Supporting Statement
Proposed Amendments to the Telemarketing Sales Rule
16 CFR § 310
(OMB Control # 3084-0097)

Overview of Information Collection

This is a request for approval of a proposed revision to an existing clearance.[1] On June 3, 2022, the Federal Trade Commission ("FTC" or "Commission") issued a Notice of Proposed Rulemaking ("NPRM") that would amend the Telemarketing Sales Rule ("TSR") and add both new recordkeeping requirements and modifications to existing recordkeeping requirements for sellers or telemarketers.[2] While the Commission has made substantial amendments to the TSR over the last 25 years to address the rise in unwanted calls—including by identifying new abusive and deceptive telemarketing practices such as prohibiting robocalls and calls to consumers on the DNC Registry—the TSR's recordkeeping provisions have remained largely static and no longer adequately meet the needs of the Commission's law enforcement mission to protect consumers. In developing the proposed amendments, the Commission carefully considered the types of records sellers and telemarketers likely keep in the ordinary course of business, any additional burden the proposed amendments would impose, and the types of records that the Commission considers necessary to enforce the TSR.

The proposed new recordkeeping provisions would require sellers or telemarketers to retain each of the following, where applicable: (1) a copy of each unique prerecorded message; (2) call detail records of telemarketing campaigns; (3) records sufficient to show a seller has an established business relationship with a consumer; (4) records sufficient to show a consumer is a previous donor to a particular charitable organization; (5) records regarding the service providers that a telemarketer uses to deliver outbound calls; (6) records of a seller or charitable organization's entity-specific do-not-call registries; and (7) records of the Commission's Do Not Call Registry that were used to ensure compliance with this Rule. The Commission believes that many sellers and telemarketers already retain the majority of the records covered by the new recordkeeping requirements in the ordinary course of business, and therefore staff does not believe that the new recordkeeping requirements will be overly burdensome for sellers and telemarketers.

The proposed modifications to the existing recordkeeping requirements would: (1) change the time period for retaining records from two years to five years; (2) clarify the records necessary for sellers or telemarketers to demonstrate that the person it is calling has consented to receive the call or to be billed; and (3) specify the format for records that include phone numbers, time, or duration. Changing the time period for recordkeeping retention would

[1] The current clearance, which contains disclosure, recordkeeping and reporting requirements, expires on September 30, 2022. On April 19, 2022, the FTC published a 60-Day Federal Register Notice seeking renewal of the currently approved information collections. 87 Fed. Reg. 23,177 (Apr. 19, 2022).
[2] 87 Fed. Reg. 33,677 (June 3, 2022).

provide the Commission adequate time to investigate potential TSR violations, given the current law enforcement hurdles in identifying the relevant seller or telemarketer responsible for TSR violations, and the applicable statute of limitations for civil penalties.

(1-2) Necessity for Collecting the Information/Use of the Information

In 1995 the Commission promulgated the TSR's recordkeeping provisions, which generally require sellers or telemarketers to retain, for a two-year period, copies of their advertisements (including telemarketing scripts); lists of their prize recipients, customers, or telemarketing sales employees; and records of a consumer's express verifiable authorizations, or express informed consents or agreements (collectively, "Consent"). The TSR requires that they maintain these records in the same manner and format as they normally would in the ordinary course of business, and they can allocate responsibility for compliance between the seller and telemarketer. As noted in the Overview, the Commission has made multiple amendments to the TSR over the last 25 years, for example, prohibiting abusive robocalls and implementing new regulatory requirements such as the DNC Registry. The Commission, however, has not made any corresponding amendments to the recordkeeping requirements.

In recent decades, the Commission has actively enforced the TSR, and brought over 150 enforcement actions against sellers or telemarketers for DNC, robocall, spoofed caller ID, and assisting and facilitating violations, but it has also faced challenges investigating potential violations of the TSR. The most significant hurdles in investigating potential TSR violations are threefold:

1. Due to the proliferation of caller ID spoofing, the Commission has difficulty identifying the seller or telemarketer responsible for sending the calls that consumers complain about.
2. The Commission has difficulty obtaining call detail records of a telemarketer's campaign, in part because the targets of investigations claim they do not retain them and the TSR does not require them to do so. Without call detail records, specific TSR violations, such as DNC violations, are difficult to prove.
3. Even when staff can obtain call detail records, it is challenging to obtain additional substantive information about the relevant calls, such as whether they were robocalls, the goods or services offered for sale, or whether the calls targeted consumers or businesses. The call detail records do not contain this information and the TSR does not require telemarketers or sellers to keep records of this information, or to link such information to a particular set of call detail records.

