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August 16, 2004

Office of the Comptroller of the Currency
250 E Street, S.W.
Public Information Room
Mail Stop 1-5
Washington, D.C. 20219
Attention: Docket No. 04-16

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Re: RIN 3064-AC73

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Attention: Docket No. R-1203

Re: Proposed Rule Under the Fair Credit Reporting Act on Affiliate Marketing

Dear Sirs and Madams:

This comment letter is submitted to the Board of Governors of the Federal Reserve System (the "Board"), the Federal Deposit Insurance Corporation ("FDIC"), and the Office of the Comptroller of the Currency ("OCC") (collectively, the "Agencies") on behalf of Wachovia Corporation and its subsidiary companies, including but not limited to Wachovia Bank, N.A., Wachovia Mortgage Corporation, Wachovia Insurance Services, Inc, Wachovia Securities, LLC, and Wachovia Education Services, Inc.(collectively referred to as "Wachovia"). Wachovia is pleased to provide comments on the proposed rulemaking under the Fair Credit Reporting Act on Affiliate Marketing ("Proposed Rule").

**Effective Date**

The Fair and Accurate Credit Transactions Act ("FACTA") requires that a final rule ("Final Rule") on affiliate marketing and opt out notices be issued by September 4, 2004 and that it become effective no later than six months after it is issued. The Agencies have requested comment on "whether there is any need to delay the compliance date beyond the effective date, to permit financial institutions to incorporate the affiliate marketing notice in their next annual GLB Act notice."

Financial institutions will need more than six months to review the Final Rule, determine how it will affect their business models, implement the necessary systems changes, and provide notices to consumers. As described below, Wachovia and other financial institutions expect to include the affiliate marketing notice in annual Gramm-Leach-Bliley Act (GLBA) privacy notices in order to consolidate consumer privacy-related communications in one document. In addition, Wachovia and other financial institutions are already beginning to prepare privacy notices for 2005.

Although the Final Rule may become "effective" six months after it is issued, we ask that compliance not be required for an additional twelve months to incorporate the affiliate marketing notice in the next annual GLBA notice. In the absence of an extension, financial institutions may find that the annual GLBA notices they are currently preparing, do not fully satisfy the affiliate sharing requirements under the Final Rule. As a result, financial institutions may have to send a single, separate notice relating to affiliate marketing during 2005 in addition to the annual GLBA notice. These multiple notices could confuse consumers as to their privacy rights. We believe an extension of an additional twelve months for financial institutions to incorporate the affiliate marketing notice into the next annual GLBA privacy notices will provide a more appropriate time period for compliance with the Final Rule.

**Consolidation of and Delivery of Notices**

Wachovia believes that the interests of its customers will be best served if the privacy notices required by the GLBA and the "opt out" notices required by FACTA are consolidated into a single communication. It will be less confusing for our existing customers if all privacy and opt out rights are included in a brochure received once a year, and, for new customers, when the account relationship is established. Separation of the two notices would create confusion among our customers, significantly increase the cost of compliance to financial institutions, and serve to continue the perception that GLBA and FACTA are separate areas of privacy compliance.

Wachovia also requests that the Agencies consider delivery methods other than by mailing notices to customers. Many of our customers open their accounts and conduct a great deal of their business through electronic means. If a customer should elect to receive account disclosures by electronic delivery, as permitted by the Truth in Savings Act and the Electronic Funds Transfer Act, it is probable and advisable to assume that these customers would expect to receive other account and related disclosures by the same means. For those customers that choose to conduct their financial services business through electronic means, it is likely that they pay more attention to electronic notice than paper. Wachovia urges the agencies to permit financial institutions to offer the widest range of media and methods of delivery of these notices.

**Duty to Provide Notice**

Although Section 624(a) prohibits a Receiving Affiliate from using Eligibility Information to make a solicitation unless the consumer has received a notice and opportunity to opt out, Section 624 does not direct which entity must provide the notice and opportunity to opt out. Instead, the statute imposes liability only on the Receiving Affiliate if it uses Eligibility Information to make a solicitation without the consumer having received a notice and opportunity to opt out. Therefore, under the plain language of the statute, the Disclosing Affiliate, the Receiving Affiliate, or any other party could provide the consumer with such notice and opportunity to opt out. This construction provides flexibility to diversified entities to determine how best to provide the consumer with a notice and opportunity to opt out.

