

Supplemental Supporting Statement
Amendments to the Telemarketing Sales Rule
16 C.F.R. Part 310
(OMB Control # 3084-0097)

On June 3, 2022, the Federal Trade Commission (“FTC” or “Commission”) submitted a Notice of Proposed Rulemaking (“NPRM”)¹ regarding the Telemarketing Sales Rule (“TSR” or “Rule”) and an accompanying Supporting Statement to the Office of Management and Budget (“OMB”) for review under the Paperwork Reduction Act (“PRA”). On June 16, 2022, OMB directed the Commission to resubmit its request when the proposed rule was finalized. The Commission is now submitting the Final Rule amendments and a Supplemental Supporting Statement to OMB.

The Commission is adopting amendments that, among other things, require telemarketers and sellers to maintain additional records of their telemarketing transactions, prohibit material misrepresentations and false or misleading statements in business to business (“B2B”) telemarketing calls, and add a new definition for the term “previous donor.” These amendments are necessary to address technological advances and to continue protecting consumers, including small businesses, from deceptive or abusive telemarketing practices.

The Commission requests approval for the new recordkeeping requirements of the Rule. These new requirements of the Rule constitute “collection[s] of information” for purposes of the Paperwork Reduction Act.²

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

The 2022 NPRM proposed amending the TSR’s recordkeeping requirements in several ways. First it proposed adding new categories of records that telemarketers and sellers must retain of their telemarketing activities. The new categories include: (1) each unique robocall, including those made using soundboard technology; (2) call detail records of telemarketing campaigns; (3) records of an established business relationship (“EBR”) with a consumer; (4) records of previous donors to a particular charity; (5) records of the service providers used to deliver outbound calls; (6) records of entity-specific do-not-call registries; and (7) records of the Commission’s Do-Not-Call Registry (“DNC”) that were used for compliance. The NPRM also proposed modifying recordkeeping requirements to more clearly define the information that must be retained, such as records demonstrating a consumer has provided verifiable authorization, express informed consent, or express agreement (collectively, “consent”). It also proposed modifying the time period to retain records from two years to five years; proposed new formatting requirements for records containing phone numbers, time, or call duration; and clarified that the failure to keep each required record in a complete and accurate manner

¹ 87 Fed. Reg. 33,677 (June 3, 2022).

² 44 U.S.C. § 3502(3); 5 C.F.R. § 1320.3(c).

constitutes one violation of the TSR. The NPRM proposed a limited safe harbor for retention of call detail records in cases of temporary and inadvertent errors. It also proposed obligating both sellers and telemarketers to keep records if they fail to allocate the responsibility between themselves.

The new recordkeeping provisions in the Final Rule are substantially similar to what was proposed in the 2022 NPRM. They require sellers or telemarketers to retain: (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 which version of the Commission's DNC Registry were used to ensure compliance with this Rule. The Final Rule modifies existing recordkeeping requirements by: (1) changing the time period for retaining records from two years to five years; (2) clarifying the records necessary for sellers or telemarketers to demonstrate that the person has provided consent required under the TSR; and (3) specifying the format for records that include phone numbers, time, or call duration.

The Final Rule amendments update the TSR's existing recordkeeping requirements so that the requirements comport with the substantial amendments to the TSR since the recordkeeping requirements were first made in 1995. The requirements are also necessary in light of the technological advancements that have made it easier and cheaper for unscrupulous telemarketers to engage in illegal telemarketing. For example, call detail records are needed to ensure that telemarketers abide by the call time restrictions, while the requirements to retain records of advertisements, telemarketing scripts, robocalls, consent, customers, prize recipients, and call details regarding the content of the call are required to determine whether a telemarketer has made the necessary disclosures.

(3) Consideration of the Use of Information Technology to Reduce Burden

The Rule permits the use of any technologies that covered firms may wish to employ and that may reduce the burden of information collection. To address concerns that businesses which do not use software or other technology to conduct telemarketing, such as retailers whose employees place individual calls to consumers, cannot comply with the new recordkeeping requirement for call detail records on a technical level, the Final Rule modifies this provision for telemarketing calls that require an individual telemarketer to manually enter a single phone number to initiate the call. For such calls, sellers and telemarketers need not retain records of the calling number, called number, date, time, duration, and disposition of the call, but must otherwise comply with the other recordkeeping requirements.