Without substantive information about the calls, it is difficult to determine whether the calls are covered by the TSR, which TSR provisions apply, and the legitimacy of any defenses raised by the targets. For example, telemarketers frequently claim that the call detail records include non-telemarketing calls such as customer service calls. The Commission has difficulty disputing that assertion without information linking the content of the call to the call detail records. In other instances, whether certain TSR provisions apply to a call largely depends on the content of the call, such as what good or service the inbound telemarketing calls are selling or to whom.

In addition to these investigative hurdles, the Commission's law enforcement experience and the regulatory review record have also demonstrated that sellers and telemarketers raise certain affirmative defenses without keeping complete or accurate records necessary to assess the merits of these defenses. For example, telemarketers and sellers do not keep complete or accurate records pertaining to Consent. Although the Commission has reiterated that sellers and telemarketers are responsible for providing documentation of certain affirmative defenses, sellers and telemarketers nevertheless still provide incomplete records, such as a list of consumer IP addresses as proof of consumers' purported express written agreement ("EWA") to receive robocalls. Thus, the NPRM proposes amending the TSR's recordkeeping provisions to address these challenges, and to help the Commission obtain the information it needs to effectively enforce the TSR.

The Commission proposes changing the time period that telemarketers and sellers must already keep records from two years to five years from the date the record is made, except for Sections 310.5(a)(1) and (a)(9), which require retention of records for five years from the date that such records are no longer in use. The Commission is proposing to change the time period from two years to five years because the Commission needs adequate time to complete its investigations of non-compliance with the TSR. Given the complexities set out above of identifying the telemarketer and seller responsible for particular telemarketing campaigns and gathering the necessary evidence, two years is no longer a sufficient amount of time for the Commission to fully complete its investigations of noncompliance, especially because the Commission may not initiate an investigation until it has been ongoing for some time. Given the decreasing cost of data storage, the Commission does not believe that changing the length of time sellers and telemarketers are required to keep records will be unduly burdensome.

(3) Use of Information Technology

The TSR's recordkeeping provisions permit sellers and telemarketers to keep records in whatever form, manner, format, or location they choose in the ordinary course of business. Accordingly, the Rule's recordkeeping provisions are consistent with the requirements of the Government Paperwork Elimination Act ("GPEA").[3] Moreover, in its NPRM, the Commission specifically sought comments on ways to minimize the burden of the Rule's collections of information on industry and individual firms (including small businesses) that must comply with the Rule. This could include the use of information technology.

The FTC's proposed rulemaking is also encouraging the use of automated technology by telemarketers and sellers to retain call detail records by including a safe harbor in the newly proposed recordkeeping requirements for any temporary and technological errors that may occur.[4] The Commission believes providing a safe harbor for the recordkeeping requirements

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[3] Pub. L. No. 105-277, Title XVII, 112 Stat. 2681-749 (1998) *codified at* 44 U.S.C. § 3501 *et seq*.

[4] The safe harbor will only apply, however, if the telemarketer or seller can demonstrate that it has implemented a process to ensure compliance with the recordkeeping provisions, trained its employees on the compliance process, demonstrated that it monitors and enforces its compliance process, and established that any failure to maintain accurate and complete records was temporary and inadvertent.

under Section 310.5(a)(2) is appropriate since the process of maintaining such records will likely be automated by technology, and telemarketers and sellers should not be held liable under this section of the TSR for brief and inadvertent technological errors so long as they make good faith efforts to comply.

Consistent with the Government Paperwork Reduction Elimination Act, Pub L. No. 105-227, Title XVII, 112 Stat. 2681-749, nothing in the Rule prescribes that the disclosures be made, records be filed or kept, or signatures be executed, on paper or in any particular format that would preclude the use of electronic methods to comply with the Rule's requirements.