In contrast to the statutory language, the Proposed Rule requires the Disclosing Affiliate to provide a consumer with a notice and a reasonable opportunity to opt out before the Receiving Affiliate can use Eligibility Information to make a solicitation. The Agencies state that "[t]he statute is ambiguous because it does not specify which affiliate must provide the opt-out notice to the consumer. The [Proposal] would resolve this ambiguity by imposing certain duties on the person that communicates the [Eligibility Information] and certain duties on the affiliate that receives the information with the intent to use that information to make or send solicitations to consumers."

Since the statute does not impose a duty on a specific party to provide the notice, and does not need to do so in order to operate as intended, the Final Rule should retain the flexibility to enable either the Disclosing Entity or the Receiving Entity to provide the notice as long as the consumer can reasonably understand how the information is being shared. Therefore, the Agencies should delete any obligation on a specific party to provide the notice and opportunity to opt out to the consumer.

The Agencies placed great emphasis in the guidance on "same name" communications. Wachovia believes that it is possible to provide a single notice in the name of multiple affiliates that will be clearly understood by customers. This process certainly will save substantial costs of preparing and mailing multiple notices to the same customer who may do business with multiple affiliates. It will also make it easier for customers to provide "opt out" notices to one or many affiliates. At this time, the guidance is ambiguous, although it appears to allow for multiple-affiliate notices if the affiliates have similar names. Wachovia submits that it is possible to provide clear and consistent messages across affiliate lines, regardless of name recognition. In that regard, we urge the Agencies to adopt a liberal standard for delivery of the notices.

**<u>Pre-Existing Business Relationship</u>**

Congress created the "pre-existing business relationship" under Section 624 of the FCRA to enable affiliated companies to meet customer expectations about how their information should be handled. Section 624(a)(4)(A) permits use of "Eligibility Information," as defined in the Proposed Rule, to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship. Section 624(d) defines a "pre-existing business relationship" to be "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 [Section 624];
>
> "(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."

The plain language of the statute provides sufficient guidance to the Agencies in defining this term, and it should be retained in the Final Rule. Although Section 624(d)(1)(D) grants the Agencies the authority to *expand* the definition of a "pre-existing business relationship, the Agencies have proposed unnecessarily narrowing the exception in some important ways.

The Agencies should reconsider the guidance in the Section-by-Section Analysis with respect to the exception pertaining to inquiries or applications regarding a product or service offered by that person during the 3-month period preceding the solicitation. The Agencies state that an "inquiry" for purposes of the Proposed Rule would be "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. 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." This explanation exceeds the statutory language and imposes an ambiguous standard on financial institutions. We strongly urge that this concept be deleted from the Final Rule.

Congress was specific when it described the types of inquiries that would suffice for purposes of establishing a "pre-existing business relationship." First, the statute requires 1) that the inquiry must be "regarding a product or service offered by that person;" and 2) that the inquiry be made "during the 3-month period immediately preceding" the solicitation. If Congress had intended to further define such inquiries, it could have done so. The suggested language of the guidance narrows the Congressional definition and makes compliance with a subjective standard difficult. Wachovia suggests that there is not any statutory evidence that Congress intended the Agencies to narrow the scope of the definition, nor is there a statutory basis for the Agencies to do so.

The Proposed Rule presents a standard, *i.e.*, that the inquiry is such that “the consumer would reasonably expect to receive information from the affiliate about its services,” that creates unnecessary uncertainty for entities wishing to comply with the law. Whether or not a consumer would “reasonably expect to receive information” provides an unnecessarily subjective standard.

The Agencies state that in all circumstances, “[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.” In addition to its request to delete the narrow and subjective definition related to pre-existing relationships, Wachovia urges the Agencies to delete the examples of when a consumer would not reasonably expect to receive information from an affiliate. In this regard, a consumer may not necessarily request information in order to expect to receive information about products or services. For example, financial institutions employ call centers to meet customer expectations by providing customer service for all of their products and services on a twenty-four hour-a-day basis. If a consumer calls to inquire about a particular product, it is reasonable to provide information to the consumer about other products available from affiliates that may be a better fit for the consumer, even if the consumer did not specifically request such information. It is also not appropriate to assume that a consumer will provide contact information if the consumer reasonably expects to receive information. For example, a consumer with a bank account may call the bank’s mortgage affiliate and reasonably assume, or even expect, the affiliate to have access to the relevant contact information. The consumer may not provide contact information in this circumstance, and the consumer’s inaction should not be an indicator of whether or not the consumer would reasonably expect to receive information from the affiliate.

**Communications Initiated by the Consumer**

Section 624(a)(4) contains a number of exceptions to the limitations of Section 624(a)(1) to reflect consumer expectations as to how their information should be handled. The plain language of the Proposed Rule appears to implement the exception as intended by Congress. However, certain examples of the exceptions in subsection 20(d) of the Proposed Rule and the accompanying Section by Section Analysis impose unwarranted limits on these exceptions. The concerns with these examples are similar to the issues discussed above with respect to the Pre-Existing Business Relationship rule.

