

FEDERAL TRADE COMMISSION

16 CFR Part 680

RIN [3084-AB63]

Affiliate Marketing Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking; request for public comment.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) requests public comment on its Affiliate Marketing Rule as part of the FTC’s systematic review of all current Commission regulations and guides. In addition, the FTC is proposing to amend the Rule to correspond to changes made to the Fair Credit Reporting Act (“FCRA”) by the Dodd-Frank Act.

DATES: Written comments must be received on or before [INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file a comment online or on paper by following the Request for Comment part of the SUPPLEMENTARY INFORMATION section below.

Write “Amendment to the Affiliate Marketing Rule, 16 CFR part 680, Rulemaking No. [xxxx],” on your comment and file your comment online at <https://www.regulations.gov>

by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission,

Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B),

Washington, DC 20580, or deliver your comment to the following address: Federal Trade

Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: David Lincicum, Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue N.W., Washington, D.C. 20580, (202) 326-2773.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Affiliate Marketing Rule

The Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) was signed into law on December 4, 2003. Public Law 108-159, 117 Stat. 1952. Section 214 of the FACT Act added a new section 624 to the FCRA. This provision gives consumers the right to restrict a person from using certain information obtained from an affiliate to make solicitations to that consumer. Section 624 generally provides that if a person receives certain consumer eligibility information from an affiliate, the person may not use that information to make solicitations to the consumer about its products or services, unless the consumer is given notice and an opportunity (via a simple method) to opt out of such use of the information, and the consumer does not opt out. The statute also provides that section 624 does not apply, for example, to a person using eligibility information: (1) to make solicitations to a consumer with whom the person has a pre-existing business relationship; (2) to perform services for another affiliate subject to certain conditions; (3) in response to a communication initiated by the consumer; or (4) to make a solicitation that has been authorized or requested by the consumer. Unlike the FCRA affiliate sharing opt-out (15 U.S.C. 1681a(d)(2)(A)(iii)) and the Gramm-Leach-Bliley Act (“GLBA”), 15 U.S.C. 6801 *et seq.*, non-affiliate sharing opt-out, which apply indefinitely, section 624

provides that a consumer's affiliate marketing opt-out election must be effective for a period of at least five years. Upon expiration of the opt-out period, the consumer must be given a renewal notice and an opportunity to renew the opt-out before information received from an affiliate may be used to make solicitations to the consumer.

The Federal Trade Commission published regulations implementing Section 624, the Affiliate Marketing Rule, 16 CFR part 680, on October 30, 2007.¹

B. Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") was signed into law in 2010.² The Dodd-Frank Act substantially changed the federal legal framework for financial services providers. Among the changes, the Dodd-Frank Act transferred to the Consumer Financial Protection Bureau ("CFPB") the Commission's rulemaking authority under portions of the FCRA.³ Accordingly, in 2012, the Commission rescinded several of its FCRA rules, which had been replaced by rules issued by the CFPB.⁴ The FTC retained rulemaking authority for other rules promulgated under the Acts to the extent the rules apply to motor vehicle dealers described in section 1029(a) of the Dodd-Frank Act⁵ that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicle or both ("motor vehicle dealers").⁶ The rules for which the FTC retains rulemaking authority include the Affiliate Marketing Rule, which now applies only to motor vehicle dealers.⁷ Entities that are not

¹ 72 FR 61423 (October 30, 2007).

² Pub. L. 111-203 (2010).

³ 15 U.S.C. 1681 *et seq.* The Dodd-Frank Act does not transfer to the CFPB rulemaking authority for section 615(e) of the FCRA ("Red Flag Guidelines and Regulations Required") and section 628 of the FCRA ("Disposal of Records"). *See* 15 U.S.C. 1681s(e).

⁴ 77 FR 22200 (April 13, 2012).

⁵ 12 U.S.C. 5519.

⁶ 77 FR 22200 (April 13, 2012).