(4) <u>Non-Duplication</u>

None of the proposed recordkeeping requirements are duplicated by any other information collection requirements imposed by the Commission.

The Federal Communications Commission ("FCC") enforces the Telephone Consumer Protection Act of 1991, 47 U.S.C. 227, and its implementing regulations, 47 CFR 64.1200 (collectively, "TCPA"), which contain recordkeeping requirements that may overlap with the recordkeeping requirements proposed by the rulemaking. For example, the proposed provision requiring sellers or telemarketers to keep a record of consumers who state they do not wish to receive any outbound calls made on behalf of a seller or telemarketer, 16 CFR 310.5(a)(10), overlaps to some degree with the TCPA's prohibition on a person or entity initiating a call for telemarketing unless such person or entity has procedures for maintaining lists of persons who request not to receive telemarketing calls including a requirement to record the request. However, the FTC's proposed recordkeeping requirements do not conflict with the TCPA's recordkeeping requirements because sellers and telemarketers can comply with both sets of requirements simultaneously. Moreover, in the FTC's experience, the recordkeeping requirements under the TCPA do not lessen the need for the more robust recordkeeping requirements the Commission is proposing to further its law enforcement efforts.

In its NPRM, the Commission sought comment and information regarding any potentially duplicative, overlapping, or conflicting federal statutes, rules, or policies.

(5) <u>Burden on Small Businesses</u>

The proposed recordkeeping requirements are designed to impose the minimum burden on all affected members of the industry, regardless of size. The Commission also certified that amending the Rules as proposed will not have a significant economic impact on a substantial number of small entities, and provided notice of that certification to the Small Business Administration ("SBA").

While some sellers or telemarketers subject to the Rule's requirements are small businesses, staff believes that everything consistent with the requirements of the Rule has been done to minimize compliance burden. The Commission believes that the proposed amendments primarily require the covered entities, including small businesses, to retain records that they are already generating and preserving in the ordinary course of business. Although the Act requires the Rule to apply to all covered firms whether they are small entities or not, the Commission is seeking comment about minimizing impact on small businesses.

(6) <u>Less Frequent Collection</u>

The proposed recordkeeping requirement would require that sellers retain the required records for a period of not less than five years. Staff believes that a record retention period shorter than this would hamper and frustrate many investigations under the FTC's enforcement program. Given the additional complexities set out above of identifying the telemarketer and seller responsible for particular telemarketing campaigns and gathering the necessary evidence, two years is no longer a sufficient amount of time for the Commission to fully complete its investigations of noncompliance, particularly when the Commission may not investigate noncompliance until well after the conduct was initiated.

(7) <u>Paperwork Reduction Act Guidelines</u>

The proposed amendment's information collection requirements are consistent with all applicable guidelines contained in 5 C.F.R. § 1320.5(d)(2), except for subsection (iv). As noted in the Overview and responses to Specifications #1-2, the proposed rule would require respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records, for more than three years. The Commission is proposing to change the retention time period from the current two years to five years because the Commission needs adequate time to complete its investigations of non-compliance with the TSR. The Commission's law enforcement experience has shown that, absent the proposed recordkeeping requirements, it is increasingly difficult to obtain critical records and associate the records with the nature, purpose, or content of a particular telemarketing campaign, frustrating the Commission's law enforcement efforts.

(8) <u>Consultation and Public Comments</u>

Dating back to the Rule's inception, the Commission has had a long history of consultation with outside parties, including affected entities and consumers. In connection with the Commission's congressionally-mandated review of the Rule,[5] the TSR was amended in January 2003 to include certain new disclosure requirements and to expand the Rule's parameters in other ways. During its 2003 and also the 2010 rulemaking processes, the Commission also considered whether it should modify the recordkeeping provisions in tandem with the substantive amendments then under consideration. In each instance, however, the Commission declined to make substantial modifications to that provision, deeming such changes unnecessary to enact the substantive amendments it was promulgating.