(4) Efforts to Identify Duplication

The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, and its implementing regulations, 47 C.F.R. § 64.1200 (collectively, "TCPA") contain recordkeeping requirements that

may overlap with the recordkeeping requirements in the Final Rule. For example, the 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 C.F.R. § 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. The Final Rule's 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 Commission's experience, the recordkeeping requirements under the TCPA do not lessen the need for the more robust recordkeeping requirements the Commission is finalizing to further its law enforcement efforts. The Commission invited comment and information regarding any potentially duplicative, overlapping, or conflicting federal statutes, rules, or policies and received one comment about a potential conflict.

The comment from the Ohio Credit Union League ("OCUL") argues that the Commission cannot proceed with the proposed amendments until the Federal Communications Commission ("FCC") has clarified whether it will allow the establishment of a new code that will inform the telemarketer placing the call why its call was blocked. OCUL argues that this would lead to telemarketers and sellers being unable to keep complete or accurate records, subjecting them to violations, if they do not know why a call was blocked. The Commission does not see a conflict between the FCC's ongoing rulemaking and the Final Rule. The Final Rule does not require the telemarketer or seller to retain records detailing why a call was blocked. Simply stating that a call was blocked as a record of the disposition of the call will suffice.

(5) Efforts to Minimize Burden on Small Organizations

To address concerns regarding the burden of retaining call detail records, the Final Rule provides an exemption for calls made by an individual telemarketer who manually enters a single telephone number to initiate those calls. For such calls, the seller or telemarketer does not need to retain records of the calling number, called number, date, time, duration, and disposition of the call. This modification should address burden concerns raised for small businesses that do not employ software or other technology to automate their telemarketing activity and still use manual operations.

The Final Rule also provides a one hundred and eighty-day grace period from the date Section 310.5(a)(2)—which requires retention of call detail records—is published in the Federal Register so sellers and telemarketers can implement any new systems, software, or procedures necessary to comply with this new provision. This modification similarly should alleviate commenters' concerns regarding the time necessary to come into compliance.

(6) Consequences of Conducting the Collection Less Frequently

The Final Rule requires additional recordkeeping to ensure that the Commission can effectively enforce and confirm compliance with the Rule's prohibition on deceptive or abusive

telemarketing acts or practices.

(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

As noted earlier, the FTC issued an NPRM on June 3, 2022. None of the public comments submitted thereafter addressed the estimated PRA burden included in the 2022 NPRM, but some commenters did raise general burden concerns.³ Other commenters concurred that sellers and telemarketers likely retained the required records in the ordinary course of business and that the cost of electronic storage is decreasing.⁴ The Commission's responses to those concerns are set forth in more detail in Section III - Final Amended Rule, and in some instances the Commission made modifications to the proposed rule to address the concerns and reduce the estimated PRA burden.

(9) Payments and Gifts to Respondents

Not applicable.

(10) Assurances of Confidentiality

Not applicable. No assurance of confidentiality is necessary because although the Rule requires regulated entities to disclose and/or maintain records, it does not require the submission of any such records to the agency. To the extent, if any, that the agency may require production of such records for law enforcement purposes in specific proceedings, such production would not constitute an information collection activity within the meaning of the Paperwork Reduction Act. In any event, in such proceedings, records would be protected by law from mandatory public disclosure.⁵

(11) Matters of a Sensitive Nature

Not applicable. The Rule does not require the disclosure or production of sensitive or confidential information to the Commission. To the extent that confidential information covered by a recordkeeping requirement is collected by the Commission for law enforcement

³ See, e.g., Enterprise Communications Advocacy Coalition 34-22 at 3; National Federation of Independent Business 33-4 at 4-5; Sirius XM Radio 34-18 at 7-8.

⁴ See, e.g., National Association of Attorneys General on behalf of 43 State Attorneys General 34-20 at 9; Professional Association for Customer Engagement 33-15 at 2-5.

⁵ See, e.g., Section 21 of the FTC Act, 15 U.S.C. § 57b-2; Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A).

purposes, the confidentiality provisions of Section 21 of the FTC Act, 15 U.S.C. § 57b-2, will apply.

