[Billing code: 6750-01-S]

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission ("FTC" or "Commission").

ACTION: Notice.

SUMMARY: The FTC intends to ask the Office of Management and Budget ("OMB") to extend through December 31, 2016, the current Paperwork Reduction Act ("PRA") clearance for the FTC's enforcement of the information collection requirements in its Affiliate Marketing Rule (or "Rule"), which applies to certain motor vehicle dealers, and its shared enforcement with the Consumer Financial Protection Bureau ("CFPB") of the provisions (subpart C) of the CFPB's Regulation V regarding other entities ("CFPB Rule"). The current clearance expires on December 31, 2013.

DATES: Comments must be filed by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be submitted by using the following weblink: https://public.commentworks.com/ftc/affiliatemarketingpra (and following the instructions on the web-based form). Comments filed in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580, in the manner detailed in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be addressed to Steven Toporoff, Attorney, Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, NJ-8100, Washington, DC 20580, (202) 326-3135.

SUPPLEMENTARY INFORMATION:

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 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] For certain other portions of the FCRA, the FTC retains its full rulemaking authority.[4]

The FTC retains rulemaking authority for its Affiliate Marketing Rule, 16 CFR 680, 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.[5]

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[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] The Dodd-Frank Act does not transfer to the CFPB rulemaking authority for FCRA sections 615(e) ("Red Flag Guidelines and Regulations Required") and 628 ("Disposal of Records"). *See* 15 U.S.C. 1681s(e); Pub. L. 111-203, section 1088(a)(10)(E). Accordingly, the Commission retains full rulemaking authority for its "Identity Theft Rules," 16 CFR part 681, and its rules governing "Disposal of Consumer Report Information and Records," 16 CFR part 682. *See* 15 U.S.C. 1681m, 1681w.

[5] *See* Dodd-Frank Act, at section 1029 (a), (c).

On December 21, 2011, the CFPB issued its interim final FCRA rule, including the affiliate marketing provisions (subpart C) of CFPB's Regulation V.[6] Contemporaneous with that issuance, the CFPB and FTC submitted to OMB, and received its approval for, that agency's respective burden estimates reflecting its overlapping enforcement jurisdiction with the FTC. The discussion in the Burden Statement below, following preliminary background information, continues that analytical framework of shared enforcement authority, as supplemented by the FTC's jurisdiction over auto motive dealers, as noted above.

Background:

As mandated by section 214 of the Fair and Accurate Credit Transactions Act ("FACT Act"), Pub. L. 108-159 (Dec. 6, 2003), the Affiliate Marketing Rule, 16 CFR part 680, specifies disclosure requirements for certain affiliated companies. Except as discussed below, these requirements constitute "collection[s] of information" for purposes of the PRA. Specifically, the FACT Act and the FTC 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 FTC 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 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.

To minimize compliance costs and burdens for entities, particularly any small businesses that may be affected, the FTC Rule contains model disclosures and opt-out notices that may be

[6] 76 FR 79308. Subpart C of the interim final rule became effective on December 30, 2011. Subpart C is codified at 12 CFR 1022.20 *et seq*. Except for certain motor vehicle dealers (*see supra* note 5 and accompanying text), the disclosure and opt-out provisions described in the "Background" discussion below also pertain to Subpart C of Regulation V and the FTC's associated co-enforcement jurisdiction.

used to satisfy the statutory requirements. The FTC Rule also gives covered entities flexibility to satisfy the notice and opt-out requirement by sending the consumer a free-standing opt-out notice or by adding the opt-out notice to the privacy notices already provided to consumers, such as those provided in accordance with the provisions of Title V, subtitle A of the Gramm Leach Bliley Act ("GLBA").[7] In either event, the time necessary to prepare or incorporate an opt-out notice would be minimal because those entities could either use the model disclosure verbatim or base their own disclosures upon it. Moreover, verbatim adoption of the model notice does not constitute a PRA "collection of information."[8]

Burden Statement:

Under the PRA, 44 U.S.C. 3501-3521, federal agencies must get OMB approval for each collection of information they conduct or sponsor. "Collection of information" includes agency requests or requirements to submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). The FTC is seeking clearance for its assumed share of the estimated PRA burden regarding the disclosure requirements under the FTC and CFPB Rules.

Except where otherwise specifically noted, staff's estimates of burden are based on its knowledge of the consumer credit industries and knowledge of the entities over which the Commission has jurisdiction. This said, estimating PRA burden of the Rule's disclosure requirements is difficult given the highly diverse group of affected entities that may use certain eligibility information shared by their affiliates to send marketing notices to consumers.