In 2014, the Commission embarked on a regulatory review of the TSR, in which it sought feedback on a number of issues including the existing recordkeeping requirements. It raised some of the challenges that the Commission has faced in bringing enforcement actions under the TSR, including the difficulty in obtaining call detail records, and sought feedback on whether the current recordkeeping requirements are sufficient for law enforcement agencies to enforce the Rule's DNC provisions. Specifically, the Commission raised the possibility of

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[5] 16 U.S.C. § 6108.

requiring sellers and telemarketers to "retain records of the telemarketing calls they have placed" to address the Commission's ongoing law enforcement challenges. It asked for public comments on: (1) the cost and burden that the lack of such a requirement imposed on law enforcement and consumers, (2) the cost and burden such a provision would impose, particularly for small businesses, and (3) whether there is an alternative solution that would reduce the law enforcement challenges and minimize the burden on industry.

In developing the proposed requirements, the Commission considered several thousand comments from individuals and entities representing a wide range of viewpoints, including law enforcement agencies, associations, industry members, individual sellers and telemarketers, and consumer advocates.

The Commission received comments from other state and federal law enforcement agencies confirming that the problems the Commission has experienced in enforcing the TSR are not unique to the agency. The Department of Justice ("DOJ") cited "extreme difficulties" in obtaining call detail records from voice providers that provide usable information because they "may contain, among other things, non-telemarketing calls" or calls by telemarketers for other clients not targeted in the investigation. DOJ also argued that the burden of keeping call detail records would be "slight" since "computer data storage prices are no longer an obstacle to maintaining records," and stated that it is "confident that most, if not all, reputable sellers and telemarketers currently maintain accurate records of their outbound calls.

The National Association of Attorneys General ("NAAG") stated that in its experience subpoenas to voice providers are "time-consuming and frequently fruitless," with those served on offshore voice providers going unanswered and U.S. voice providers either refusing to provide the records or requesting an "exorbitant fee for doing so." NAAG also argued "savings realized by telemarketers" from modern dialing technologies "should not be realized at the expense of law enforcement's resources and consumer protection."

Consumer advocacy groups concurred that requiring the retention of outbound call detail records would benefit consumers. The National Consumer Law Center, Consumer Federation of America, Americans for Financial Reform, Consumers Union, Consumer Action, Consumer Federation of California, The Maryland Consumer Rights Coalition, National Association of Consumer Advocates, U.S. PIRG, Virginia Citizens Consumer Council, and Consumer Assistance Council, Inc. of Cape Cod and the Islands (collectively, "NCLC, et al.") submitted a joint comment supporting a recordkeeping requirement for all outbound telemarketing calls, and further advocating that sellers and telemarketers should also be required to record the entirety of all completed calls so that it is possible to examine the "overall net impression" of the representations made to determine if they are unfair or deceptive. AARP argued that in addition to call detail records, sellers and telemarketers should also maintain complete recordings of calls to "ease the burden on federal and state enforcers as well as make it easier for citizens to bring private cases." Another commenter also noted that "TCPA plaintiffs would benefit from companies keeping internal records."

Industry comments generally opposed any mandatory requirement to maintain call detail records, arguing that imposing such a requirement would be overly burdensome, particularly for small businesses. None of the industry comments, however, provided concrete information or data on the costs associated with requiring telemarketers to maintain call detail records, nor did they suggest any alternative solutions that address the Commission's law enforcement challenges while minimizing the burden on industry.

Additionally, a few industry comments confirmed that some businesses are already requiring telemarketers to retain call detail records in the regular course of business. Notably, the Association of Magazine Media ("MPA") supported requiring "telemarketers to retain their own call records" as a "reasonable and workable approach." MPA also stated "[s]ome magazine publishers are currently requiring third party telemarketing providers to maintain outbound call records for three years," and argued that recordkeeping requirements would provide "an added layer of transparency that further blocks opportunities for fraudulent behavior."

(9) Gifts or Payment

Not applicable.

(10-11) Privacy & Confidentiality/Sensitive Questions

The collection of information in this Rule is consistent with all applicable guidelines contained in 5 C.F.R. § 1320.5(d)(2). To the extent that information covered by a recordkeeping requirement of the Rule is collected by the Commission for law enforcement purposes, the confidentiality provisions of Sections 6(f) and 21 of the Federal Trade Commission Act, 15 U.S.C. §§ 46(f) and 57b-2, will apply.

