

**SUPPORTING STATEMENT**  
**for the Paperwork Reduction Act Information Collection Submission for**  
**Regulation S-AM**

**A. JUSTIFICATION**

**1. Necessity of Information Collection**

Section 624 of the Fair Credit Reporting Act (“FCRA”) requires that consumers must be provided with notice and an opportunity to opt out before a company makes marketing solicitations to them based on the communication of certain personal financial information by an affiliated company. Section 624 was added to the FCRA by the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”), which also required the Federal Trade Commission, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Secretary of the Treasury, and the National Credit Union Administration (collectively, the “Agencies”), as well as the Securities and Exchange Commission (“Commission”), to prescribe regulations necessary to implement the purposes of Section 624. As required by the FACT Act, the affiliate marketing rules contained in Regulation S-AM (17 CFR Part 248, Subpart B) are, to the extent possible, consistent with and comparable to the Agencies’ corresponding rules.

Regulation S-AM implements the requirements of Section 624 with respect to investment advisers and transfer agents registered with the Commission, as well as brokers, dealers and investment companies (collectively, “Covered Persons”). Section 624 and Regulation S-AM limit a Covered Person’s use of certain consumer financial information (“eligibility information”) received from an affiliate to solicit a consumer for marketing purposes, unless the consumer has been given notice and a reasonable opportunity and a reasonable and simple method to opt out of such solicitations. In addition, as a practical matter, Covered Persons need to keep records of any opt-out elections in order for the opt-out elections to be effective. The opt-out period must last at least five years. At the end of the opt-out period, the consumer must be provided with an expiration notice and a new chance to opt out before the receiving affiliate may resume making marketing solicitations based on the consumer’s eligibility information.

Notice and opt-out opportunities are required only if a Covered Person receives eligibility information from an affiliate for use in marketing solicitations. Covered Persons that do not have affiliates, or that do not receive eligibility information from affiliates for use in marketing solicitations, would not be required to provide affiliate marketing notices or opt-out opportunities. The regulation also contains a number of exceptions that apply in other circumstances, such as where the affiliate has a pre-existing business relationship with the consumer or where the consumer requests marketing information.

Regulation S-AM is necessary to implement Section 624 of the FCRA and Section 214 of the FACT Act as directed by Congress. In drafting Regulation S-AM and the corresponding rules of the Agencies, the Commission and the Agencies attempted to retain procedural flexibility and to minimize compliance burdens except as required by the terms of the FACT Act. The Commission and the Agencies believe that the rules do not impose significant burdens in excess of the statutory requirements.

## **2. Purpose and Use of the Information Collection**

Regulation S-AM requires that consumers be provided with notice and an opportunity to opt out of receiving marketing solicitations that are based on the communication of eligibility information between affiliates. The notice and opt-out requirements are designed to benefit consumers by enabling them to limit certain marketing solicitations from affiliated companies. The collection of information is required by Congress pursuant to Section 624 of the FCRA.

## **3. Consideration Given to Information Technology**

In general, improved information technology would not reduce the burdens associated with Regulation S-AM. Notices may be delivered electronically to consumers who have agreed to the electronic delivery of information. Also, Covered Persons may use a Privacy Notice Online Form Builder to download and complete to create a customized privacy notice (available at [http://www.federalreserve.gov/bankinfo/privacy\\_notice\\_instructions.pdf](http://www.federalreserve.gov/bankinfo/privacy_notice_instructions.pdf)).

## **4. Duplication**

Regulation S-P (17 CFR Part 248, Subpart A) and the FCRA both contain provisions related to the *sharing* of consumer credit information between nonaffiliated third parties and affiliates, and a model form for providing financial privacy notices required by Regulation S-P may be used to satisfy Regulation S-AM's requirement to provide an initial affiliate marketing opt-out notice. With respect to Covered Persons, however, no rule other than Regulation S-AM addresses the *using* of eligibility information received from affiliates for use in marketing solicitations.

## **5. Effect on Small Entities**

Small entities are not required to provide affiliate marketing notice and opt-out opportunities if they do not have affiliates or if they do not engage in the types of affiliate marketing practices covered by Regulation S-AM. Even when they are subject to the regulation's notice and opt-out requirements, however, smaller entities should not be subject to any disproportionate burden.

## **6. Consequences of Not Conducting Collection**

A notice and opt-out opportunity need be given only once, before a Covered Person uses eligibility information received from an affiliate for a marketing solicitation. Less frequent reports would not be viable because the regulation's third-party reporting requirement is also required by Section 624 of the FCRA.

## **7. Inconsistencies with Guidelines in 5 CFR 320.5(d)(2)**

There are no special circumstances. This collection is consistent with the guidelines in 5 CFR 1320.5(d)(2).

## **8. Consultations Outside the Agency**

The required Federal Register notice with a 60-day comment period soliciting comments on this collection of information was published. No public comments were received.

## **9. Payment or Gift**

Not applicable.

## **10. Confidentiality**

No assurances of confidentiality are provided.

## **11. Sensitive Questions**

No information of a sensitive nature will be required under this collection of information. The information collection collects Personally Identifiable Information (PII) that may include name, home address, work address, work telephone number, and financial information. The agency has determined that a system of records notice (SORN) and privacy impact assessment (PIA) are not required in connection with the collection of information. The information collection is collected and maintained by Covered Persons. The Covered Persons are not required under the Rule to submit data to the SEC.

## **12. Burden of Information Collection**

Regulation S-AM potentially applies to all of the approximately 20,195 Covered Persons registered with the Commission,<sup>1</sup> although only approximately 11,309 of them have one or more corporate affiliates, and the regulation requires only approximately 2,020 to provide consumers with an affiliate marketing notice and an opt-out opportunity.<sup>2</sup>

The Commission staff estimates that there are approximately 11,309 Covered Persons having one or more affiliates, and that they each spend an average of 0.20 hours per year to review affiliate marketing practices, for, collectively, an estimated annual time burden of 2,262 hours at an annual internal compliance cost of approximately \$1,203,384. The staff also estimates that approximately 2,020 Covered Persons provide notice and opt-out opportunities to consumers, and that they each spend an average of 7.6 hours per year creating notices, providing notices and opt-out

---

<sup>1</sup> This includes, as of June 2019, all 13,281 SEC-registered investment advisers (according to filed Form ADV's), all 259 SEC-registered transfer agents (according to filed Form TA-1's), all 3,806 SEC-registered broker-dealers (according to filed Form BD's), and all 2,849 SEC-registered investment companies (according to Form N-CEN).

<sup>2</sup> Regulation S-AM: Limitations on Affiliate Marketing; Final Rules, 74 FR 40398 (Aug. 11, 2009) ("Final Rules") at 40427 ("Based on a review of forms filed with the Commission, we estimate that approximately 56% of Covered Persons have an affiliate. . . . [W]e estimate that approximately 10% of Covered Persons . . . will be required to provide consumers with notices and an opportunity to opt out under Regulation S-AM.")

opportunities, monitoring the opt-out notice process, making and updating records of opt-out elections, and addressing consumer questions and concerns about opt-out notices, for, collectively, an estimated annual time burden of 15,352 hours at an annual internal compliance cost of approximately \$2,999,296. Thus, the staff estimates that the collection of information requires a total of approximately 11,309 respondents to incur an estimated annual time burden of a total of 17,614 hours at a total annual internal cost of compliance of approximately \$4,202,680.

As noted in Item 1 above, the election of a consumer to opt out must be effective for a period of at least five years. The staff estimates that respondents will incur an average burden of 1 hour every 5 years, or 0.20 hours per year ( $1 / 5 = 0.20$ ) to review affiliate marketing practices. The staff also estimates that respondents will incur an estimated annual burden of 7.6 hours per year to create and deliver affiliate marketing notices, monitor and respond to inquiries about the opt-process, and make and update records of opt-out elections, based on an estimate of 4 hours to deliver notices and record opt-out elections, and 3.6 hours to create notices and monitor and respond to inquiries ( $4 + 3.6 = 7.6$ ).

