.51 Technical Staff	2	\$83.02		\$152,259
\$17.19 Clerical Workers	1	\$17.19		\$31,526
				\$367,588

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

Entities that are subject to the Commission’s GLBA privacy notice regulation already provide privacy notices to their customers.⁹ Because the FACT Act and the Rule contemplate

⁸ 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 2018, U.S. Department of Labor, released March 29, 2019, Table 1 (“National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2018”): <http://www.bls.gov/news.release/ocwage.htm>.

⁹ 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

that the affiliate marketing notice can be included in the GLBA notices, the burden on GLBA regulated entities would be greatly reduced. 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, Staff estimates that any capital or non-labor costs associated with compliance for these entities are *de minimis*.

(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 \$176,538 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. FTC staff has consolidated the two previous Information Collections ("IC") titled "Non-GLBA entities under the FACT Act Affiliate Marketing Rule" and "GLBA entities under the FACT Act Affiliate Marketing Rule" into a single IC titled "Affiliate Marketing Notice Disclosures." Previously, staff's burden estimates had distinguished between entities that choose to send required affiliate marketing notices as part of annual GLBA privacy notices and those that choose to send affiliate marketing notices separately. The consolidation is based on staff's revised understanding that all or nearly all institutions covered by the Rule are also covered by the Commission's Privacy Rule, 16 CFR 313, and choose to incorporate the affiliate marketing opt-out notice required under the Rule into their initial and annual GLBA privacy notices. As a result, it is no longer necessary to distinguish between so-called "GLBA entities" and "non-GLBA entities" under the Rule.

In addition, FTC staff has updated its estimate of overall burden hours based on industry data from the National Automobile Dealers Association and the National Independent Automobile Dealers Association providing the number of motor vehicle dealers subject to the Rule. Staff has also revised its estimate of the burden associated with its shared enforcement of the CFPB's affiliate sharing rule, 12 CFR 1022.21, based on burden estimates adopted by the CFPB and approved during the most recent renewal of PRA clearance for the CFPB's rule.¹⁰

incorporated in the institution's initial and annual notices. In 2015, Congress, as part of the FAST Act, amended the GLBA to provide an exception under which financial institutions that meet certain conditions are not required to provide annual notices to customers. FAST Act, Public Law 114-94, section 75001. Staff seeks comment on the use of this exception by financial institutions that are required to provide an affiliate marketing notice, as such institutions would have to send an affiliate marketing notice annually.

¹⁰ See Consumer Financial Protection Bureau, Agency Information Collection Activities: Submission for OMB Review; Comment Request, 82 FR 32,686 (2017); CFPB Supporting Statement, *Fair Credit Reporting Act (Regulation V)*, 12 CFR 1022, OMB Control Number: 3170-0002 (2017).

(16) Plans for Tabulation and Publication

Not applicable.

(17) Display of Expiration Date for OMB Approval

Not applicable.

(18) Exceptions to Certification

Not applicable.