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Washington, DC 20551
Attention: Docket No. R-1203

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attention: RIN 3064-AC73

Becky Baker
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1-5
Washington, DC 20219
Attention: Docket No. 04-16

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: No. 2004-31

Re: Fair Credit Reporting Affiliate Marketing Regulations

Ladies and Gentlemen:

This comment letter is submitted on behalf of Bank of America Corporation in response to the notice of proposed rulemaking ("Proposed Rule") and request for public comment issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency and the Office of Thrift Supervision (collectively, the "Agencies"), published in the Federal Register on July 15, 2004. Pursuant to the Fair Credit Reporting Act ("FCRA"), as amended by the Fair and Accurate Credit

Transactions Act of 2003 ("FACT Act"), the Proposed Rule would prescribe regulations to implement section 624 of the FCRA concerning affiliate marketing. Bank of America is one of the world's largest financial institutions, serving individual consumers, small businesses and large corporations with a full range of banking, investing, asset management and other financial and risk-management products and services. The company provides unmatched convenience in the United States, serving 33 million consumer relationships with 5,700 retail banking offices, more than 16,000 ATMs and award-winning online banking with more than ten million active users. Bank of America appreciates the opportunity to comment on this important topic.

The FACT Act requires the Agencies, the National Credit Union Administration, the Federal Trade Commission and the Securities and Exchange Commission to prescribe regulations to implement Section 624 of the Fair Credit Reporting Act, as amended by the FACT Act. These agencies are required to consult and coordinate with each other, so that, to the extent possible, the regulations they issue are consistent and comparable.

The FCRA specifically permits sharing of experience and transaction information among affiliates and also permits sharing of "other" information among affiliates with appropriate notice and opt out rights. The provisions of section 624 added by the FACT Act do not further restrict the ability of affiliated entities to share either type of information. However, they do impose certain restrictions on initiating marketing communications to consumers based upon both types of information (defined as "eligibility information") received from an affiliate of the entity initiating the marketing communications. Bank of America supports the right of consumers not to receive outbound direct marketing solicitations if they do not want such offers. Bank of America has offered its customers and consumers the ability to elect not to receive marketing communications initiated by Bank of America companies through direct mail, telemarketing and e-mail marketing for many years and communicates this option regularly through its annual privacy notice, even though such communication has not been required by law.

While Section 624 of the Act addresses marketing and affords consumers the right to exclude themselves from direct marketing initiated by a financial institution, the Proposed Rule goes beyond this legislative objective. We believe that the Proposed Rule, in several instances, attempts to regulate the sharing of information among financial institution affiliates. Such regulation is not authorized by the FACT Act. We will first outline the primary concerns we have with the Proposed Rule and then discuss additional issues presented by the Proposed Rule.

Primary Concerns

Communications Initiated by the Consumer.

One of the exceptions that permits institutions to initiate marketing communications to a consumer is when the consumer initiates the communication. The language of section 624 is as follows: "This section shall not apply to a person:…using information in

response to a communication initiated by the consumer"[1]. The Agencies have interpreted this to mean that the use of the information must be "responsive to the communication initiated by the consumer."[2] The examples provided in the supplementary material to the Proposed Rule ("Supplementary Material") indicate a very narrow interpretation by requiring the use of eligibility information to be specifically responsive to the consumer's communication. We do not believe that was the intent of this exception. We believe that the intent was to recognize that when the consumer initiates the contact, the kinds of harms meant to be addressed by the law (that is, intrusion on the seclusion of the consumer at home) are not present. In this situation, the consumer chose to initiate a communication with the institution and thus chose to make the contact. As such, the intrusion into their solitude is minimal if the institution chooses to use eligibility information to make a marketing solicitation during that contact. The fact that the discussion may extend beyond the consumer's initial topic should not be the focus.

In addition, frequently, the consumer does not really know what may help them to resolve the issue that may have prompted the contact. Thus, restricting the ability to use eligibility information from an affiliate to the exact issue presented by the consumer will be difficult for compliance and may not result in an adequate response for the consumer. Also, this interpretation makes this exception effectively the same as the exception for inquiries under the pre-established business relationships. While it is clear that there is overlap in these exceptions, statutory construction would dictate that there must be meaningful differences or they both would not be included in the law. In this case, the communication initiated by the consumer is broader and not meant to be limited to exactly what the consumer inquired about. While the Agencies' example of the consumer calling to inquire about hours of operation or driving directions may be extreme, we believe that institutions will be directed by good customer service to act appropriately in those situations. In any event, the consumer, having initiated the contact, can terminate it as well.