The staff estimates that a respondent's annual burden of senior compliance staff reviewing affiliate marketing practices will average 0.20 hours at approximately \$532 per hour (the \$532 per hour figure is based on the hourly cost for a Chief Compliance Officer according to the Securities Industry and Financial Markets Association (SIFMA)'s *Management & Professional Earnings in the Securities Industry 2013*, modified by Commission staff to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead ("2013 SIFMA Management & Professional Earnings data"). This estimate, together with the estimate of 11,309 as the number of Covered Persons having one or more affiliates, results in an estimated annual burden for reviewing marketing practices of approximately 2,262 hours ( $0.20 \times 11,309 = 2,261.8$ ) at an internal compliance cost of approximately \$1,203,384 ( $\$532 \times 2,262 = \$1,203,384$ ).

The staff estimates that a respondent's annual burden of delivering notices to consumers and recording opt-out elections will be 4 hours at approximately \$76 per hour (the \$76 per hour figure is based on the average hourly cost of \$78 for a Senior General Clerk, \$63 for a General Clerk, \$81 for an Administrative Assistant, \$70 for a Compliance Clerk, and \$89 for a Senior Data Entry Clerk according to SIFMA's *Office Salaries in the Securities Industry 2013*, modified by Commission staff to account for an 1,800-hour work-year and inflation, and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead ( $\$78 + \$63 + \$81 + \$70 + \$89 = \$381$ ;  $\$381 / 5 = \$76.2$ ). The staff estimates that a respondent's annual burden of creating notices, monitoring the opt-process, and addressing consumer questions and concerns about opt-out notices will be 3.6 hours at approximately \$328 per hour (the \$328 per hour figure is based on the average hourly cost of \$241 for a Programmer Analyst, \$342 for a Senior Database Administrator, \$310 for a Compliance Manager, \$489 for a Director of Compliance, \$218 for a Paralegal, and \$366 for a Compliance Attorney according to 2013 SIFMA Management & Professional Earnings data ( $\$241 + \$342 + \$310 + \$489 + \$218 + \$366 = \$1,966$ ;  $\$1,966 / 6 = \$327.66$ )). These estimates, together with an estimate of 2,020 as the number of Covered Persons required to provide notice and opt-out opportunities to consumers, results in an estimated annual burden of 15,352 hours for creating notices, providing notices and opt-out opportunities, monitoring the opt-out notice process, making and updating records of opt-

out elections, and addressing consumer questions and concerns about opt-out notices ( $3.6 + 4 = 7.6$ ;  $7.6 \times 2,020 = 15,352$ ) at an internal compliance cost of approximately \$2,999,296 ( $4 \times 2,020 = 8,080$ ;  $\$76 \times 8,080 = \$614,080$ ;  $3.6 \times 2,020 = 7,272$ ;  $\$328 \times 7,272 = \$2,385,216$ ;  $\$614,080 + \$2,385,216 = \$2,999,296$ ).

Based on the foregoing, the estimated total annual time burden of the collection of information is 17,614 hours ( $2,262 + 15,352$ ) at an internal compliance cost of approximately \$4,202,680 ( $\$1,203,384 + \$2,999,296 = \$4,202,680$ ).

<b>Burden</b>	<b>Burden Type</b>	<b>Number of Respondents</b>	<b>Hours Per Year</b>	<b>Total Industry Hours</b>
Review affiliate marketing practices	Third party disclosure	11,309	0.20	2,262
Deliver notices and record opt-out elections and create notices and monitor and respond to inquiries	Third party disclosure	2,020	7.6	15,352
<b>Total Aggregate Burden</b>				17,614 hours

### **13. Costs to Respondents**

Other than the internal compliance costs discussed in Item 12 above, Regulation S-AM does not impose any additional start-up or continuing operating, maintenance, or materials costs.

### **14. Costs to Federal Government**

Not applicable. Regulation S-AM requires third-party disclosure rather than government reporting.

### **15. Changes in Burden**

The change in total annual time burden from 27,957 hours to 17,614 hours resulted from a decrease in the number of entities subject to Regulation S-AM (the estimated number of Covered Persons having one or more affiliates decreased from approximately 17,954 to approximately 11,309, and the estimated number of Covered Persons required to provide notice and opt-out opportunities decreased from approximately 3,206 to approximately 2,020). Based on the changes described, the estimated total annual time burden of the collection of information changed from 27,957 ( $3,591 + 24,366$ ) hours to 17,614 hours ( $2,262 + 15,352$ ).

### **16. Information Collection Planned for Statistical Purposes**

Not applicable. The information collection is not used for statistical purposes.

**17. Approval to Omit OMB Expiration Date**

The Commission is not seeking approval to omit the expiration date.

**18. Exceptions to Certification for Paperwork Reduction Act Submissions**

This collection complies with the requirements in 5 CFR 1320.9.

**B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS**

This collection does not involve statistical methods.

## APPENDIX

### A. Section 624 of the Fair Credit Reporting Act (15 U.S.C. 1681t)

United States Code, 2011 Edition

Title 15 - COMMERCE AND TRADE

CHAPTER 41 - CONSUMER CREDIT PROTECTION

SUBCHAPTER III - CREDIT REPORTING AGENCIES

#### §1681s-3. Affiliate sharing

##### (a) Special rule for solicitation for purposes of marketing

###### (1) Notice

Any person that receives from another person related to it by common ownership or affiliated by corporate control a communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 1681a(d)(2)(A) of this title, may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless—

(A) it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons for purposes of making such solicitations to the consumer; and

(B) the consumer is provided an opportunity and a simple method to prohibit the making of such solicitations to the consumer by such person.

###### (2) Consumer choice

###### (A) In general

The notice required under paragraph (1) shall allow the consumer the opportunity to prohibit all solicitations referred to in such paragraph, and may allow the consumer to choose from different options when electing to prohibit the sending of such solicitations, including options regarding the types of entities and information covered, and which methods of delivering solicitations the consumer elects to prohibit.

###### (B) Format

Notwithstanding subparagraph (A), the notice required under paragraph (1) shall be clear, conspicuous, and concise, and any method provided under paragraph (1)(B) shall be simple. The regulations prescribed to implement this section shall provide specific guidance regarding how to comply with such standards.

###### (3) Duration

###### (A) In general

The election of a consumer pursuant to paragraph (1)(B) to prohibit the making of solicitations shall be effective for at least 5 years, beginning on the date on which the person receives the election of the consumer, unless the consumer requests that such election be revoked.

###### (B) Notice upon expiration of effective period

At such time as the election of a consumer pursuant to paragraph (1)(B) is no longer effective, a person may not use information that the person receives in the manner described in paragraph (1) to make any solicitation for marketing purposes to the consumer, unless the consumer receives a notice and an opportunity, using a simple method, to extend the opt-out for another period of at least 5 years, pursuant to the procedures described in paragraph (1).

**(4) Scope**

This section shall not apply to a person—

(A) using information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship;

(B) using information to facilitate communications to an individual for whose benefit the person provides employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;

(C) using information to perform services on behalf of another person related by common ownership or affiliated by corporate control, except that this subparagraph shall not be construed as permitting a person to send solicitations on behalf of another person, if such other person would not be permitted to send the solicitation on its own behalf as a result of the election of the consumer to prohibit solicitations under paragraph (1)(B);

(D) using information in response to a communication initiated by the consumer;

(E) using information in response to solicitations authorized or requested by the consumer; or

(F) if compliance with this section by that person would prevent compliance by that person with any provision of State insurance laws pertaining to unfair discrimination in any State in which the person is lawfully doing business.

