MORTGAGE BANKERS ASSOCIATION
Investing in communities

August 16, 2004

ELECTRONIC DELIVERY

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551

Re: FACT Act Affiliate Marketing Rule, Regulation V; Docket No. R-1203

Dear Sirs and Madams:

The Mortgage Bankers Association ("MBA") appreciates the opportunity to comment on the Notice of Proposed Rulemaking ("NOPR")[1] issued by the Office of the Comptroller of the Currency ("OCC"), Office of Thrift Supervision, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation and the National Credit Union Administration (collectively, "Agencies") under Section 214 of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"),[2] which creates a new Section 624 of the Fair Credit Reporting Act ("FCRA") that addresses the use of "consumer report" information obtained from affiliates.[3] Under Section 214, if a company receives from an affiliate "a communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A)" [of FCRA], the company "may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless" the consumer is given the opportunity to opt out of the company's use of the information for marketing.[4]

EXECUTIVE SUMMARY

The MBA believes that the regulations implementing new Section 624 should take into account the important benefits that consumers receive from the sharing of consumer information, including information obtained from an affiliate. As Assistant Treasury Secretary Wayne Abernethy has noted:

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1 69 Fed. Reg. 42502 (Jul. 15, 2004). The Agencies' respective regulations will be published at 12 C.F.R. Parts 41, 222, 334, 571 and 717. For ease of reference in this comment letter, instead of individually listing each part (*e.g.*, "12 C.F.R. § 41.20(a), 222.20(a), etc.), we will refer to "Section xxx.20(a)" or such other subsection as may be appropriate.

2 P.L. 108-159 (Dec. 4, 2003).

3 The prior FCRA Section 624, along with several other FCRA provisions, was renumbered by FACTA. *See* FACTA § 214(a)(1).

4 *Id.*

> [T]he sharing of information, within secure parameters reinforced by uniform national standards, has increased the access of more consumers to a wider variety of financial services, at lower costs, than ever before.
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> . . . .
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> Today, you can walk into a bank almost anywhere in the country, and 9 times out of 10, or maybe even 19 times out of 20, the answer is already "yes," you can get the loan. The application process serves to discover just what minor adjustments are necessary to price your particular risk properly. The banker may never have seen you before, never known you, but because of information sharing through the uniform standards of [FCRA], the banker knows a million people like you and already has been able to price your risk and can offer you a product that very day that meets the needs of you and your family. Because of modern financial information sharing in America, millions of people have been brought into the financial mainstream. That is a tremendous achievement, found nowhere else on earth.[5]

The use of information from affiliates is an important component of our highly successful and efficient system of using information about consumers to deliver appropriate products and services to them. By using information from an affiliate that may already be contained in a diversified company's common databases, a company not only saves its own costs of obtaining the information elsewhere, but it also can provide its products to consumers more quickly and efficiently than otherwise.

In enacting Section 624, Congress set out specific standards that balance these acknowledged benefits of affiliate marketing against the desire of some consumer advocates for more restrictions on affiliate information-sharing. Although the proposed rules generally reflect that balance, there are several areas in which the proposal goes beyond the specific statutory language in ways that we believe would burden our industry without providing a concomitant consumer benefit. This letter sets forth significant areas of concern in the proposed rule that the Agencies should consider when reviewing and revising the final rules. The MBA notes, in particular, the following issues:

- FACTA requires that, before a company may use information obtained from an affiliate in marketing, the consumer must receive a disclosure that the affiliate may use the information in marketing and be offered an opportunity to opt-out from such use. The Agencies' proposed regulations would place responsibility for making the

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5 Remarks of Treasury Assistant Secretary for Financial Institutions Wayne A. Abernathy to the Exchequer Club of Washington, Washington, D.C., Mar. 19, 2003, available at http://www.ustreas.gov/press/releases/js140.htm (last visited Aug. 3, 2004).

disclosure on the company that shares the information and has a current business relationship with the customer (although it could arrange for the receiving company to act as its agent in providing the notice). This requirement is not supported by the statute and could make it difficult to make a single disclosure to all customers of a corporate family. It would create particular problems for those of our members that have only a brief relationship with the customer, ending when the loan is sold at or soon after closing, who would have to provide the opt-out notice at closing. Moreover, the need to compensate the company making the disclosures could create problems under Sections 23A and 23B of the Federal Reserve Act and RESPA. The Agencies appear to be concerned that a consumer might not open and read a disclosure with a return address from a company with which he or she does not have a current business relationship, but this concern can be addressed through content and format requirements rather than by attempting to place legal responsibility for making the disclosure on the sharing company.