Although the language of the Proposed Rule in Section 20(c )(4) appears to implement the statutory exception, the Agencies’ discussions of this exception in the Section-by Section Analysis suggest otherwise. In particular, the Agencies state that “[t]o be covered by the proposed exception, use of eligibility information must be responsive to the communication initiated by the consumer. For example, if a consumer calls an affiliate to ask about retail locations and hours, the affiliate may not then use eligibility information to make solicitations to the consumer about specific products because those solicitations would not be responsive to the consumer’s communication.” The Agencies further state that "[t]he time period during which solicitations remain responsive to the consumer's communication will depend on the facts and circumstances."

Wachovia believes this interpretation unnecessarily narrows the statutory language and does not reflect congressional intent. As noted above, the exception applies to the use of information in response to a communication initiated by a consumer. Congress did not impose an additional qualifier, such as proposed, because the exception recognized that responses to consumer inquiries are not interruptions or intrusions into the consumer's routine, and therefore not of the type regulated under Section 624 of the FCRA.

As written, the example could preclude an employee in a call center or financial center from advising a consumer of a service that addresses a problem raised by the consumer because (1) the service is offered by an affiliate and (2) the consumer did not know to ask for the service. For example, a consumer, anticipating college expenses, may contact his/her mortgage lender to obtain a line of credit secured by the residence. It is inconceivable that the mortgage lender should not be able to discuss lines of credit offered by the banking affiliate of the mortgage company. Since the consumer has initiated a communication in this situation, the limitations referenced above will reduce the opportunities for a consumer to learn of better products or lower cost.

**Solicitation**

The FCRA prohibits an affiliate from using Eligibility Information to make a "solicitation" for marketing purposes to a consumer unless the consumer receives a notice and opportunity to opt out. Congress defined a "solicitation" as "the marketing of a product or service initiated by a person to a particular consumer that is based on an exchange of [Eligibility Information from one affiliate to another], 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" by the Agencies. The basic definition of a "solicitation" generally restates the statutory definition.

The Proposal includes a provision intended to exclude marketing directed at the general public from the definition of a "solicitation." It is important to distinguish such marketing from "solicitations" as that term is used in Section 624 of the FCRA, and to exclude television, magazine, and billboard advertisements from the definition. Not only did Congress not intend to cover marketing directed at the general public in the limitations of Section 624(a)(1), but it would also be impossible to allow consumers to opt out of receiving such marketing messages. However, the Proposal has inadvertently misstated the types of marketing that would not be a "solicitation." Specifically, the Proposal states that it would "not include communications that are directed at the general public *and* distributed without the use of eligibility information communicated by an affiliate." (Emphasis added.)

Marketing should be excluded from being considered a solicitation if it is directed at the general public *or* if it is distributed without the use of Eligibility Information. The statute defines a "solicitation" as marketing "to a particular consumer that is based on an exchange of [Eligibility Information from one affiliate to another]." Therefore, if the marketing is not "to a particular consumer" *or* if it is not based on use of Eligibility Information, it would not be a solicitation. We ask the Agencies to amend the Proposal accordingly to change *and* to *or*.

**Constructive Sharing**

The Agencies seek comment on what they describe as constructive sharing. Under the plain language of the statute, the scenario described by the Agencies would not be subject to Section 624. Section 624(a)(1) states that "[a]ny 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 [Section 603(d)(2)(A) of the FCRA], may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless" the consumer receives a notice and opportunity to opt out.

In the example provided by the OCC of an insurance company providing selection criteria to an affiliated bank and the bank sending marketing information to the customers on behalf of the insurance company, no exchange occurs of Eligibility Information among affiliates. The consumer who provides information to the affiliate reveals that the consumer meets the affiliate's selection criteria. Even if a communication of information from the consumer to the insurance company should be deemed to be a communication of Eligibility Information from the bank to the insurance company, the Proposal would still not apply. In order for Section 624 of the FCRA to apply, the Receiving Affiliate must use Eligibility Information obtained from the Disclosing Affiliate to make a solicitation for its own products or services to the consumer. However, in the Agencies' example, the Receiving Affiliate (the insurance company) did not use Eligibility Information to make the solicitation. The insurance company did not receive the Eligibility Information, to the extent it does at all, *until after the solicitation had been made and the consumer responded.*

If you have any further questions or comments on this matter, please do not hesitate to contact the undersigned at 704-374-4645.

Sincerely,

Campbell Tucker