The estimates provided in this burden statement may well overstate actual burden. As

[7] 15 U.S.C. 6801 *et seq.*

[8] "The public disclosure of information originally supplied by the Federal government to the recipient for purpose of disclosure to the public is not included within [the definition of collection of information]." 5 CFR 1320.3(c)(2).

noted above, verbatim adoption of the disclosure of information provided by the federal government is not a "collection of information" to which to assign PRA burden estimates, and an unknown number of covered entities will opt to use the model disclosure language. Second, an uncertain, but possibly significant, number of entities subject to FTC jurisdiction do not have affiliates and thus would not be covered by section 214 of the FACT Act or the Rule. Third, Commission staff does not know how many companies subject to FTC jurisdiction under the Rule actually share eligibility information among affiliates and, of those, how many affiliates use such information to make marketing solicitations to consumers. Fourth, still other entities may choose to rely on the exceptions to the Rule's notice and opt-out requirements.[9] Finally, the population estimates below to apply further calculations are based on industry data that, while providing tallies of business entities within industries and industry segments, does not identify those entities individually. Thus, there is no clear path to ascertain how many individual businesses have newly entered and departed within a given industry classification, from one year to the next or from one triennial PRA clearance cycle to the next. Accordingly, there is no ready way to quantify how many establishments accounted for in the data reflect those previously accounted for in the FTC's prior PRA analysis, i.e., entities that would already have experienced a declining learning curve applying the Rule with the passage of time. For simplicity, the FTC analysis will continue to treat covered entities as newly undergoing the previously assumed learning curve cycle, although this would effectively overstate estimated burden for unidentified covered entities that have remained in existence since OMB's most recent clearances for the FTC

[9] Exceptions include, for example, having a preexisting business relationship with a consumer, using information in response to a communication initiated by the consumer, and solicitations authorized or requested by the consumer.

Rule.[10]

As in the past, FTC staff's estimates assume a higher burden will be incurred during the first year of a prospective OMB three-year clearance, with a lesser burden for each of the subsequent two years because the opt-out notice to consumers is required to be given only once. Institutions may provide for an indefinite period for the opt-out or they may time limit it, but for no less than five years.

Staff's labor cost estimates take into account: managerial and professional time for reviewing internal policies and determining compliance obligations; technical time for creating the notice and opt-out, in either paper or electronic form; and clerical time for disseminating the notice and opt-out.[11] In addition, staff's cost estimates presume that the availability of model disclosures and opt-out notices will simplify the compliance review and implementation processes, thereby significantly reducing the cost of compliance. Moreover, the Rule gives entities considerable flexibility to determine the scope and duration of the opt-out. Indeed, this flexibility permits entities to send a single joint notice on behalf of all of its affiliates.

A. Non-GLBA Entities

Based, in part, on industry data regarding the number of businesses under various industry codes, staff estimates that 1,174,347 non-GLBA entities under FTC jurisdiction have

[10] On December 21, 2010, OMB granted three-year clearance for the Rule through December 31, 2013 under Control No. 3084-0131. On February 3, 2012, OMB additionally approved under that control number FTC adjustments submitted on December 9, 2011 to reflect the effects of the Dodd-Frank Act, but the latter approval retained the previously accorded clearance expiration of December 31, 2013.

[11] No clerical time was included in staff's burden analysis for GLBA entities as the notice would likely be combined with existing GLBA notices.

affiliates and would be affected by the Rule.[12] Staff further estimates that there are an average of 5 businesses per family or affiliated relationship, and that the affiliated entities will choose to send a joint notice, as permitted by the Rule. Thus, an estimated 234,869 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.

Based on the above, total burden for non-GLBA entities during the prospective three-year clearance period would be approximately 3,288,166 hours, cumulatively. Associated labor cost would total $123,353,199.[13] These estimates include the start-up burden and attendant costs, such as determining compliance obligations. Non-GLBA entities, however, will give notice only

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[12] This estimate is derived from an analysis of a database of U.S. businesses based on June 2013 SIC codes for businesses that market goods or services to consumers, which included 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 and businesses that do not use data or information subject to the rule. To the resulting sub-total (7,111,026), staff applies a continuing assumed rate of affiliation of 16.75 percent, *see* 75 FR 43526, 43528 n. 6 (July 26, 2010), 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 1,174,347.

[13] 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 2012, U.S. Department of Labor released March 29, 2013, Table 1 ("National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2012"): http://www.bls.gov/news.release/pdf/ocwage.pdf. The respective private sector hourly wages for these classifications are $52.20, $38.55, and $16.54. 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 $525.20. This subtotal is then multiplied by the estimated number of non-GLB business families projected to send the affiliate marketing notice (234,869) to determine cumulative labor cost burden for non-GLBA entities ($123,353,199).

once during the clearance period ahead. Thus, averaged over that three-year period, the estimated annual burden for non-GLBA entities is 1,096,055 hours and $41,117,733 in labor costs.

B. GLBA Entities

Entities that are subject to the Commission's GLBA privacy notice regulation already provide privacy notices to their customers.[14] 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.[15] Staff further estimates that 3,350 GLBA entities under FTC jurisdiction would be affected,[16] so that the total burden for GLBA entities during the first year of the clearance period would approximate 20,100 hours (3,350 x 6) and $1,003,493 in associated labor costs.[17]

Allowing for increased familiarity with procedure, 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

[14] 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.