- FACTA provides for a five-year opt-out period on use by a company of information received from an affiliate, which the consumer may extend for five years. The proposed regulations provide that, if the consumer's relationship with the sharing entity terminates, the opt-out continues indefinitely. There is no basis in the statute for extending the opt-out indefinitely in this way. Whether the consumer has a relationship with the sharing entity is irrelevant under the statute as to whether an affiliate can use the information. As noted above, the entity with which the consumer had an initial contact should not form the basis of the obligations under the statute. Similarly, as long as the notice is provided to the consumer, it should make no difference whether the consumer maintains a relationship with an entity or not.

- The proposed regulations provide a framework for electronic disclosures that runs the risk of leading to conflicting or unclear requirements. The proposed regulations would allow companies to comply with either Section 101 of the Electronic Signatures in Global and National Commerce Act ("ESIGN") or with special rules for electronic disclosures set out in the regulations, which include requirements that the consumer consent to and acknowledge the receipt of electronic disclosures. But because Section 624 does not require written disclosures, the ESIGN Act does not require consumer consent for electronic delivery of these disclosures. The consent procedure and acknowledgement procedures would be operationally burdensome and expose industry to litigation over technical failures to comply. Because the acknowledgment requirement imposes a greater burden on disclosures made electronically than on written disclosures, it is also not permitted under the ESIGN Act. Although the Agencies recognize in the proposed regulations' preamble that the ESIGN Act does not require consent, the proposed regulations nevertheless provide alternative consent procedures. The MBA believes that this provision should be deleted or revised to be consistent with ESIGN and to provide clear guidance to the industry.

- The Agencies request comment on whether oral disclosures should be permitted and how they can be "clear and conspicuous." The MBA believes that oral disclosures are permitted by FACTA, can be "clear and conspicuous," and should be permitted by the final regulations.

- The Agencies should also revise the definition of "consumer" to restrict application of Section 624 and the proposed regulations to information that is shared for personal, family, or household purposes.

- As required by FACTA, the proposed regulation would allow a company to include a "statement-stuffer" promoting an affiliate's products, in which the customers who receive the material are not selected using "eligibility information" that is covered by the rule. The Agencies request comment on whether this type of promotion should be allowed where the material includes a code that reveals eligibility information to the affiliate when the customer responds to the offer, allowing what the Agencies refer to as "constructive sharing" of the information by the affiliate without the opportunity for the consumer to opt-out. MBA believes that this practice is not covered, and should not be covered, by the opt-out requirement of Section 624. The affiliate only uses the information in response to a customer inquiry, a situation that is excluded from the opt-out requirement by the statute and the proposed regulation. Coding the material does not defeat the purposes of Section 624, because consumers cannot be selected to receive the solicitation based on eligibility information, and therefore the information is never "used" for marketing.

DISCUSSION

This section of the MBA's letter provides a more in-depth analysis of the issues raised above, and raises issues that the MBA may wish to consider when determining how best to comment on the Agencies' proposed regulations.

1) Responsibility for Providing Notice and an Opportunity to Opt Out (12 C.F.R. § xxx.20(a)

The Agencies have taken the position that the entity having the relationship with the consumer should be responsible for providing the consumer with notice that information may be shared with the affiliates, and for providing the consumer with the opportunity to "opt-out" from the information sharing. 12 C.F.R. § xxx.20(a). The statute does not support this interpretation. FACTA does not identify which entity must provide the notice but simply states, using the passive voice, that "it [must be] clearly and conspicuously disclosed to the consumer" that the information may be shared, and "the consumer [must be] provided" the opportunity to opt-out. Although the Agencies assert that this language is ambiguous,[6] the MBA believes that the use of the passive voice represents a conscious and unambiguous Congressional choice not to affix legal responsibility to any particular entity. The existing affiliate opt-out provision, Section

[6] 69 Fed. Reg. 42506.

603(d)(2)(iii), contains very similar language, and many companies have been sending notices from a central source (not necessarily the company with the relationship with the customers) since that provision was enacted in 1996.

Assigning this responsibility to the entity that has the relationship with the consumer may be an attempt to ensure that the consumer does not ignore the Section 624 notice as a piece of "junk mail" coming from an unfamiliar company. We think we understand the Agencies' intent, but requiring that a specific entity take responsibility for providing the notice will not achieve that goal and will, we believe, create significant difficulties for the mortgage industry.

First, this requirement will make it difficult to provide a single notice for all affiliates within a holding company, since different entities will have customer relationships with different consumers and no single entity will have a relationship with all of them that will allow it to send a single notice. This will, of necessity, require each affiliate to have its own notice, even if the notices are physically sent by one affiliate. Preventing a combined, company-wide notice is inconsistent with Section 624(b) of FCRA, added by Section 214 of FACTA, which specifically states that the required opt-out notice may be combined "with any other notice required to be issued under any other provision of law."