⁷ *Id.*

motor vehicle dealers are covered by the CFPB’s Regulation V, Subpart C, which is substantially similar to the Commission’s Rule.⁸

II. Technical Changes to Correspond to Statutory Changes Resulting from the Dodd-Frank Act

The Commission promulgated the Affiliate Marketing Rule at a time when it had rulemaking authority for a broader group of entities. While the Dodd-Frank Act did not change the Commission’s enforcement authority for the Affiliate Marketing Rule, it did narrow the Commission’s rulemaking authority with respect to the Rule. It now covers only motor vehicle dealers. The amendments in the Dodd-Frank Act necessitate a technical revision to the Affiliate Marketing Rule to ensure that the regulation is consistent with the text of the amended FCRA. Accordingly, the Commission proposes to modify the Affiliate Marketing Rule to properly reflect the Rule’s scope.

The proposed amendment to section 680.1(b) narrows the scope description of the Affiliate Marketing Rule to the entities excluded from Consumer Financial Protection Bureau jurisdiction as described in the Dodd-Frank Act.⁹ It does so by replacing the broad term “person” with the term “motor vehicle dealer,” as defined in amended section 680.3.

The proposed amendment to section 680.3 adds a definition of “motor vehicle dealer” that defines motor vehicle dealers as those entities excluded from Consumer Financial Protection Bureau jurisdiction as described in the Dodd-Frank Act.¹⁰ Also, the

⁸ 12 CFR § 1022.20-27. There are no substantive differences between the two rules, but the two rules are organized differently and, in some cases, use different examples. *See, e.g.*, 12 CFR § 1022.20(b)(4)(iii).

⁹ 12 U.S.C. § 5519.

¹⁰ *Id.*

proposed amendments revise the term “you” (680.3(m)) to refer to a motor vehicle dealer.

The proposed amendments do not change the substantive provisions of the Rule or the examples in the Rule, even where those provisions and examples involve entities other than motor vehicle dealers that are covered by the CFPB’s rule, rather than the Commission’s Rule. The primary reason for retaining these provisions and examples is that the Rule addresses the relationship between covered motor vehicle dealers and their affiliates, which may not be motor vehicle dealers. The obligations and exceptions set forth by the rule are inextricably linked to a consumer’s relationship and actions in relation to all affiliates, both motor vehicle dealers and non-motor vehicle dealers. In order for the Rule to apply meaningfully, it must address both types of entities, even those that are not directly covered by the rule. This will not create any conflict with the CFPB’s corresponding rule, as the Commission’s Affiliate Marketing Rule and the CFPB’s rule are substantially similar and impose the same obligations and exceptions on entities that they cover.

III. Regulatory Review of the Affiliate Marketing Rule

In addition to proposing the changes described above, the Commission seeks information about the costs and benefits of the Rule, and its regulatory and economic impact. Consistent with its practice of reviewing all of its rules and guides periodically, the Commission seeks to ascertain whether changes in technology, business models, or the law warrant modification or rescission of the Rule. As part of this review the Commission solicits comments on, among other things, the economic impact and benefits of the Affiliate Marketing Rule; possible conflict between the Affiliate Marketing Rule

and state, local, or other federal laws or regulations; and the effect on the Affiliate Marketing Rule of any technological, economic, or other industry changes.

IV. Issues for Comment

The Commission requests written comment on any or all of the following questions. These questions are designed to assist the public and should not be construed as a limitation on the issues about which public comments may be submitted. The Commission requests that responses to its questions be as specific as possible, including a reference to the question being answered, and refer to empirical data or other evidence upon which the comment is based whenever available and appropriate.

1. Is there a continuing need for specific provisions of the Affiliate Marketing Rule? Why or why not?
2. What benefits has the Affiliate Marketing Rule provided to consumers? What evidence supports the asserted benefits?
3. What modifications, if any, should be made to the Affiliate Marketing Rule to increase the benefits to consumers?
 - a. What evidence supports the proposed modifications?
 - b. How would these modifications affect the costs imposed by the Affiliate Marketing Rule?
4. What significant costs, if any, has the Affiliate Marketing Rule imposed on consumers? What evidence supports the asserted costs?
5. What modifications, if any, should be made to the Affiliate Marketing Rule to reduce any costs imposed on consumers?
 - a. What evidence supports the proposed modifications?