**(5) No retroactivity**

This subsection shall not prohibit the use of information to send a solicitation to a consumer if such information was received prior to the date on which persons are required to comply with regulations implementing this subsection.

**(b) Notice for other purposes permissible**

A notice or other disclosure under this section may be coordinated and consolidated with any other notice required to be issued under any other provision of law by a person that is subject to this section, and a notice or other disclosure that is equivalent to the notice required by subsection (a) of this section, and that is provided by a person described in subsection (a) of this section to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of subsection (a) of this section.

**(c) User requirements**

Requirements with respect to the use by a person of information received from another person related to it by common ownership or affiliated by corporate control, such as the requirements of this section, constitute requirements with respect to the exchange of information among persons affiliated by common ownership or common corporate control, within the meaning of section 1681t(b)(2) of this title.

**(d) Definitions**

For purposes of this section, the following definitions shall apply:

**(1) Pre-existing business relationship**

The term “pre-existing business relationship” means a relationship between a person, or a person's licensed agent, and a consumer, based on—

(A) a financial contract between a person and a consumer which is in force;

(B) the purchase, rental, or lease by the consumer of that person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and that person during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section;

(C) an inquiry or application by the consumer regarding a product or service offered by that person, during the 3-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section; or

(D) any other pre-existing customer relationship defined in the regulations implementing this section.

## **(2) Solicitation**

The term “solicitation” means the marketing of a product or service initiated by a person to a particular consumer that is based on an exchange of information described in subsection (a) of this section, and is intended to encourage the consumer to purchase such product or service, but does not include communications that are directed at the general public or determined not to be a solicitation by the regulations prescribed under this section.

(Pub. L. 90–321, title VI, §624, as added Pub. L. 108–159, title II, §214(a)(2), Dec. 4, 2003, 117 Stat. 1980.)

### **Prior Provisions**

A prior section 624 of Pub. L. 90–321 was renumbered section 625 and is classified to section 1681t of this title.

Another prior section 624 of Pub. L. 90–321 was renumbered section 626 and is classified to section 1681u of this title.

### **Effective Date**

Section subject to joint regulations establishing effective dates as prescribed by Federal Reserve Board and Federal Trade Commission, except as otherwise provided, see section 3 of Pub. L. 108–159, set out as an Effective Date of 2003 Amendment note under section 1681 of this title.

### **Regulations**

Pub. L. 108–159, title II, §214(b), Dec. 4, 2003, 117 Stat. 1982, as amended by Pub. L. 111–203, title X, §1088(b)(3), July 21, 2010, 124 Stat. 2092, provided that:

“(1) In general.—Regulations to carry out section 624 of the Fair Credit Reporting Act (15 U.S.C. 1681s–3), shall be prescribed, as described in paragraph (2), by—

“(A) the Commodity Futures Trading Commission, with respect to entities subject to its enforcement authorities;

“(B) the Securities and Exchange Commission, with respect to entities subject to its enforcement authorities; and

“(C) the Bureau, with respect to other entities subject to this Act [see Short Title of 2003 Amendment note set out under section 1601 of this title].

“(2) Coordination.—Each agency required to prescribe regulations under paragraph (1) shall consult and coordinate with each other such agency so that, to the extent possible, the regulations prescribed by each such entity are consistent and comparable with the regulations prescribed by each other such agency.

“(3) Considerations.—In promulgating regulations under this subsection, each agency referred to in paragraph (1) shall—

“(A) ensure that affiliate sharing notification methods provide a simple means for consumers to make determinations and choices under section 624 of the Fair Credit Reporting Act [15 U.S.C. 1681s–3], as added by this section;

“(B) consider the affiliate sharing notification practices employed on the date of enactment of this Act [Dec. 4, 2003] by persons that will be subject to that section 624; and

“(C) ensure that notices and disclosures may be coordinated and consolidated, as provided in subsection (b) of that section 624.

“(4) Timing.—Regulations required by this subsection shall—

“(A) be issued in final form not later than 9 months after the date of enactment of this Act [Dec. 4, 2003]; and

“(B) become effective not later than 6 months after the date on which they are issued in final form.”

[For definitions of terms used in section 214(b) of Pub. L. 108–159, set out above, see section 2 of Pub. L. 108–159, set out as a Definitions note under section 1681 of this title.]

### **Studies of Information Sharing Practices**

Pub. L. 108–159, title II, §214(e), Dec. 4, 2003, 117 Stat. 1983, as amended by Pub. L. 111–203, title X, §1088(b)(4), July 21, 2010, 124 Stat. 2092, provided that:

“(1) In general.—The Federal banking agencies, the National Credit Union Administration, and the Bureau shall jointly conduct regular studies of the consumer information sharing practices by financial institutions and other persons that are creditors or users of consumer reports with their affiliates.

“(2) Matters for study.—In conducting the studies required by paragraph (1), the agencies described in paragraph (1) shall—

“(A) identify—

“(i) the purposes for which financial institutions and other creditors and users of consumer reports share consumer information;

“(ii) the types of information shared by such entities with their affiliates;

“(iii) the number of choices provided to consumers with respect to the control of such sharing, and the degree to and manner in which consumers exercise such choices, if at all; and

“(iv) whether such entities share or may share personally identifiable transaction or experience information with affiliates for purposes—

“(I) that are related to employment or hiring, including whether the person that is the subject of such information is given notice of such sharing, and the specific uses of such shared information; or

“(II) of general publication of such information; and

“(B) specifically examine the information sharing practices that financial institutions and other creditors and users of consumer reports and their affiliates employ for the purpose of making underwriting decisions or credit evaluations of consumers.

“(3) Reports.—

“(A) Initial report.—Not later than 3 years after the date of enactment of this Act [Dec. 4, 2003], the Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly submit a report to the Congress on the results of the initial study conducted in accordance with this subsection, together with any recommendations for

legislative or regulatory action.

“(B) Follow-up reports.—The Federal banking agencies, the National Credit Union Administration, and the Commission shall, not less frequently than once every 3 years following the date of submission of the initial report under subparagraph (A), jointly submit a report to the Congress that, together with any recommendations for legislative or regulatory action—

“(i) documents any changes in the areas of study referred to in paragraph (2)(A) occurring since the date of submission of the previous report;

“(ii) identifies any changes in the practices of financial institutions and other creditors and users of consumer reports in sharing consumer information with their affiliates for the purpose of making underwriting decisions or credit evaluations of consumers occurring since the date of submission of the previous report; and

“(iii) examines the effects that changes described in clause (ii) have had, if any, on the degree to which such affiliate sharing practices reduce the need for financial institutions, creditors, and other users of consumer reports to rely on consumer reports for such decisions.”

[For definitions of terms used in section 214(e) of Pub. L. 108–159, set out above, see section 2 of Pub. L. 108–159, set out as a Definitions note under section 1681 of this title.]

**B. Regulation S-AM (17 CFR Part 248, Subpart B)****Title 17: Commodity and Securities Exchanges****Part 248—Regulations S-P and S-AM****Subpart B—Regulation S-AM: Limitations on Affiliate Marketing****§ 248.101 Purpose and scope.**

(a) *Purpose.* The purpose of this subpart is to implement section 624 of the Fair Credit Reporting Act, 15 U.S.C. 1681, *et seq.* (“FCRA”). Section 624, which was added to the FCRA by section 214 of the Fair and Accurate Credit Transactions Act of 2003, Public Law 108-159, 117 Stat. 1952 (2003) (“FACT Act” or “Act”), regulates the use of consumer information received from an affiliate to make marketing solicitations.