The Proposed Rule would provide examples of the consumer-initiated communication exception. For example, proposed section ___.20(d)(2)(i) indicates that if a consumer initiates a call to a securities affiliate concerning its products or services and provides contact information for receiving information, the affiliate may use eligibility information from an affiliate to make solicitations in response to the call. Requiring that the consumer provide contact information suggests that the affiliate could not use affiliate eligibility information to solicit the consumer over the phone on the same call, but would have to mail or e-mail a solicitation to the consumer. Nothing in section 624 even suggests that a consumer's communication should be required to include the consumer's contact information in order for the exception to apply.

The Proposed Rule also indicates that the consumer is not deemed to have initiated the communication if the institution places a call to the consumer, leaves a message, and the consumer calls back. The real issue here is the consumer's ability to opt out from being contacted at home for marketing solicitations. If the consumer chooses to return the call,

[1] 15 USC 1681s-3(4).
[2] 69 Fed. Reg. 42,508 (July 15, 2004).

he or she has presumably done so at a convenient time and only if they desired to do so. If there are concerns that calls will be made with misleading messages to instigate the consumer to return the call on false pretexts, unfair and deceptive practices laws and regulations will address that concern. In addition, it may be nearly impossible for the recipient of the consumer's return call to know whether it was made in response to a prior call or not. This is especially true with respect to calls made to call centers where different individuals may be making and receiving the calls. Thus, this would effectively prevent us from being able to use eligibility information to make cross sales solicitations when the consumer calls the institution.

Constructive Sharing

The Agencies specifically request comment on whether the Proposed Rule should apply "if affiliated companies seek to avoid providing notice and opt-out by engaging in the 'constructive sharing' of eligibility information to conduct marketing."[3] As described by the Agencies, "constructive sharing" occurs when a financial institution uses its own information to make marketing solicitations to its own customers concerning an affiliate's products or services, and the consumers' responses provide the affiliate with discernible eligibility information about the consumers. The term "constructive sharing" is not used in section 624 or anywhere else in the FCRA or the FACT Act. Neither the letter nor the purpose of section 624 of the FCRA applies to so-called "constructive sharing." Accordingly, the final rule should not limit "constructive sharing."

Section 624 of the FCRA applies only when an entity uses eligibility information *received from an affiliate* to make a marketing solicitation to a consumer (emphasis added). If an entity uses its own information to market an affiliate's products or services, the entity has not used eligibility information received from an affiliate. If an entity does not receive eligibility information from an affiliate before the marketing solicitation is made, section 624 simply does not apply, and the entity may make a solicitation to a consumer without the consumer receiving notice and an opportunity to opt out. In the "constructive sharing" scenario posed by the Agencies, the entity making the solicitation does not receive eligibility information from an affiliate, and the entity on whose behalf the solicitation is made only receives information from a consumer's response after the solicitation has been made. As a result, section 624 does not apply.

We understand that the Agencies may have borrowed the concept of "constructive sharing" from some of the interpretations under the Gramm-Leach-Bliley Act ("GLBA") relating to third party sharing. GLBA does impose restrictions on sharing of nonpublic personal information with third parties and thus, the concept of "constructive sharing" where third parties may be able to glean information from a consumer's response to a marketing solicitation, may be relevant. However, even in the GLBA interpretation, the Agencies did not prohibit the use of "constructive sharing." Instead, they required that institutions make it clear to the consumer that by responding to the third party they may be, in effect, sharing some information about themselves. Thus, the consumer could make an informed choice about responding to the solicitation.

[3] 69 Fed. Reg. at 42,507.

The concept of Constructive sharing is inapplicable to Section 624. The purpose of section 624 is to give consumers the right to opt out of receiving marketing solicitations in certain circumstances. Unlike GLBA, the FACT Act does not restrict the sharing or disclosure of consumer information to affiliates. Thus, the focus is much narrower than GLBA. Here, there is no restriction on the sharing, only on initiating of marketing solicitations as a result of receipt of eligibility information from an affiliate.

Compliance Date

The Supplementary Material indicates that the mandatory compliance date will be included in the final rules.[4] The Agencies specifically request comment on whether the mandatory compliance date "should be different from the effective date of the final regulations."[5] Section 214(b)(4)(B) of the FACT Act states that the regulations are to become effective within six months after being issued in final form. We believe that the final rule should provide an additional six months for compliance for new accounts, *i.e.*, financial institutions would be required to comply with the notice and opt-out requirement within twelve months after the rule is issued in final form. This additional compliance time would assist financial institutions that must make significant changes to business practices and procedures in order to comply with the final rule.

