

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

Overview of Information Collection

This is a request for approval of a proposed revision to an existing clearance. On March 7, 2024, the Federal Trade Commission (“FTC” or “Commission”) announced the pending issuance of a Notice of Proposed Rulemaking (“NPRM”) that would amend the Telemarketing Sales Rule (“TSR”) to extend its coverage to inbound telemarketing calls by consumers to technical support services – i.e., calls that consumers make in response to an advertisement through any medium or to a direct mail solicitation. The proposed amendment would newly require these inbound tech support calls to comply with the Rule’s recordkeeping and disclosure requirements. The proposed amendment is necessary in light of the widespread deception and consumer injury caused by tech support scams. The proposed amendment would provide the Commission with the ability to obtain stronger relief in cases involving tech support scams, including civil penalties and consumer redress.

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

Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act” or “Act”) in 1994 to curb deceptive and abusive telemarketing practices and provide anti-fraud and privacy protections for consumers receiving telephone solicitations to purchase goods or services.¹ The Telemarketing Act directed the Commission to adopt a rule prohibiting deceptive or abusive telemarketing practices, including prohibiting telemarketers from undertaking a pattern of unsolicited calls that reasonable consumers would consider coercive or abusive of their privacy, restricting the time of day telemarketers may make unsolicited calls to consumers, and requiring telemarketers to promptly and clearly disclose that the purpose of the call is to sell goods or services.² The Act also directed the Commission to address in its rule other acts or practices that it found to be deceptive or abusive, including acts or practices of entities or individuals that assist and facilitate deceptive telemarketing, and to consider including recordkeeping requirements.³ Pursuant to the Act’s directive, the FTC promulgated the TSR on August 23, 1995,⁴ and has since substantively amended the Rule multiple times to address deceptive acts or practices by scammers employing new technologies and practices.

While the Commission has sued tech support scams for engaging in deceptive practices under the TSR where applicable, the Commission has brought cases under the FTC Act alone if

¹ 15 U.S.C. § 6101-6108.

² 15 U.S.C. § 6102(a)(3).

³ 15 U.S.C. § 6101(a).

⁴ 60 FR 43842 (Aug. 23, 1995).

the telemarketer’s practices could arguably fall within an exception to the TSR. In April 2021, the Supreme Court’s decision in *AMG Capital Management, LLC v. FTC* overturned forty years of precedent from the U.S. Circuit Courts of Appeal that had previously held the Commission could take action under the FTC Act to return money unlawfully taken from consumers through deceptive practices. As a result, the Commission is now limited in its ability to obtain monetary relief from tech support scams whose business practices, in some cases, arguably place the scams beyond the reach of the Rule. Amending the Rule would clarify that all tech support scams are potentially subject to the Rule.

The proposed amendment would newly require inbound telemarketing calls by consumers to technical support services – i.e., calls that consumers make in response to an advertisement through any medium or to a direct mail solicitation – to comply with the Rule’s recordkeeping and disclosure requirements. As described in Section IV of the NPRM, the proposed amendment is intended to address the widespread harm caused by deceptive tech support services, which disproportionately impact older consumers compared to younger ones. The proposed amendment would provide the Commission with the ability to obtain stronger relief in cases involving tech support scams, including civil penalties and consumer redress.

(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”).⁵ Moreover, in its NPRM, the Commission specifically seeks 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.

Consistent with the GPEA, 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) Non-Duplication

None of the proposed disclosure or recordkeeping requirements are duplicated by any other information collection requirements imposed by the Commission. In its NPRM, the Commission seeks comment and information regarding any potentially duplicative, overlapping, or conflicting federal statutes, rules, or policies.

(5) Burden on Small Businesses

The proposed disclosure and 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

⁵ Pub. L. No. 105-277, Title XVII, 112 Stat. 2681-749 (1998), *codified at* 44 U.S.C. § 3501 *et seq.*

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 recordkeeping 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) Less Frequent Collection

A less frequent proposed disclosure requirement or recordkeeping requirement would less effectively address the widespread harm caused by deceptive tech support services, which disproportionately impact older consumers compared to younger ones. 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 complexities of identifying the telemarketer and seller responsible for particular telemarketing campaigns and gathering the necessary evidence, a shorter period of time 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) Paperwork Reduction Act Guidelines

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.