(b) *Scope.* This subpart applies to any broker or dealer other than a notice-registered broker or dealer, to any investment company, and to any investment adviser or transfer agent registered with the Commission. These entities are referred to in this subpart as “you.”

**§ 248.102 Examples.**

The examples in this subpart are not exclusive. The examples in this subpart provide guidance concerning the rules' application in ordinary circumstances. The facts and circumstances of each individual situation, however, will determine whether compliance with an example, to the extent applicable, constitutes compliance with this subpart. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise under this subpart. Similarly, the examples do not illustrate any issues that may arise under other laws or regulations.

**§§ 248.103-248.119 [Reserved]****§ 248.120 Definitions.**

As used in this subpart, unless the context requires otherwise:

(a) *Affiliate* of a broker, dealer, or investment company, or an investment adviser or transfer agent registered with the Commission means any person that is related by common ownership or common control with the broker, dealer, or investment company, or the investment adviser or transfer agent registered with the Commission. In addition, a broker, dealer, or investment company, or an investment adviser or transfer agent registered with the Commission will be deemed an affiliate of a company for purposes of this subpart if:

(1) That company is regulated under section 214 of the FACT Act, Public Law 108-159, 117 Stat. 1952 (2003), by a government regulator other than the Commission; and

(2) Rules adopted by the other government regulator under section 214 of the FACT Act treat the broker, dealer, or investment company, or investment adviser or transfer agent registered with the Commission as an affiliate of that company.

(b) *Broker* has the same meaning as in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)). A “broker” does not include a broker registered by notice with the Commission under section 15(b)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(11)).

(c) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(d) *Commission* means the Securities and Exchange Commission.

(e) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(f) *Concise* —(1) *In general*. The term “concise” means a reasonably brief expression or statement.

(2) *Combination with other required disclosures*. A notice required by this subpart may be concise even if it is combined with other disclosures required or authorized by Federal or State law.

(g) *Consumer* means an individual.

(h) *Control* of a company means the power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of any company is presumed to control the company. Any person who does not own more than 25 percent of the voting securities of any company will be presumed not to control the company. Any presumption regarding control may be rebutted by evidence, but, in the case of an investment company, will continue until the Commission makes a decision to the contrary according to the procedures described in section 2(a)(9) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(9)).

(i) *Dealer* has the same meaning as in section 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(5)). A “dealer” does not include a dealer registered by notice with the Commission under section 15(b)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(11)).

(j) *Eligibility information* means any information the communication of which would be a consumer report if the exclusions from the definition of “consumer report” in section 603(d)(2)(A) of the FCRA did not apply. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(k) *FCRA* means the Fair Credit Reporting Act (15 U.S.C. 1681, *et seq.* ).

(l) *GLBA* means the Gramm-Leach-Bliley Act (15 U.S.C. 6801, *et seq.* ).

(m) *Investment adviser* has the same meaning as in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)).

(n) *Investment company* has the same meaning as in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3) and includes a separate series of the investment company.

(o) *Marketing solicitation* —(1) *In general*. The term “marketing solicitation” means the marketing of a product or service initiated by a person to a particular consumer that is:

(i) Based on eligibility information communicated to that person by its affiliate as described in this subpart; and

(ii) Intended to encourage the consumer to purchase or obtain such product or service.

(2) *Exclusion of marketing directed at the general public*. A marketing solicitation does not include marketing communications that are directed at the general public. For example, television, general circulation magazine, billboard advertisements and publicly available Web sites that are not directed to particular consumers would not constitute marketing solicitations, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications.

(3) *Examples of marketing solicitations*. A marketing solicitation would include, for example, a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a particular consumer that is based on eligibility information received from an affiliate.

(p) *Person* means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(q) *Pre-existing business relationship* —(1) *In general*. The term “pre-existing business relationship” means a relationship between a person, or a person's licensed agent, and a consumer based on:

(i) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by this subpart;

(ii) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart; or

(iii) An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart.

(2) *Examples of pre-existing business relationships*. (i) If a consumer has a brokerage

account with a broker-dealer that is currently in force, the broker-dealer has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(ii) If a consumer has an investment advisory contract with a registered investment adviser, the investment adviser has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(iii) If a consumer was the record owner of securities issued by an investment company, but the consumer redeems these securities, the investment company has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date the consumer redeemed the investment company's securities.

(iv) If a consumer applies for a margin account offered by a broker-dealer, but does not obtain a product or service from or enter into a financial contract or transaction with the broker-dealer, the broker-dealer has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for three months after the date of the application.

(v) If a consumer makes a telephone inquiry to a broker-dealer about its products or services and provides contact information to the broker-dealer, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the broker-dealer has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(vi) If a consumer makes an inquiry by e-mail to a broker-dealer about one of its affiliated investment company's products or services but does not obtain a product or service from, or enter into a financial contract or transaction with the broker-dealer or the investment company, the broker-dealer and the investment company both have a pre-existing business relationship with the consumer and can therefore use eligibility information they receive from their affiliates to make solicitations to the consumer about their products or services for three months after the date of the inquiry.

(vii) If a consumer who has a pre-existing business relationship with an investment company that is part of a group of affiliated companies makes a telephone call to the centralized call center for the affiliated companies to inquire about products or services offered by a broker-dealer affiliated with the investment company, and provides contact information to the call center, the call constitutes an inquiry to the broker-dealer. In these circumstances, the broker-dealer has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from the investment company to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(3) *Examples where no pre-existing business relationship is created.* (i) If a consumer makes a telephone call to a centralized call center for a group of affiliated companies to inquire

about the consumer's existing account at a broker-dealer, the call does not constitute an inquiry to any affiliate other than the broker-dealer that holds the consumer's account and does not establish a pre-existing business relationship between the consumer and any affiliate of the account-holding broker-dealer.

(ii) If a consumer who has an advisory contract with a registered investment adviser makes a telephone call to an affiliate of the investment adviser to ask about the affiliate's retail locations and hours, but does not make an inquiry about the affiliate's products or services, the call does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate. Also, the affiliate's capture of the consumer's telephone number does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate.

(iii) If a consumer makes a telephone call to a broker-dealer in response to an advertisement offering a free promotional item to consumers who call a toll-free number, but the advertisement does not indicate that the broker-dealer's products or services will be marketed to consumers who call in response, the call does not create a pre-existing business relationship between the consumer and the broker-dealer because the consumer has not made an inquiry about a product or service offered by the institution, but has merely responded to an offer for a free promotional item.

(r) *Transfer agent* has the same meaning as in section 3(a)(25) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(25)).

(s) *You* means:

(1) Any broker or dealer other than a broker or dealer registered by notice with the Commission under section 15(b)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(11));

(2) Any investment company;

(3) Any investment adviser registered with the Commission under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1, *et seq.* ); and

(4) Any transfer agent registered with the Commission under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1).

#### **§ 248.121 Affiliate marketing opt out and exceptions.**

(a) *Initial notice and opt out requirement* —(1) *In general.* You may not use eligibility information about a consumer that you receive from an affiliate to make a marketing solicitation to the consumer, unless:

(i) It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that you may use eligibility information about that consumer received from an affiliate to make marketing solicitations to the consumer;

(ii) The consumer is provided a reasonable opportunity and a reasonable and simple method to “opt out,” or the consumer prohibits you from using eligibility information to make marketing solicitations to the consumer; and

(iii) The consumer has not opted out.

(2) *Example.* A consumer has a brokerage account with a broker-dealer. The broker-dealer furnishes eligibility information about the consumer to its affiliated investment adviser. Based on that eligibility information, the investment adviser wants to make a marketing solicitation to the consumer about its discretionary advisory accounts. The investment adviser does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The investment adviser is prohibited from using eligibility information received from its broker-dealer affiliate to make marketing solicitations to the consumer about its discretionary advisory accounts unless the consumer is given a notice and opportunity to opt out and the consumer does not opt out.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By an affiliate that has or has previously had a pre-existing business relationship with the consumer; or

(ii) As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or has previously had a pre-existing business relationship with the consumer.