The FACT Act specifically permits institutions to incorporate this new notice into other notices it provides, including the GLBA privacy notice. Bank of America currently includes a notice of consumers' right to opt out of receiving direct marketing in its annual privacy policy notice, and would expect to continue to do so to meet this requirement. We provide our annual privacy policy notice during the first 6 months of the year and will be providing those notices for the 2005 privacy policy from January through June of 2005. Pursuant to GLBA, we have established this as our annual period and must continue to provide annual notices during that time frame. In order to meet those deadlines and printing and distribution schedules, we must finalize the content for our 2005 privacy policy notice by the end of August. Thus, if the final rule provides for a compliance date of March 4, 2005, and requires us to revise the notice we currently include in our privacy notice, we will be required to again revise our privacy notice and do another complete distribution before March 4, 2005. As previously mentioned, there is significant lead time to develop, print and distribute the notices. This would also require us to do direct mailings of our revised privacy notice or a special mailing for this notice, rather than our current process which is to include the notice in statements where applicable. We believe that this is not required by section 624, which clearly contemplates that this new notice could be included within the privacy policy notice. Because it is unlikely the rule will be finalized before most institutions will finalize their 2005 privacy notices, we do not believe the Agencies should require compliance (that is, distribution of the notice) for existing customers prior to the completion of each institution's next annual privacy notice distribution begun after the effective date of the final rule. This will allow an orderly and efficient notice process and will benefit

[4] 69 Fed. Reg. at 42,509.
[5] *Id*.

consumers by including all of their privacy choices in a single notice and avoiding multiple, differing notices to each consumer.

Other Considerations

Designation of Responsibility for Providing Notice

The Proposed Rule would require a financial institution that shares eligibility information with an affiliate to provide the opt-out notice to the consumer. We believe that the final rule should not require that any specific entity provide the notice, but should only require that the consumer receive a notice before an affiliate may make a solicitation to the consumer based on eligibility information received from another affiliate. The entity that physically provides the notice is irrelevant.

Although the Agencies recognize in the Supplemental Material that section 624 does not impose any restriction on the sharing institution, the Proposed Rule establishes a contrary position. This is contrary to the clear legislative language of section 624. Thus, it is inappropriate to impose obligations on the sharing institution. This is particularly true in light of the fact that section 624 is covered by the FCRA private right of action provisions in sections 616 and 617. While members within a holding company may elect to have the sharing institution provide the notice, such a result should not be mandated by the final rule.

Pre-Existing Business Relationship Exception

A "pre-existing business relationship" is defined to mean a relationship between a person and a consumer based on the following: (1) a financial contract between the person and the consumer that is in force; (2) 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 policy in force or having another continuing relationship) between the person and the consumer during the 18-month period immediately preceding the date of the solicitation; or (3) 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 of the solicitation. With respect to the first part of this definition, we believe that the Agencies should clarify that a "financial contract" includes any in-force contract relating to a financial product or service. Regarding the second part of this definition, the Agencies should make it clear that the 18 months begins to run at the time that all contractual obligations by either party have expired. In addition, they should make it clear that an active account includes any account where there are outstanding obligations on either side, regardless of whether transactions occur.

The third element is a relationship based on a consumer's inquiry or application regarding the person's products or services during the 3 months preceding the date on which a solicitation is made or sent to the consumer would qualify as a pre-existing business relationship.[6] The Agencies indicate that this is similar to the definition of

[6] Proposed Rule ___.3(m)(3).

"established business relationship" under the amended Telemarketing Sales Rule and that it should reflect the consumer's expectation to receive solicitations. As a result, the Agencies conclude that "an inquiry includes any affirmative request by a consumer for information, such that the consumer would reasonably expect to receive information from the affiliate about its products or services."[7] Additionally, the Agencies indicate in the Supplementary Material that "[a] consumer would not reasonably expect to receive information from the affiliate if the consumer does not request information or does not provide contact information to the affiliate."[8] We believe that this interpretation is much too restrictive and not required by section 624. We are concerned that this narrow interpretation interjects requirements not set forth in the statute and would require consumers to make the necessary specific statements in their inquiry. As stated before, consumers often do not know what they are seeking, only that they have a concern or problem to resolve. They look to their financial institution, and often in the case of Bank of America, to the whole group of affiliated companies which they do not necessarily segregate as separate entities, for those answers. Restricting the ability of a financial institution to respond to the customer, using affiliate eligibility information, will harm consumers who do not know exactly what they are asking for as well as limiting the financial institution's ability to respond and provide good customer services. Bank of America urges the Agencies not to impose these additional restrictions on the ability to use eligibility information to respond to inquiries.

Additionally, the Agencies specifically request comment on whether there are additional circumstances that should be included within the definition of pre-existing business relationship.[9] We believe that the term pre-existing business relationship should be defined to include relationships arising out of the ownership of servicing rights, a participation interest in lending and similar relationships.