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

[16] 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.

[17] 3,350 GLBA families x [$52.20 x 5 hours) + ($38.55 x 1 hour)] = $1,003,493.

clearance, amounting to 13,400 hours (3,350 x 4) and $653,753 in labor costs in each of the ensuing two years.[18] Thus, averaged over the three-year clearance period, the estimated annual burden for GLBA entities is 15,633 hours and $770,333 in labor costs.

The cumulative average annual burden for both non-GLBA and GLBA for the prospective three-year clearance period is 1,111,688 burden hours and $41,888,066 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: 560,179 hours; $20,771,941, 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 60,959 motor vehicle dealerships subject to the Rule.[19] Of these, staff estimates that 10% are non-GLBA entities (6,096), and 90% are GLBA entities (54,863). Applying an assumed rate of affiliation of 16.75%, staff estimates that there are 102 non-GLBA and 9,190 GLBA motor vehicle dealerships affiliate families. Staff further assumes there are an average of 5 businesses per family or affiliated relationship, leaving

[18] 3,350 GLBA families x [($52.20 x 3 hours) + ($38.55 x 1 hours)] = $653,753.

[19] This figure consists, in part, of 55,417 car dealers per NADA (franchise/new cars) (http://www.nada.org/Publications/NADADATA/2011/default) and NIADA data (independents/used cars) (http://www.usedcarnews.com/news/2963-niada-survey-shows-more-action-online), respectively, for 2011, multiplied by an added factor of 1.10 to cover for an unknown quantity of additional motor vehicle dealer types (motorcycles, boats, other recreational vehicles) also covered within the definition of motor vehicle dealer under section 1029(a) of the Dodd-Frank Act. This leaves a total of 60,959 motor vehicle dealers subject to the Rule.

approximately 20 non-GLBA and 1,838 GLBA 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 is 8,670 hours.[20]

To calculate the FTC's total shared burden hours, staff deducted from the total burden hours (1,111,688 hours) those attributed to motor vehicle dealerships (8,670), leaving a total of 1,103,108 hours to split between the CFPB and the FTC. The resulting shared burden for the CFPB is half that amount, or 551,509 hours. To calculate the total burden hours for the FTC, staff added the burden hours associated with motor vehicle dealers (8,670 hours), resulting in a total burden of 560,179 hours.

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 $3,501 annualized labor costs,[21] and GLBA business families have $422,648 annualized labor costs,[22] for cumulative annualized costs of $426,149.

To calculate, on an annualized basis, the FTC's cumulative share of labor cost burden, staff deducted from the overall total ($41,117,733) the labor costs attributed to motor vehicle dealerships ($426,149), leaving a net amount of $40,691,584 to split between the CFPB and the

[20] 20 non-GLBA families x 4.666667 hours = 93 hours; 1,838 GLBA families x 4.666667 hours = 8,577 hours.

[21] (20 non-GLBA families x $525.20) ÷ 3 = $3,501.

[22] In the first year, GLBA families have $550,573 costs: 1,838 x [($52.20 x 5 hours) + ($38.55 x 1 hour)] = $550,573. In each of the second and third years, GLBA families have $358,686 in costs: 1,838 x [($52.20 x 3 hours) + ($38.55 x 1 hour)] = $358,686.

FTC. The resulting shared burden for the CFPB is half that amount, or $20,345,792. To calculate the total burden hours for the FTC, staff added the costs associated with motor vehicle dealers ($426,149), resulting in a total cost burden for the FTC of $20,771,941.

Request for Comment:

Interested parties are invited to submit written comments. Comments should refer to "Affiliate Marketing Rule PRA" to facilitate the organization of comments. Please note that your comment – including your name and your state – will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at http://www.ftc.gov/os/publiccomments.shtm.

Because comments will be made public, they should not include any sensitive personal information, such as any individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential" as provided in Section 6(f) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing matter for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c).[23]

[23] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted using the following weblink https://public.commentworks.com/ftc/affiliatemarketingpra (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink https://public.commentworks.com/ftc/affiliatemarketingpra. If this Notice appears at www.regulations.gov/search/index.jsp, you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at http://www.ftc.gov/os/publiccomments.shtm. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at http://www.ftc.gov/ftc/privacy.shtm.

Pursuant to Section 3506(c)(2)(A) of the PRA, the FTC invites comments on: (1) whether the disclosure requirements are necessary, including whether the information will be practically useful; (2) the accuracy of our burden estimates, including whether the methodology and

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and the public interest. See FTC Rule 4.9(c), 16 CFR 4.9(c).

assumptions used are valid; (3) how to improve the quality, utility, and clarity of the disclosure requirements; and (4) how to minimize the burden of providing the required information to consumers. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

David C. Shonka
Principal Deputy General Counsel.

[FR Doc. 2013-20794 Filed 08/26/2013 at 8:45 am; Publication Date: 08/27/2013]