- b. How would these modifications affect the benefits provided by the Affiliate Marketing Rule?
6. What benefits, if any, has the Affiliate Marketing Rule provided to businesses, including small businesses? What evidence supports the asserted benefits?
7. What modifications, if any, should be made to the Affiliate Marketing Rule to increase its benefits to businesses, including small businesses?
 - a. What evidence supports the proposed modifications?
 - b. How would these modifications affect the costs the Affiliate Marketing Rule imposes on businesses, including small businesses?
 - c. How would these modifications affect the benefits to consumers?
8. What significant costs, if any, including costs of compliance, has the Affiliate Marketing Rule imposed on businesses, including small businesses? What evidence supports the asserted costs?
9. What modifications, if any, should be made to the Affiliate Marketing Rule to reduce the costs imposed on businesses, including small businesses?
 - a. What evidence supports the proposed modifications?
 - b. How would these modifications affect the benefits provided by the Affiliate Marketing Rule?
10. What evidence is available concerning the degree of industry compliance with the Affiliate Marketing Rule?
11. What modification, if any, should be made to the Affiliate Marketing Rule to account for changes in relevant technology or economic conditions? What evidence supports the proposed modifications?

12. Does the Affiliate Marketing Rule overlap or conflict with other federal, state, or local laws or regulations? If so, how?
 - a. What evidence supports the asserted conflicts?
 - b. With reference to the asserted conflicts, should the Affiliate Marketing Rule be modified? If so, why, and how? If not, why not?
13. Should the Affiliate Marketing Rule be amended to remove provisions addressing circumstances that do not apply, or typically do not apply, to motor vehicle dealers?
14. Can the examples set forth in the Affiliate Marketing Rule be further amended to make them more helpful and informative to motor vehicle dealers? Would additional examples be helpful, and if so, what examples? Should examples that relate to types of transactions that are not typical in the motor vehicle context be removed?
15. The Commission proposes to amend the Rule to reflect statutory changes to the Rule's scope. Are the proposed modifications appropriate? Should additional amendments be made? Would these amendments create conflicts with any other federal, state, or local regulations or laws?

V. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write "Affiliate Marketing Rule, 16 CFR part 680, Project No. []" on the comment. Your comment, including your name and

your state, will be placed on the public record of this proceeding, including the <https://www.regulations.gov> website.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comment online. To make sure that the Commission considers your online comment, you must file it at <https://www.regulations.gov> by following the instructions on the web-based form.

If you file your comment on paper, write “Affiliate Marketing Rule, 16 CFR part 680, Project No. []” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website, <https://www.regulations.gov>, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else'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. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment

should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential,” as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2), including in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material 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). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the <https://www.regulations.gov> website, we cannot redact or remove your comment from the website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the Commission website at <https://www.ftc.gov> to read this document and the news release describing 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 on or **before** [INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the

Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

VI. Communications by Outside Parties to the Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding, from any outside party to any Commissioner or Commissioner's advisor, will be placed on the public record.¹¹

VII. Paperwork Reduction Act

The Affiliate Marketing Rule contains information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within the Office of Management and Budget ("OMB") regulations that implement the Paperwork Reduction Act ("PRA"). 44 U.S.C. 3501 *et seq.* OMB has approved the Rule's existing information collection requirements through February 28, 2023 (OMB Control No. 3084-0131). Under the existing clearance, the FTC has attributed to itself the estimated burden regarding all motor vehicle dealers and shares equally the remaining estimated PRA burden with the CFPB for other persons for which both agencies have enforcement authority.

This proposal would amend 16 CFR part 680. The proposed amendments do not modify or add to information collection requirements that were previously approved by OMB. The amendments make no substantive changes to the Rule, other than to clarify that the scope of the Rule is limited to motor vehicle dealers. The Rule's OMB clearance already reflects that scope. Therefore, the Commission does not believe that the proposed

¹¹ 16 CFR 1.26(b)(5).

amendments would substantially or materially modify any “collections of information” as defined by the PRA.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to either provide an Initial Regulatory Flexibility Analysis (“IRFA”) with a proposed rule, or certify that the proposed rule will not have a significant impact on a substantial number of small entities.¹² The Commission does not expect that this Rule, if adopted, would have the threshold impact on small entities. The Commission does not expect the proposal to impose costs on small motor vehicle dealers because the amendments are primarily for clarification purposes and should not result in any increased burden on any motor vehicle dealer. Thus, a small entity that complies with current law need not take any different or additional action if the proposal is adopted.