(12) Burden Estimate[6]

Estimate of Revised Annual Hours Burden Associated with New Recordkeeping Requirements: 230,500 hours.

The Commission estimates the PRA burden of the proposed amendments based on its knowledge of the telemarketing industry and data compiled from the Do Not Call Registry. In calendar year 2021, 11,756 telemarketing entities accessed the Do Not Call Registry; however, 536 were exempt entities obtaining access to data. Of the non-exempt entities, 6,835 obtained data for a single state. Staff assumes that these 6,835 entities are operating solely intrastate, and thus would not be subject to the TSR. Therefore, Staff estimates that approximately 4,385 telemarketing entities (11,756 – 536 exempt – 6,835 intrastate) are currently subject to the TSR. The Commission also estimates that there will be 75 new entrants to the industry per year.

The Commission has previously estimated that complying with the TSR's current recordkeeping requirements requires 100 hours for new entrants to develop recordkeeping systems that comply with the TSR and 1 hour per year for established entities to file and store

[6] The FTC staff estimates burden only for revised ICs affected by the proposed rulemaking regarding recordkeeping requirements for the Telemarketing Sales Rule. The estimates below detail revisions to two affected ICs.

records after their systems are created, for a total annual recordkeeping burden of 4,385 hours for established entities and 7,500 hours for new entrants who must develop required record systems.[7]

Because the proposed rule contains new recordkeeping requirements, the Commission anticipates that in the first year after the proposed amendments take effect, every entity subject to the TSR would need to ensure that their recordkeeping systems meet the new requirements. The Commission estimates that this undertaking will take 50 hours. This includes 10 hours to verify that the entities are maintaining the required records, and 40 hours to create and retain call detail records. This yields an additional burden of 219,250 hours for established entities (50 hours × 4,385 covered entities).

For new entrants, the Commission estimates that the new requirements will increase their overall burden for establishing new recordkeeping systems from 100 hours per year to 150 hours per year. This yields a total burden for new entrants of 11,250 hours (150 hours × 75 new entrants per year).

Estimated Revised Annual Labor Cost Burden Associated with New Recordkeeping Requirements: $6,712,085.

The Commission estimates annual labor costs by applying appropriate hourly wage rates to the burden hours described above. The Commission estimates that established entities will employ skilled computer support specialists to modify their recordkeeping systems. Applying a skilled labor rate of $29.11/hour[8] to the estimated 50 burden hours for established entities yields $6,384,560 in labor costs in the first year after the proposed amendments would take effect (4,385 respondents × $1,456).

As described above, the Commission estimates that new entrants will spend approximately 150 hours per year to establish new recordkeeping systems. Applying a skilled labor rate of $29.11/hour to the estimated 150 burden hours for new entrants, the Commission estimates that the annual labor costs for new entrants would be approximately $327,525 (75 entrants × $4,367).

[7] See 87 Fed. Reg. 23,177 (Apr. 19, 2022).

[8] This figure is derived from the mean hourly wage shown for "Computer Support Specialist." See "Occupational Employment and Wages-May 2021" Bureau of Labor Statistics, U.S. Department of Labor, Last Modified March 31, 2022, Table 1 ("National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2021") available at https://www.bls.gov/news.release/ocwage.t01.htm (last visited April 5, 2022).

Program Change Due to Agency Discretion: The FTC proposes to revise two existing ICs as a result of the proposed rulemaking:

Revised IC: Recordkeeping for Live TM Calls

	Requested	Program Change Due to New Statute	Program Change Due to Agency Discretion	Change Due to Adjustment in Agency Estimate	Change Due to Potential Violation of the PRA	Previously Approved
Annual Number of Responses for this IC	4385	0	-2176	0		6561
Annual IC Time Burden (Hour)	219250	0	212689	0		6561
Annual IC Cost Burden (Dollars)	285025	0	-43025	0		328050