(8) Consultation and Public Comments

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,⁶ 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

⁶ 15 U.S.C. § 6108.

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 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.

The Commission’s recent Advance Notice of Proposed Rulemaking⁷ received ten comments addressing whether the TSR should require inbound tech support calls to comply with the TSR. Nine comments supported the proposal: six filed anonymously or by consumers, and three filed by organizations.⁸ The National Association of Attorneys General (“NAAG”) “wholeheartedly” agreed with the proposal and believed that amending the TSR will have a “substantial effect” on tech support scams.⁹ NAAG stated that the scams “have become one of the most prevalent scams in the nation over the past few years.”¹⁰ The Electronic Privacy Information Center (“EPIC”) also supported the proposal and noted that the “serious nature of this fraud is comparable to that in the transactions already singled out for coverage of inbound calls.”¹¹ USTelecom-The Broadband Association (“USTelecom”) also supported the proposal, noting that tech support scams are a “significant menace for both consumers and businesses.”¹²

The Third Party Payments Association (“TPPA”) opposed “prohibiting inbound telemarketing calls.”¹³ TPPA acknowledged that these scams disproportionately affect older adults, but it contended that those problems will “diminish over time” as consumers become more familiar with technology.¹⁴ TPPA also cautions that “prohibiting” inbound tech support calls could raise conflicts with the FTC’s Policy Statement on Repair Restrictions, create confusion for consumers and businesses, and “unduly burden legitimate business activity by prohibiting Inbound telemarketing of technical support services.”¹⁵ As explained in Section III of the NPRM,¹⁶ the scope and severity of injury from tech support scams, including their

⁷ See Advance Notice of Proposed Rulemaking, 84 FR 52393 (Oct. 2, 2019).

⁸ The comments are Jennifer Pierce 33-04; Kara V. 33-12; Anonymous 33-02; Anonymous 33-10; and Anonymous 33-11.

⁹ NAAG 33-16 at 6.

¹⁰ Id. at 7.

¹¹ EPIC 33-17 at 10.

¹² UST 33-14 at 7.

¹³ TPPA 34-14 at 2. The ANPR did not propose prohibiting inbound tech support calls. It proposed requiring inbound tech support calls to comply with the TSR. It is not clear from TPPA’s comment whether TPPA’s concerns are limited to the effects of prohibiting tech support calls as opposed to merely requiring the calls to comply with the TSR.

¹⁴ Id.

¹⁵ Id.

¹⁶ See FTC Report to Congress, Protecting Older Consumers, 2021-2022 (“2022 Protecting Older Consumers Report”) at 31 (Oct. 18, 2022), available at <https://www.ftc.gov/reports/protecting-older-consumers>

impact on older adults, warrants amending the TSR.

(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

The proposed amendment will newly require certain inbound tech support calls to comply with the Rule's recordkeeping and disclosure requirements. This will increase the PRA burden for sellers or telemarketers as detailed below.

A. Estimated Annual Hours Burden - 123,816 (derived from 19,566 disclosure + 104,250 recordkeeping)

The Commission estimates the PRA burden of the proposed amendment based on its knowledge of the telemarketing industry and data compiled from the Do Not Call Registry. The annual hours of burden for sellers or telemarketers will consist of two components: the time required to make disclosures, and the costs of complying with the Rule's recordkeeping requirements.

First the Commission estimates that the disclosure burden will take 19,566 hours. Calculating the disclosure burden requires estimating the number of inbound tech support calls that will now be subject to the TSR if the proposed amendment goes into effect. The Commission uses the same methodology it has used in the past to calculate the disclosure burden for categories of calls that are excluded from the TSR's exemptions for inbound calls

As it has in the past, the Commission estimates that there are 1.8 billion inbound telemarketing calls that result in sales, that consumer injury from telemarketing fraud is \$40 billion a year, and that it takes seven seconds to make the disclosures required by the Rule in inbound calls.