(12) Estimated Annual Hours and Labor Cost Burden

The Final Rule contains new recordkeeping requirements and modifications to existing recordkeeping requirements. As explained above and in the 2022 NPRM, the Commission believes that for the most part, sellers and telemarketers already generate and retain these records either because the TSR already requires it or because they already do so in the ordinary course of business. For example, to comply with the TSR, sellers and telemarketers must already have a reliable method to identify whether they have a previous business relationship with a customer or whether the customer is a prior donor. They must also access the DNC Registry and maintain an entity specific DNC registry. Moreover, sellers and telemarketers are also likely to keep records about their existing customers or donors and service providers in the ordinary course of business. The Final Rule now further requires telemarketers and sellers to keep call detail records of their telemarketing campaigns. Specifically, it requires sellers and telemarketers to keep call detail records of their telemarketing campaigns because in the Commission's experience, sellers and telemarketers use technologies that can easily generate these records. If a seller or telemarketer does not use such technology, however, and an individual telemarketer must manually enter a single telephone number to initiate a call to that number, then the seller or telemarketer does not need to retain records of the calling number, called number, date, time, duration and disposition of the telemarketing call under Sections 310.5(a)(2)(vii) and (x) of the Final Rule for those calls. The Commission made this modification to reduce the anticipated PRA burden for those sellers and telemarketers who manually place telemarketing calls. However, as a matter of caution, the Commission estimates the anticipated PRA burden will stay roughly the same as what was projected in 2022 NPRM, because that estimate was largely based on the use of automated mechanisms. Further, the Commission's enforcement of the Rule and review of the comments shows that few sellers and telemarketers manually place telemarketing calls. Thus, the anticipated PRA burden could be significantly lower than the estimates set out below.

Estimated Hours of Burden: 3,750 annual hours for new entrants and a one-time burden of 184,650 hours for established entities

The Commission estimates the PRA burden of the Final Rule based on its knowledge of the telemarketing industry and data compiled from the Do Not Call Registry. In calendar year 2022, 10,804 telemarketing entities accessed the Do Not Call Registry; however, 549 were exempt entities obtaining access to data. Of the non-exempt entities, 6,562 obtained data for a single state. Staff assumes that these 6,562 entities are operating solely intrastate, and thus would not be subject to the TSR. Therefore, Staff estimates that approximately 3,693 telemarketing entities (10,804 – 549 exempt – 6,562 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 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. Because the Final Rule contains new recordkeeping requirements, the Commission anticipates that in the first year after the Final Rule 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 one-time burden of 184,650 hours for established entities (50 hours × 3,693 covered entities). For new entrants, the Commission estimates that the new requirements will increase their overall burden for establishing new recordkeeping systems by 50 hours per year. This yields a total added burden for new entrants of 3,750 hours (50 hours × 75 new entrants per year) in addition to what OMB has already approved.

Estimated Labor Costs: \$116,138 annually for new entrants and a one-time burden of \$5,718,611 for established entities

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 \$30.97/hour to the estimated 184,650 burden hours for established entities yields approximately \$5,718,611 in one-time labor costs during the first year after the amendments take effect. As described above, the Commission estimates that with the Final Rule new entrants will spend approximately 50 additional hours per year to establish new recordkeeping systems. Applying a skilled labor rate of \$30.97/hour to the estimated 3,750 burden hours for new entrants, the Commission estimates that the annual labor costs for new entrants would be approximately \$116,138.

(13) Capital and Other Non-Labor Costs

Annual non-labor cost burden: \$56,520.

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 Final Rule requires retention of additional records, Staff estimates that these requirements will increase to \$60 per year in office supplies on average for each of the 3,768 covered entities per year in office supplies. This equates to roughly \$37,680 for covered entities as a result of the Final Rule (and \$226,080 in total for all covered entities, including the \$188,400 already covered under the prior rule's clearance with OMB).

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 gigabyte 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 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 on average for each of the 3,768 covered entities per year for electronic storage. This equates to roughly \$18,840 in total for all covered entities.

(14) Estimated Cost to the Federal Government

Staff does not estimate any additional costs to the Federal Government.

(15) Program Changes or Adjustments

This is a program change, not an adjustment. The Commission estimates an additional 3,750 annual hours and \$116,138 in annual labor costs for new entrants, a one-time burden of 184,650 hours and \$5,718,611 in labor costs for established entities, and an annual non-labor cost burden of \$56,520.

(16) Statistical Use of Information/Publication of Results

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

(17) Requested Permission Not to Display the Expiration Date for OMB Approval

The OMB control number and expiration date associated with this PRA submission will be displayed on the Federal government's electronic PRA docket at www.reginfo.gov and at 16 C.F.R. § 1.101. There are no government forms or other documents upon which display of the control number and expiration date would be appropriate.

(18) Exceptions to the "Certification for Paperwork Reduction Act Submissions"

Not applicable.