Revised IC: Recordkeeping for new entrants for live & prerecorded calls

	Requested	Program Change Due to New Statute	Program Change Due to Agency Discretion	Change Due to Adjustment in Agency Estimate	Change Due to Potential Violation of the PRA	Previously Approved
Annual Number of Responses for this IC	75	0	0	0	0	75
Annual IC Time Burden (Hour)	11250	0	3750	0	0	7500
Annual IC Cost Burden (Dollars)	0	0	0	0	0	0

(13) Estimated Nonrecurring Costs

Staff previously estimated that the non-labor costs to comply with the TSR's recordkeeping requirements were de minimis because most affected entities would maintain the required records in the ordinary course of business. Staff estimated that the recordkeeping requirements could require $50 per year in office supplies to comply with the Rule's recordkeeping requirements. Because the proposed recordkeeping requirements require retaining additional records, Staff estimates that these requirements will increase to $60 per year in office supplies. This results in an estimated cost of $263,100 (4,385 covered entities × $60).

The new recordkeeping requirements also require entities to retain call detail records and audio recordings of prerecorded messages used in calls. Staff estimates that the costs associated with preserving these records will also be de minimis. The Commission regularly obtains call detail records from voice providers when investigating potential TSR violations, and these records are kept in databases with small file sizes even when the database contains information about a substantial number of calls. For example, the Commission received a 2.9 gigabyte database that contained information about 56 million calls. The Commission also received a 1.2 gigabtye database that contained information about 5.5 million calls. Similarly, audio files of most prerecorded messages will not be very large because prerecorded messages are typically short in duration. Storing electronic data is very inexpensive. Electronic storage can cost $.74 per gigabyte per year for onsite storage including hardware, software, and personnel costs. Commercial cloud-based storage options are less expensive and can cost around $.20 per gigabyte per year. The Commission estimates that the non-labor costs associated with electronically storing audio files of prerecorded messages and call detail records will cost around $5 a year for a total cost of $21,925 (4,385 covered entities × $5). This yields a total additional recordkeeping cost of $285,025 (4,385 covered entities × $65).

(14) <u>Estimated cost to the Government</u>

Staff believes that the cost to the FTC for administering the proposed Rule changes will be *de minimis*. The Commission has amended the TSR several times in order to impose fees on entities that must pay for access to the National Registry. In the Do-Not-Call Registry Fee Extension Act of 2007, Congress directed the FTC to make a moderate reduction in the TSR's fees for access to the National Registry, and to expand the definition of "exempt" entities eligible to access the National Registry without charge. Accordingly, the Commission amended the Rule to comply with that directive. Staff anticipates that, to the extent Registry and enforcement costs are not fully offset by the fees collected, the FTC's budget will cover the shortfall.

(15) <u>Reasons for Changes</u>

As described above, the proposed rulemaking would result in additional recordkeeping burden for covered entities. The Commission has also revised downward its estimate of the number of covered entities based on updated industry data from 6,561 in 2019 to 4,385 in 2022.

Thus, even though the proposed amendments will add 230,500 recordkeeping hours, the overall impact to the previously cleared estimate in 2019 is an estimated additional 216,439 hours of recordkeeping burden hours, annualized, and cumulative of all affected entities (since there are 2,176 fewer covered entities now). The changes also would result in an incremental increase of $6,265,223 labor costs for recordkeeping over the previously cleared estimate in 2019 of $446,862, resulting in an estimated total of $6,712,085. Finally, the proposed changes would also result in an estimated total of $285,025 in additional capital/non-labor costs. Although per entity capital/non-labor costs for recordkeeping are anticipated to increase by $15 per entity, this yields an overall decrease of $43,025 for the industry as a whole compared to the 2019 clearance because of an estimated reduction of the total number of covered entities.

(16) <u>Publicizing Results</u>

There are no plans to publish for statistical use any information required by the Rule.

(17) <u>Display of Expiration Date for OMB Approval</u>

This is not applicable, since the Commission will display the expiration date of the clearance.

(18) <u>Exceptions to the "Certification for Paperwork Reduction Act Submissions"</u>

Not applicable. The FTC certifies that this collection of information is consistent with the requirements of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8(b)(3), and is not seeking an exemption to these certification requirements.