(b) *Making marketing solicitations* —(1) *In general.* For purposes of this subpart, you make a marketing solicitation if:

(i) You receive eligibility information from an affiliate;

(ii) You use that eligibility information to do one or more of the following:

(A) Identify the consumer or type of consumer to receive a marketing solicitation;

(B) Establish criteria used to select the consumer to receive a marketing solicitation; or

(C) Decide which of your products or services to market to the consumer or tailor your marketing solicitation to that consumer; and

(iii) As a result of your use of the eligibility information, the consumer is provided a marketing solicitation.

(2) *Receiving eligibility information from an affiliate, including through a common database.* You may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that you may access.

(3) *Receipt or use of eligibility information by your service provider.* Except as provided in paragraph (b)(5) of this section, you receive or use an affiliate's eligibility information if a service provider acting on your behalf (whether an affiliate or a nonaffiliated third party) receives or uses that information in the manner described in paragraph (b)(1)(i) or (b)(1)(ii) of this section. All relevant facts and circumstances will determine whether a person is acting as your service provider when it receives or uses an affiliate's eligibility information in connection with marketing your products and services.

(4) *Use by an affiliate of its own eligibility information.* Unless you have used eligibility information that you receive from an affiliate in the manner described in paragraph (b)(1)(ii) of this section, you do not make a marketing solicitation subject to this subpart if your affiliate:

(i) Uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the affiliate's consumer; or

(ii) Directs its service provider to use the affiliate's own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the consumer, and you do not communicate directly with the service provider regarding that use.

(5) *Use of eligibility information by a service provider* —(i) *In general.* You do not make a marketing solicitation subject to this subpart if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that you may access) receives eligibility information from your affiliate that your affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market your products or services to that affiliate's consumer, so long as:

(A) Your affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market your products or services);

(B) Your affiliate establishes specific terms and conditions under which the service provider may access and use your affiliate's eligibility information to market your products and services (or those of affiliates generally) to your affiliate's consumers, such as the identity of the affiliated companies whose products or services may be marketed to the affiliate's consumers by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times your affiliate's consumers may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) Your affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses your affiliate's eligibility information in accordance with the terms and conditions established by your affiliate relating to the marketing of your products or services;

(D) Your affiliate is identified on or with the marketing materials provided to the consumer; and

(E) You do not directly use your affiliate's eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) *Writing requirements.* (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between your affiliate and the service provider; and

(B) The specific terms and conditions established by your affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(6) *Examples of making marketing solicitations.* (i) A consumer has an investment advisory contract with a registered investment adviser that is affiliated with a broker-dealer. The broker-dealer receives eligibility information about the consumer from the investment adviser. The broker-dealer uses that eligibility information to identify the consumer to receive a marketing solicitation about brokerage products and services, and, as a result, the broker-dealer provides a marketing solicitation to the consumer about its brokerage services. Pursuant to paragraph (b)(1) of this section, the broker-dealer has made a marketing solicitation to the consumer.

(ii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that after using the eligibility information to identify the consumer to receive a marketing solicitation about brokerage products and services, the broker-dealer asks the registered investment adviser to send the marketing solicitation to the consumer and the investment adviser does so. Pursuant to paragraph (b)(1) of this section, the broker-dealer has made a marketing solicitation to the consumer because it used eligibility information about the consumer that it received from an affiliate to identify the consumer to receive a marketing solicitation about its products or services, and, as a result, a marketing solicitation was provided to the consumer about the broker-dealer's products and services.

(iii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that eligibility information about consumers who have an investment advisory contract with a registered investment adviser is placed into a common database that all members of the affiliated group of companies may independently access and use. Without using the investment adviser's eligibility information, the broker-dealer develops selection criteria and provides those criteria, marketing materials, and related instructions to the investment adviser. The investment adviser reviews eligibility information about its own consumers using the selection criteria provided by the broker-dealer to determine which consumers should receive the broker-dealer's marketing materials and sends the broker-dealer's marketing materials to those consumers. Even though the broker-dealer has received eligibility information through the common database as provided in paragraph (b)(2) of this section, it did not use that information to identify consumers or establish selection criteria; instead, the investment adviser used its own eligibility information. Therefore, pursuant to paragraph (b)(4)(i) of this section, the broker-dealer has not made a marketing solicitation to the consumer.

(iv) The same facts as in the example in paragraph (b)(6)(iii) of this section, except that the registered investment adviser provides the broker-dealer's criteria to the investment adviser's service provider and directs the service provider to use the investment adviser's eligibility information to identify investment adviser consumers who meet the criteria and to send the

broker-dealer's marketing materials to those consumers. The broker-dealer does not communicate directly with the service provider regarding the use of the investment adviser's information to market its products or services to the investment adviser's consumers. Pursuant to paragraph (b)(4)(ii) of this section, the broker-dealer has not made a marketing solicitation to the consumer.

(v) An affiliated group of companies includes an investment company, a principal underwriter for the investment company, a retail broker-dealer, and a transfer agent that also acts as a service provider. Each affiliate in the group places information about its consumers into a common database. The service provider has access to all information in the common database. The investment company controls access to and use of its eligibility information by the service provider. This control is set forth in a written agreement between the investment company and the service provider. The written agreement also requires the service provider to establish reasonable policies and procedures designed to ensure that the service provider uses the investment company's eligibility information in accordance with specific terms and conditions established by the investment company relating to the marketing of the products and services of all affiliates, including the principal underwriter and the retail broker-dealer. In a separate written communication, the investment company specifies the terms and conditions under which the service provider may use the investment company's eligibility information to market the retail broker-dealer's products and services to the investment company's consumers. The specific terms and conditions are: a list of affiliated companies (including the retail broker-dealer) whose products or services may be marketed to the investment company's consumers by the service provider; the specific products or services or types of products or services that may be marketed to the investment company's consumers by the service provider; the categories of eligibility information that may be used by the service provider in marketing products or services to the investment company's consumers; the types or categories of the investment company's consumers to whom the service provider may market products or services of investment company affiliates; the number and types of marketing communications that the service provider may send to the investment company's consumers; and the length of time during which the service provider may market the products or services of the investment company's affiliates to its consumers. The investment company periodically evaluates the service provider's compliance with these terms and conditions. The retail broker-dealer asks the service provider to market brokerage services to certain of the investment company's consumers. Without using the investment company's eligibility information, the retail broker-dealer develops selection criteria and provides those criteria, its marketing materials, and related instructions to the service provider. The service provider uses the investment company's eligibility information from the common database to identify the investment company's consumers to whom brokerage services will be marketed. When the retail broker-dealer's marketing materials are provided to the identified consumers, the name of the investment company is displayed on the retail broker-dealer's marketing materials, an introductory letter that accompanies the marketing materials, an account statement that accompanies the marketing materials, or the envelope containing the marketing materials. The requirements of paragraph (b)(5) of this section have been satisfied, and the retail broker-dealer has not made a marketing solicitation to the consumer.

(vi) The same facts as in the example in paragraph (b)(6)(v) of this section, except that the terms and conditions permit the service provider to use the investment company's eligibility information to market the products and services of other affiliates to the investment company's

consumers whenever the service provider deems it appropriate to do so. The service provider uses the investment company's eligibility information in accordance with the discretion afforded to it by the terms and conditions. Because the terms and conditions are not specific, the requirements of paragraph (b)(5) of this section have not been satisfied.