Consumer Authorization or Request

Proposed section ___.20(c)(5) would provide an exception for a person that uses eligibility information "[i]n response to an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation." This proposed exception does not track the statutory language. Section 624(a)(4)(E) of the FCRA does not require the consumer's authorization or request to be "affirmative." The Proposed Rule and the Supplementary Information do not indicate how an authorization or request would be "affirmative," or the basis for adding this language, except to say that a pre-selected check box does not satisfy this requirement. Consumers are familiar with check boxes, and if a consumer has the ability to "unselect" a pre-selected check box, the exception should apply. A request or authorization can be manifested many ways. Adding the requirement that a request or authorization be affirmative will only inject uncertainty into the process.

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[7] *Id*.
[8] *Id*.
[9] 69 Fed. Reg. at 42,506.

In addition, we believe that the Agencies should clarify that a consumer's authorization or request does not have to refer to a specific product or service or to a specific provider of products or services in order for the exception to apply. As discussed above, the exception should apply if the consumer's authorization or request concerns a type of product or service or a type of provider of products or services.

Definition of Solicitation

Proposed section ___.3(n)(1) would define a "solicitation" as marketing initiated to a particular person that is "[b]ased on eligibility information" received from an affiliate and "[i]ntended to encourage the consumer to purchase" a product or service. We believe that this definition should be clarified to state that a solicitation is a "marketing *communication* initiated to a particular person…" (emphasis added). "Marketing" is itself a very broad term. In this case, we believe the intent is to address communications intended to encourage purchases.

The Agencies have proposed to exclude from the term "solicitation" any communications directed at the general public and distributed without the use of eligibility information. Bank of America supports the determination that communications directed to the general public should not be considered "solicitations" under the rule. We also believe that the rule should clarify that this could include announcements about the availability of products or services on VRU hold messages, ATM screens, internet sites and other forms of media that are accessed by individuals and not necessarily broadcast via traditional mass media.

Content of Notice

The Proposed Rule provides that the opt out notice must be clear, conspicuous and concise and must accurately disclose (1) that the consumer may elect to limit the entity's affiliates from using eligibility information to make or send solicitations to the consumer; (2) if applicable, that the consumer's election will apply for a specified period of time and that the consumer will have the ability to extend it once that time has expired; and (3) a reasonable and simple method for the consumer to opt out. The Proposed Rule also states that the institution may provide for a menu of options (such as opting out of direct mail, email or telemarketing and options as to what affiliates and what information are covered), so long as one option gives the consumer the ability to opt out of all forms of marketing, all affiliates and all types of information. Bank of America does not believe that it is necessary to require that there be a single option allowing consumers to opt out of all forms of marketing from all affiliates and with respect to all types of information offered.

As we currently offer our direct marketing opt out options, the consumer can contact us by toll-free telephone call, on the internet and in person to request not to receive the solicitations through the various channels. When the customer calls, they can elect to opt out of all channels, but the communication does not necessarily offer a single option to do that because they speak with a customer service representative. Although section 624

requires that the method to opt out be simple, we do not believe this would require an additional option to check a single box or press a single button on the VRU to accomplish this. In addition, adding this type of additional requirement will mean that many institutions attempting to comply with this requirement in their 2005 privacy notices, without final guidance, will fall short of the requirement. The Agencies have indicated that institutions may choose to comply by offering a broader right to opt out than required by the law and they may satisfy the content requirement by providing a clear, conspicuous and concise notice that accurately discloses the consumer's opt out rights. Since Bank of America currently offers such broader rights, we applaud the Agencies for their recognition of that option. However, we urge the Agencies not to impose additional requirements on the content of the notice that may ultimately cause institutions who have offered broader rights or attempted to comply prior to final guidance to be in violation of the requirements with little additional benefit to consumers.

Oral Notices

In the Supplementary Information, the Agencies indicate that proposed section ___.20(a), which would require the affiliate providing eligibility information to provide the consumer notice, "contemplates that the opt out notice will be provided to the consumer in writing or, if the consumer agrees, electronically."[10] The Agencies specifically request comments on whether there are circumstances in which it is necessary and appropriate to allow an oral notice. We believe that the final rule should permit oral notices. This would permit the institution to provide the notice at the time they are communicating with a consumer and proceed to make a solicitation using eligibility information if the consumer does not elect to opt out. This would allow use of eligibility information in situations where no other exception applies and provides for prompt customer service. We believe that when a consumer is discussing a current activity, application or transaction, a discussion of this right to opt out will be conspicuous. The language for scripting of the discussion should follow the model form or other applicable language to ensure that it is concise and clear.

Bank of America appreciates the opportunity to comment on the Agencies' proposal. If you have any questions regarding our comments, please contact Kathryn D. Kohler, Assistant General Counsel, at (704) 386-9644.

Very truly yours,

Kathryn D. Kohler

Kathryn D. Kohler
Assistant General Counsel

[10] 69 Fed. Reg. at 42,507.