The Commission estimates the disclosure burden for particular categories of calls that are excluded from the TSR's exemptions by extrapolating a percentage of those calls based on their complaint rates in the FTC's Consumer Sentinel system. The resulting percentage of total fraud complaints must be adjusted to reflect the fact that only a relatively small percentage of telemarketing calls are fraudulent. To extrapolate the percentage of fraudulent telemarketing calls, staff divides a Congressional estimate of annual consumer injury from telemarketing

fraud (\$40 billion) by available data on total consumer and business-to-business telemarketing sales (\$310.0 billion projected for 2016), or 13%. The two percentages are then multiplied together to determine the percentage of the 1.8 billion annual inbound telemarketing calls represented by each type of fraud complaint. That number is then rounded to the nearest ten. In 2022, there were 2,369,527 fraud complaints and 89,158 complaints about tech support. Thus, the general sales disclosure burden is 19,566 hours (1.8 billion inbound calls x the percentage of fraud complaints for tech support (89,158/2,369,527) x the percentage of telemarketing calls that are estimated to be fraudulent (.13) x the length of the disclosures (8 seconds per disclosure ÷ 3,600 to convert to hours).

Second, the estimated recordkeeping burden is 104,250 hours. Estimating this burden requires estimating how many new telemarketing entities will be subject to the TSR if the proposed amendment goes into effect. To create this estimate, staff first estimates the number of existing telemarketing entities that engage in tech support sales. 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. To estimate the percentage of those entities that sell tech support products and services, staff again relies on the percentage of fraud complaints for tech support out of the total fraud complaints. (89,158/2,369,527), which is multiplied by the number of telemarketing entities (3,693), to produce the estimate that 139 telemarketing entities receive tech support calls.

If the proposed amendment goes into effect, additional businesses will likely be covered by the TSR. For example, tech support companies that advertise their products through general advertisements and do not engage in upselling may be subject to the Rule for the first time. On the other hand, companies that market through a combination of advertisements and outbound telemarketing are already subject to the Rule. Companies that receive inbound calls from consumers with questions about their products who then engage in upsells of technical support services are also already subject to the Rule. The Commission estimates that the proposed amendment will increase the number of telemarketing entities that receive inbound tech support calls by a factor of 5, which would mean that an additional 695 entities will be covered by the Rule.

The Commission estimates that after implementation of the separate Final Rule proceeding which, among other things, requires telemarketers and sellers to maintain additional records of their telemarketing transactions, complying with the TSR’s current recordkeeping requirements requires 150 hours for new entrants to develop recordkeeping systems that comply with the TSR, for a total annual recordkeeping burden of 104,250 hours.

Estimated Revised Annual Labor Cost Burden: \$3,544,614.

The Commission estimates annual labor costs by applying appropriate hourly wage rates to the burden hours described above. The Commission estimates that the annual labor cost for disclosures will be \$315,991. This total is the product of applying an assumed wage of

\$16.15/hour for 19,566 hours of disclosures.¹⁷ The Commission estimates that the annual labor cost for recordkeeping will be \$3,228,623.¹⁸ This is calculated by applying a skilled labor rate of \$30.97/hour to the estimated 150 burden hours for the estimated 695 entities that will now be covered by the Rule ($\$30.97 \times 150 \times 695$).

(13) Capital and other Non-Labor Costs

The Commission estimates that the annual non-labor costs are \$55 a year, derived from \$5 for electronically storing audio files, and \$50 for storing the required records. The Commission thus estimates that the annual non-labor costs will be \$38,255 (695 entries x \$55).

(14) Estimated cost to the Government

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

(15) Program Changes or Adjustments

This would be a program change, not an adjustment. The estimated additional annual hours of burden would be 123,816, and the estimated additional annual labor costs would be \$3,544,614.

(16) Publicizing Results

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

(17) Display of Expiration Date for OMB Approval

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

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

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

¹⁷ This figure is derived from the mean hourly wage shown for Telemarketers. See “Occupational Employment and Wages—May 2022,” U.S. Department of Labor, released April 25, 2023 Table 1 (“National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2022”), available at <https://www.bls.gov/news.release/ocwage.t01.htm>.

¹⁸ This figure is derived from the mean hourly wage shown for Computer Support Specialists from the U.S. Department of Labor source set out in the prior footnote.