(c) *Exceptions.* The provisions of this subpart do not apply to you if you use eligibility information that you receive from an affiliate:

(1) To make a marketing solicitation to a consumer with whom you have a pre-existing business relationship;

(2) To facilitate communications to an individual for whose benefit you provide employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;

(3) To perform services on behalf of an affiliate, except that this paragraph shall not be construed as permitting you to send marketing solicitations on behalf of an affiliate if the affiliate would not be permitted to send the marketing solicitation as a result of the election of the consumer to opt out under this subpart;

(4) In response to a communication about your products or services initiated by the consumer;

(5) In response to an authorization or request by the consumer to receive solicitations; or

(6) If your compliance with this subpart would prevent you from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which you are lawfully doing business.

(d) *Examples of exceptions* —(1) *Example of the pre-existing business relationship exception.* A consumer has a brokerage account with a broker-dealer. The consumer also has a deposit account with the broker-dealer's affiliated depository institution. The broker-dealer receives eligibility information about the consumer from its depository institution affiliate and uses that information to make a marketing solicitation to the consumer about the broker-dealer's college savings accounts. The broker-dealer may make this marketing solicitation even if the consumer has not been given a notice and opportunity to opt out because the broker-dealer has a pre-existing business relationship with the consumer.

(2) *Examples of service provider exception.* (i) A consumer has a brokerage account with a broker-dealer. The broker-dealer furnishes eligibility information about the consumer to its affiliate, a registered investment adviser. Based on that eligibility information, the investment adviser wants to make a marketing solicitation to the consumer about its advisory services. The investment adviser does not have a pre-existing business relationship with the consumer and none of the other exceptions in paragraph (c) of this section apply. The consumer has been given an opt out notice and has elected to opt out of receiving such marketing solicitations. The investment adviser asks a service provider to send the marketing solicitation to the consumer on

its behalf. The service provider may not send the marketing solicitation on behalf of the investment adviser because, as a result of the consumer's opt out election, the investment adviser is not permitted to make the marketing solicitation.

(ii) The same facts as in paragraph (d)(2)(i) of this section, except the consumer has been given an opt out notice, but has not elected to opt out. The investment adviser asks a service provider to send the solicitation to the consumer on its behalf. The service provider may send the marketing solicitation on behalf of the investment adviser because, as a result of the consumer's not opting out, the investment adviser is permitted to make the marketing solicitation.

(3) *Examples of consumer-initiated communications.* (i) A consumer who is the record owner of shares in an investment company initiates a communication with an affiliated registered investment adviser about advisory services. The affiliated investment adviser may use eligibility information about the consumer it obtains from the investment company or any other affiliate to make marketing solicitations regarding the affiliated investment adviser's services in response to the consumer-initiated communication.

(ii) A consumer who has a brokerage account with a broker-dealer contacts the broker-dealer to request information about how to save and invest for a child's college education without specifying the type of savings or investment vehicle in which the consumer may be interested. Information about a range of different products or services offered by the broker-dealer and one or more of its affiliates may be responsive to that communication. Such products, services, and investments may include the following: investments in affiliated investment companies; investments in section 529 plans offered by the broker-dealer; or trust services offered by a different financial institution in the affiliated group. Any affiliate offering products or services that would be responsive to the consumer's request for information about saving and investing for a child's college education may use eligibility information to make marketing solicitations to the consumer in response to this communication.

(iii) A registered investment adviser makes a marketing call to the consumer without using eligibility information received from an affiliate. The investment adviser leaves a voice-mail message that invites the consumer to call a toll-free number to receive information about services offered by the investment adviser. If the consumer calls the toll-free number to inquire about the investment advisory services, the call is a consumer-initiated communication about a product or service, and the investment adviser may now use eligibility information it receives from its affiliates to make marketing solicitations to the consumer.

(iv) A consumer calls a broker-dealer to ask about retail locations and hours, but does not request information about its products or services. The broker-dealer may not use eligibility information it receives from an affiliate to make marketing solicitations to the consumer because the consumer-initiated communication does not relate to the broker-dealer's products or services. Thus, the use of eligibility information received from an affiliate would not be responsive to the communication and the exception does not apply.

(v) A consumer calls a broker-dealer to ask about retail locations and hours. The customer service representative asks the consumer if there is a particular product or service about which the consumer is seeking information. The consumer responds that the consumer wants to stop in

and find out about mutual funds (i.e., registered open-end investment companies). The customer service representative offers to provide that information by telephone and mail additional information to the consumer. The consumer agrees and provides or confirms contact information for receipt of the materials to be mailed. The broker-dealer may use eligibility information it receives from an affiliate to make marketing solicitations to the consumer about mutual funds because such marketing solicitations would respond to the consumer-initiated communication about mutual funds.

(4) *Examples of consumer authorization or request for marketing solicitations.* (i) A consumer who has a brokerage account with a broker-dealer authorizes or requests information about life insurance offered by the broker-dealer's insurance affiliate. The authorization or request, whether given to the broker-dealer or the insurance affiliate, would permit the insurance affiliate to use eligibility information about the consumer it obtains from the broker-dealer or any other affiliate to make marketing solicitations to the consumer about life insurance.

(ii) A consumer completes an online application to open an online brokerage account with a broker-dealer. The broker-dealer's online application contains a blank check box that the consumer may check to authorize or request information from the broker-dealer's affiliates. The consumer checks the box. The consumer has authorized or requested marketing solicitations from the broker-dealer's affiliates.

(iii) A consumer completes an online application to open an online brokerage account with a broker-dealer. The broker-dealer's online application contains a check box indicating that the consumer authorizes or requests information from the broker-dealer's affiliates. The consumer does not deselect the check box. The consumer has not authorized or requested marketing solicitations from the broker-dealer's affiliates.

(iv) The terms and conditions of a brokerage account agreement contain preprinted boilerplate language stating that by applying to open an account the consumer authorizes or requests to receive solicitations from the broker-dealer's affiliates. The consumer has not authorized or requested marketing solicitations from the broker-dealer's affiliates.

(e) *Relation to affiliate-sharing notice and opt out.* Nothing in this subpart limits the responsibility of a person to comply with the notice and opt out provisions of Section 603(d)(2)(A)(iii) of the FCRA (15 U.S.C. 1681a(d)(2)(A)(iii)) where applicable.

#### **§ 248.122 Scope and duration of opt out.**

(a) *Scope of opt out* —(1) *In general.* Except as otherwise provided in this section, the consumer's election to opt out prohibits any affiliate covered by the opt out notice from using eligibility information received from another affiliate as described in the notice to make marketing solicitations to the consumer.

(2) *Continuing relationship* —(i) *In general.* If the consumer establishes a continuing relationship with you or your affiliate, an opt out notice may apply to eligibility information obtained in connection with:

(A) A single continuing relationship or multiple continuing relationships that the consumer establishes with you or your affiliates, including continuing relationships established subsequent to delivery of the opt out notice, so long as the notice adequately describes the continuing relationships covered by the opt out; or

(B) Any other transaction between the consumer and you or your affiliates as described in the notice.

(ii) *Examples of continuing relationships.* A consumer has a continuing relationship with you or your affiliate if the consumer:

(A) Opens a brokerage account or enters into an advisory contract with you or your affiliate;

(B) Obtains a loan for which you or your affiliate owns the servicing rights;

(C) Purchases investment company shares in his or her own name;

(D) Holds an investment through you or your affiliate; such as when you act or your affiliate acts as a custodian for securities or for assets in an individual retirement arrangement;

(E) Enters into an agreement or understanding with you or your affiliate whereby you or your affiliate undertakes to arrange or broker a home mortgage loan for the consumer;

(F) Enters into a lease of personal property with you or your affiliate; or

(G) Obtains financial, investment, or economic advisory services from you or your affiliate for a fee.