¹² 5 U.S.C. 603-605.

Therefore, based on available information, the Commission certifies that amending the Affiliate Marketing Rule as proposed will not have a significant economic impact on a substantial number of small businesses. Although the Commission certifies under the RFA that the proposed amendment would not, if promulgated, have a significant impact on a substantial number of small entities, the Commission has determined, nonetheless, that it is appropriate to publish an IRFA to inquire into the impact of the proposed amendment on small entities. Therefore, the Commission has prepared the following analysis:

A. Description of the Reasons for the Proposed Rule

To address the Dodd-Frank Act's changes to the Commission's rulemaking authority, the Commission proposes to clarify that the Rule applies only to motor vehicle dealers.

B. Succinct Statement of the Objectives, and Legal Basis For, the Proposed Rule

The objectives of the proposed Rule are discussed above. The legal basis for the proposed Rule is 15 U.S.C. § 1681s-3.

C. Description of Small Entities to Which the Proposed Rule Will Apply

Determining a precise estimate of the number of small entities¹³ to which the Rule applies is not readily feasible. Financial institutions covered by the Rule include certain

¹³ The U.S. Small Business Administration Table of Small Business Size Standards Matched to North American Industry Classification System Codes (NAICS) are generally expressed in either millions of dollars or number of employees. A size standard is the largest that a business can be and still qualify as a small business for Federal Government programs. For the most part, size standards are the annual receipts or the average employment of a firm. New car dealers (NAICS code 441100) are classified as small if they have fewer than 200 employees. Used car dealers (NAICS code 441120) are classified as small if their annual receipts are \$27 million or less. Recreational vehicle dealers, boat dealers, motorcycle, ATV and all other motor vehicle dealers (NAICS codes 441210, 441222 and 441228) are classified as small if their annual receipts are \$35 million or less. The 2019 Table of Small Business Size Standards is available at <https://www.sba.gov/document/support--table-size-standards>.

motor vehicle dealers. A substantial number of these entities likely qualify as small businesses. The Commission estimates that the proposed amendment will not have a significant impact on small businesses because it imposes no new obligations.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements, Including Classes of Covered Small Entities and Professional Skills Needed To Comply

The proposed amendments would impose no new reporting, recordkeeping, or other compliance requirements. The small entities potentially covered by the proposed amendment will include all such entities subject to the Rule.

E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any other federal statutes, rules, or policies that would duplicate, overlap, or conflict with the proposed amendment. Nonetheless, the Commission is requesting comment on the extent to which other federal standards involving consumer information may duplicate and/or satisfy or possibly conflict with the Rule's requirements for any covered financial institutions.

F. Description of Any Significant Alternatives to the Proposed Rule

The Commission has not proposed any specific small entity exemption or other significant alternatives because the proposed amendment would not impose any new requirements or compliance costs. Nonetheless, the Commission welcomes comment on any significant alternative consistent with the FCRA that would minimize the impact of the proposed Rule on small entities.

IX. Proposed Rule Language
List of Subjects in 16 CFR Part 680

Consumer protection, Credit, Trade practices.

For the reasons stated above, the Federal Trade Commission proposes to amend part 680 of title 16 of the Code of Federal Regulations as follows:

1. Revise the authority section for part 680 to read as follows:

Authority: Pub. L. 108-159, sec. 311; 15 U.S.C.A. 1681s-3; 12 U.S.C. 5519(d).

2. Revise § 680.1(b) to read as follows:

§ 680.1 Scope.

* * * * *

(b) *Scope.* This part applies to any motor vehicle dealer as defined in § 680.3 that uses information from its affiliates for the purpose of marketing solicitations, or provides information to its affiliates for that purpose.

3. In § 680.3, redesignate paragraphs (i)-(l) as paragraphs (j)-(m) and add a new paragraph (i) to read as follows:

§ 680.3 Definitions.

* * * * *

(i) *Motor vehicle dealer.* The term “motor vehicle dealer” means any person excluded from Consumer Financial Protection Bureau jurisdiction as described in 12 U.S.C. 5519.

* * * * *

By direction of the Commission.

April J. Tabor,

Acting Secretary.