(3) *No continuing relationship* —(i) *In general.* If there is no continuing relationship between a consumer and you or your affiliate, and you or your affiliate obtain eligibility information about a consumer in connection with a transaction with the consumer, such as an isolated transaction or an application that is denied, an opt out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

(ii) *Examples of isolated transactions.* An isolated transaction occurs if:

(A) The consumer uses your or your affiliate's ATM to withdraw cash from an account at another financial institution; or

(B) A broker-dealer opens a brokerage account for the consumer solely for the purpose of liquidating or purchasing securities as an accommodation, i.e., on a one-time basis, without the expectation of engaging in other transactions.

(4) *Menu of alternatives.* A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt out notice but not other types of affiliates

covered by the notice, electing to prohibit marketing solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit marketing solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all marketing solicitations from all of the affiliates that are covered by the notice.

(5) *Special rule for a notice following termination of all continuing relationships* —(i) *In general.* A consumer must be given a new opt out notice if, after all continuing relationships with you or your affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with you or your affiliate(s) and the consumer's eligibility information is to be used to make a marketing solicitation. The new opt out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent with paragraph (b) of this section, the consumer's decision not to opt out after receiving the new opt out notice would not override a prior opt out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt out notice applies to eligibility information obtained in connection with the terminated relationship.

(ii) *Example.* A consumer has an advisory contract with a company that is registered with the Commission as both a broker-dealer and an investment adviser, and that is part of an affiliated group. The consumer terminates the advisory contract. One year after terminating the advisory contract, the consumer opens a brokerage account with the same company. The consumer must be given a new notice and opportunity to opt out before the company's affiliates may make marketing solicitations to the consumer using eligibility information obtained by the company in connection with the new brokerage account relationship, regardless of whether the consumer opted out in connection with the advisory contract.

(b) *Duration of opt out.* The election of a consumer to opt out must be effective for a period of at least five years (the “opt out period”) beginning when the consumer's opt out election is received and implemented, unless the consumer subsequently revokes the opt out in writing or, if the consumer agrees, electronically. An opt out period of more than five years may be established, including an opt out period that does not expire unless revoked by the consumer.

(c) *Time of opt out.* A consumer may opt out at any time.

### **§ 248.123 Contents of opt out notice; consolidated and equivalent notices.**

(a) *Contents of opt out notice* —(1) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(i) *The name of the affiliate(s) providing the notice.* If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as “ABC,” then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by “all of the ABC companies,” “the ABC banking, credit card, insurance, and securities companies,” or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either

separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by “all of the ABC and XYZ companies” or by “the ABC bank and securities companies and the XYZ insurance companies”;

(ii) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as “ABC,” then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by “all of the ABC companies,” “the ABC banking, credit card, insurance, and securities companies,” or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to “all of the ABC and XYZ companies” or to “the ABC banking and securities companies and the XYZ insurance companies”;

(iii) A general description of the types of eligibility information that may be used to make marketing solicitations to the consumer;

(iv) That the consumer may elect to limit the use of eligibility information to make marketing solicitations to the consumer;

(v) That the consumer's election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires;

(vi) If the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, that the consumer who has chosen to limit marketing solicitations does not need to act again until the consumer receives a renewal notice; and

(vii) A reasonable and simple method for the consumer to opt out.

(2) *Joint relationships.* (i) If two or more consumers jointly obtain a product or service, a single opt out notice may be provided to the joint consumers. Any of the joint consumers may exercise the right to opt out.

(ii) The opt out notice must explain how an opt out direction by a joint consumer will be treated. An opt out direction by a joint consumer may be treated as applying to all of the associated joint consumers, or each joint consumer may be permitted to opt out separately. If each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the joint consumers and the joint consumers must be permitted to exercise their separate rights to opt out in a single response.

(iii) It is impermissible to require all joint consumers to opt out before implementing any opt out direction.

(3) *Alternative contents.* If the consumer is afforded a broader right to opt out of receiving marketing than is required by this subpart, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt out rights.

(4) *Model notices.* Model notices are provided in the Appendix to this subpart.

(b) *Coordinated and consolidated notices.* A notice required by this subpart may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law by the entity providing the notice, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the FCRA (15 U.S.C. 1681a(d)(2)(A)(iii)) and the GLBA privacy notice.

(c) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, satisfies the requirements of this section.

#### **§ 248.124 Reasonable opportunity to opt out.**

(a) *In general.* You must not use eligibility information that you receive from an affiliate to make marketing solicitations to a consumer about your products or services unless the consumer is provided a reasonable opportunity to opt out, as required by § 248.121(a)(1)(ii).

(b) *Examples of a reasonable opportunity to opt out.* The consumer is given a reasonable opportunity to opt out if:

(1) *By mail.* The opt out notice is mailed to the consumer. The consumer is given 30 days from the date the notice is mailed to elect to opt out by any reasonable means.

(2) *By electronic means.* (i) The opt out notice is provided electronically to the consumer, such as by posting the notice at an Internet Web site at which the consumer has obtained a product or service. The consumer acknowledges receipt of the electronic notice. The consumer is given 30 days after the date the consumer acknowledges receipt to elect to opt out by any reasonable means.

(ii) The opt out notice is provided to the consumer by e-mail where the consumer has agreed to receive disclosures by e-mail from the person sending the notice. The consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* The opt out notice is provided to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction. There is a simple process that the consumer may use to opt out at that time using the same mechanism through which the transaction is conducted.

(4) *At the time of an in-person transaction.* The opt out notice is provided to the consumer in writing at the time of an in-person transaction. The consumer is required to decide, as a

necessary part of proceeding with the transaction, whether to opt out before completing the transaction, and is not permitted to complete the transaction without making a choice. There is a simple process that the consumer may use during the course of the in-person transaction to opt out, such as completing a form that requires consumers to write a “yes” or “no” to indicate their opt out preference or that requires the consumer to check one of two blank check boxes—one that allows consumers to indicate that they want to opt out and one that allows consumers to indicate that they do not want to opt out.

(5) *By including in a privacy notice.* The opt out notice is included in a GLBA privacy notice. The consumer is allowed to exercise the opt out within a reasonable period of time and in the same manner as the opt out under that privacy notice.

**§ 248.125 Reasonable and simple methods of opting out.**

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a marketing solicitation to the consumer about your products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by § 248.121(a)(1)(ii).

(b) *Examples* —(1) *Reasonable and simple opt out methods.* Reasonable and simple methods for exercising the opt out right include:

- (i) Designating a check-off box in a prominent position on the opt out form;
- (ii) Including a reply form and a self-addressed envelope together with the opt out notice;
- (iii) Providing an electronic means to opt out, such as a form that can be electronically mailed or processed at an Internet Web site, if the consumer agrees to the electronic delivery of information;
- (iv) Providing a toll-free telephone number that consumers may call to opt out; or
- (v) Allowing consumers to exercise all of their opt out rights described in a consolidated opt out notice that includes the GLBA privacy, FCRA affiliate sharing, and FCRA affiliate marketing opt outs, by a single method, such as by calling a single toll-free telephone number.

(2) *Opt out methods that are not reasonable and simple.* Reasonable and simple methods for exercising an opt out right *do not* include:

- (i) Requiring the consumer to write his or her own letter;
- (ii) Requiring the consumer to call or write to obtain a form for opting out, rather than including the form with the opt out notice; or
- (iii) Requiring the consumer who receives the opt out notice in electronic form only, such as through posting at an Internet Web site, to opt out solely by paper mail or by visiting a different Web site without providing a link to that site.

(c) *Specific opt out means.* Each consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for that consumer.

**§ 248.126 Delivery of opt out notices.**

(a) *In general.* The opt out notice must be provided so that each consumer can reasonably be expected to receive actual notice. For opt out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in this subpart or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001, *et seq.*

(b) *Examples of reasonable expectation of actual notice.* A consumer may reasonably be expected to receive actual notice if the affiliate providing the notice:

- (1) Hand-delivers a printed copy of the notice to the consumer;
- (2) Mails a printed copy of the notice to the last known mailing address of the consumer;
- (3) Provides a notice by e-mail to a consumer who has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or
- (4) Posts the notice on the Internet Web site at which the consumer obtained a product or service electronically and requires the consumer to acknowledge receipt of the notice.

(c) *Examples of no reasonable expectation of actual notice.* A consumer may not reasonably be expected to receive actual notice if the affiliate providing the notice:

- (1) Only posts the notice on a sign in a branch or office or generally publishes the notice in a newspaper;
- (2) Sends the notice by e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or
- (3) Posts the notice on an Internet Web site without requiring the consumer to acknowledge receipt of the notice.

**§ 248.127 Renewal of opt out elections.**

(a) *Renewal notice and opt out requirement* —(1) *In general.* After the opt out period expires, you may not make marketing solicitations to a consumer who previously opted out, unless:

- (i) The consumer has been given a renewal notice that complies with the requirements of this section and §§ 248.124 through 248.126, and a reasonable opportunity and a reasonable and simple method to renew the opt out, and the consumer does not renew the opt out; or
- (ii) An exception in § 248.121(c) applies.

(2) *Renewal period.* Each opt out renewal must be effective for a period of at least five years as provided in § 248.122(b).

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By the affiliate that provided the previous opt out notice, or its successor; or

(ii) As part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt out notice.

(b) *Contents of renewal notice.* The renewal notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as “ABC,” then the notice may indicate it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by “all of the ABC companies,” “the ABC banking, credit card, insurance, and securities companies,” or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by “all of the ABC and XYZ companies” or by “the ABC banking and securities companies and the XYZ insurance companies”;

(2) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as “ABC,” then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by “all of the ABC companies,” “the ABC banking, credit card, insurance, and securities companies,” or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to “all of the ABC and XYZ companies” or to “the ABC banking and securities companies and the XYZ insurance companies”;

(3) A general description of the types of eligibility information that may be used to make marketing solicitations to the consumer;

(4) That the consumer previously elected to limit the use of certain information to make marketing solicitations to the consumer;

(5) That the consumer's election has expired or is about to expire;

(6) That the consumer may elect to renew the consumer's previous election;

(7) If applicable, that the consumer's election to renew will apply for the specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires; and

(8) A reasonable and simple method for the consumer to opt out.

(c) *Timing of the renewal notice*—(1) *In general*. A renewal notice may be provided to the consumer either:

(i) A reasonable period of time before the expiration of the opt out period; or

(ii) Any time after the expiration of the opt out period but before marketing solicitations that would have been prohibited by the expired opt out are made to the consumer.

(2) *Combination with annual privacy notice*. If you provide an annual privacy notice under the GLBA, providing a renewal notice with the last annual privacy notice provided to the consumer before expiration of the opt out period is a reasonable period of time before expiration of the opt out in all cases.

(d) *No effect on opt out period*. An opt out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt out period, even if the consumer does not renew the opt out.

#### **§ 248.128 Effective date, compliance date, and prospective application.**

(a) *Effective date*. This subpart is effective September 10, 2009.

(b) *Mandatory compliance date*. Compliance with this subpart is required not later than January 1, 2010.

(c) *Prospective application*. The provisions of this subpart do not prohibit you from using eligibility information that you receive from an affiliate to make a marketing solicitation to a consumer if you receive such information prior to January 1, 2010. For purposes of this section, you are deemed to receive eligibility information when such information is placed into a common database and is accessible by you.

#### **Appendix to Subpart B of Part 248—Model Forms**

a. Although you and your affiliates are not required to use the model forms in this Appendix, use of a model form (if applicable to each person that uses it) complies with the requirement in section 624 of the FCRA for clear, conspicuous, and concise notices.

b. Although you may need to change the language or format of a model form to reflect your actual policies and procedures, any such changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Acceptable changes include, for example:

1. Rearranging the order of the references to “your income,” “your account history,” and

“your credit score.”

2. Substituting other types of information for “income,” “account history,” or “credit score” for accuracy, such as “payment history,” “credit history,” “payoff status,” or “claims history.”

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as “the [ABC] group of companies.”

4. Substituting other types of affiliates covered by the notice for “credit card,” “insurance,” or “securities” affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt out period, the notice may omit information about the renewal notice.

6. Adding a statement informing the consumer how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: “If you previously opted out, you do not need to do so again.”

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address.

10. Adding disclosures regarding the treatment of opt-outs by joint consumers to comply with § 248.123(a)(2), if applicable.

A-1—Model Form for Initial Opt Out Notice (Single-Affiliate Notice)

A-2—Model Form for Initial Opt Out Notice (Joint Notice)

A-3—Model Form for Renewal Notice (Single-Affiliate Notice)

A-4—Model Form for Renewal Notice (Joint Notice)

A-5—Model Form for Voluntary “No Marketing” Notice

A-1—Model Form for Initial Opt Out Notice (Single-Affiliate Notice)—[Your Choice to Limit Marketing]/[Marketing Opt Out]

- [Name of Affiliate] is providing this notice.
- [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]
- You may limit our affiliates in the [ABC] group of companies, such as our [investment adviser, broker, transfer agent, and investment company] affiliates, from marketing their products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit

score].

- Your choice to limit marketing offers from our affiliates will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years]/[at least another 5 years].

- [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

- By telephone: 1-877-####-#####

- On the Web: *www.—.com*

- By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

Do not allow your affiliates to use my personal information to market to me.

A-2—Model Form for Initial Opt Out Notice (Joint Notice)—[Your Choice to Limit Marketing]/[Marketing Opt Out]

- The [ABC group of companies] is providing this notice.

- [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

- You may limit the [ABC] companies, such as the [ABC investment companies, investment advisers, transfer agents, and broker-dealers] affiliates, from marketing their products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].

- Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years]/[at least another 5 years].

- [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers

from the [ABC] companies, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

- By telephone: 1-877-###-####
- On the Web: *www.—.com*
- By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

Do not allow any company [in the ABC group of companies] to use my personal information to market to me.

A-3—Model Form for Renewal Notice (Single-Affiliate Notice)—[Renewing Your Choice to Limit Marketing]/[Renewing Your Marketing Opt Out]

- [Name of Affiliate] is providing this notice.
- [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]
- You previously chose to limit our affiliates in the [ABC] group of companies, such as our [investment adviser, investment company, transfer agent, and broker-dealer] affiliates, from marketing their products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].
- Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

- By telephone: 1-877-###-####
- On the Web: *www.—.com*
- By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

Renew my choice to limit marketing for [x] more years.

A-4—Model Form for Renewal Notice (Joint Notice)—[Renewing Your Choice to Limit

## Marketing]/[Renewing Your Marketing Opt Out]

- The [ABC group of companies] is providing this notice.
- [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]
- You previously chose to limit the [ABC] companies, such as the [ABC investment adviser, investment company, transfer agent, and broker-dealer] affiliates, from marketing their products or services to you based on your personal information that they receive from other ABC companies. This information includes your [income], your [account history], and your [credit score].
- Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

- By telephone: 1-877-####-#####
- On the Web: *www.—.com*
- By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

Renew my choice to limit marketing for [x] more years.

## A-5—Model Form for Voluntary “No Marketing” Notice—Your Choice to Stop Marketing

- [Name of Affiliate] is providing this notice.
- You may choose to stop all marketing from us and our affiliates.
- [Your choice to stop marketing from us and our affiliates will apply until you tell us to change your choice.]

To stop all marketing, contact us [include all that apply]:

- By telephone: 1-877-####-#####
- On the Web: *www.—.com*
- By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

Do not market to me.