Second, the requirement creates particular difficulties under federal banking law for mortgage companies that want to use information from banking affiliates in marketing, by creating unintended interactions with other regulations. For example, suppose that a mortgage company asks an affiliated bank to send opt-out notices to the mortgage company's customers, so that the mortgage company may use information from the bank to market mortgage loans to bank customers who do not object to such marketing. Under Section 23B(a)(1) of the Federal Reserve Act and its implementing Regulation W, the mortgage company must compensate the bank for *at least* the fair market value of this service.[7] By contrast, under Section 8 of the Real Estate Settlement Procedures Act ("RESPA"), the ("RESPA"), the compensation paid by the mortgage company to the bank *may not exceed* an amount that bears a reasonable relationship to the market value of the services required.[8] Thus, if the mortgage company pays too little for the service, it risks violating Section 23B, while if it pays too much, the excess amount may be viewed as a referral fee prohibited under RESPA.

One solution, which is not clearly permitted under the proposal as drafted, is for a non-misleading opt-out notice to be provided either by the mortgage company itself or by a non-banking affiliate that is not subject to Section 23B. As noted below, the Agencies

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7 12 U.S.C. § 371c-1(a)(1); 12 C.F.R. § 223.52(a)(3). Although this requirement applies to national banks and state member banks of the Federal Reserve, similar restrictions are placed on other insured depository institutions. *See* 12 U.S.C. §§ 1468(a) (insured savings associations) and 1828(j) (insured state non-member banks). While these restrictions are intended to ensure financial institutions' safety and soundness by requiring intra-organization payment to reflect market realities, these other regulatory requirements may affect the ultimate structure of corporate compliance with the Agencies' proposed regulations.

8 12 U.S.C. § 2607(c); 24 C.F.R. § 3500.14(g)(2).

appear to acknowledge that the real issue is not which entity provides the disclosure (which the consumer will not know in any case) but whether the consumer is reasonably likely to read the notice and consider whether he or she wishes to opt out of data-sharing programs.

Although we believe that the requirement for the sharing institution to provide the notice should be removed, MBA supports the "rules of construction" in the regulation, which provide greater flexibility in delivering the notice.[9] First, the transmitting affiliate may use agents or other affiliates (including affiliates receiving eligibility information) to send the notice, as long as those affiliates: 1) do not use eligibility information to give a solicitation until after the notice is provided; *and* 2) the notice is given either i) in the name of the affiliate with the business relationship, or ii) in a common corporate name.[10] This provision is helpful but should be clarified to allow use of brand names and trade names as well as the actual "corporate name." In addition, an agent or other affiliate should be allowed to send a common notice that uses more than one name in a non-deceptive manner.

Second, each transmitting affiliate does not need to provide the opt-out notice *if* the original notice is broad enough to cover them. For example, if A has a relationship with a consumer and transmits eligibility information to B and in turn, B transmits eligibility information to C (and A, B and C are all affiliates), then B need not obtain an opt-out from the consumer *if* A's opt-out notice is broad enough to allow for C's use of the eligibility information.[11] MBA also supports this provision.

2) <u>Scope of Coverage</u>

The Agencies seek comment on whether the definition of "eligibility information" appropriately reflects the scope of coverage, or whether the regulation should track the statutory language in FCRA Section 624(a)(1).[12] The regulation defines "eligibility information" as "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."[13] "Eligibility information" may include a person's own transaction or experience information, such as information about a consumer's account history with that person, and other information, such as information from credit bureau reports or applications.[14] Eligibility information is not a defined term in Section 624; but it does clearly state that it refers to "a communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A)."[15]

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[9] 12 C.F.R. § xxx.20(a)(2); *see also* 69 Fed. Reg. at 42507.
[10] *Id.*
[11] *Id.*
[12] 69 Fed. Reg. at 42504.
[13] 12 C.F.R. § xxx.3(j).
[14] 69 Fed. Reg. at 42506.
[15] 15 U.S.C. § 1681s-3(a)(1).

The MBA supports the Agencies' proposed regulatory definition of "eligibility information." The Agencies' definition does not appear to change the scope of coverage beyond that provided in FACTA Section 214.

The Agencies note that it may be burdensome for companies to determine and track whether consumer report information is eligibility information (to which the opt-out provisions of FCRA Section 624 apply) or information that may be shared with affiliates under other exceptions to FCRA (to which the marketing opt-out provisions of Section 624 do not apply).[16] The Agencies indicate that companies can satisfy their Section 624 obligations by voluntarily offering opt-out based on consumer report information that is shared under *any* of the FCRA Section 603(d)(2) exceptions, rather than just Section 603(d)(2)(A).[17] Although MBA agrees that companies should be allowed to provide a broader opt-out than statutorily required, the regulation should also indicate that Section 624 and the regulation only apply to information shared under Section 603(d)(2)(A).

3) Duration of Opt-Out (12 C.F.R. § xxx.25)

The Agencies have stated that the opt-out begins "as soon as reasonably practicable after the consumer's opt out election is received," and lasts for five years, unless the consumer revokes it in writing (or electronically, if the consumer agrees to do so).[18] Moreover, the opt-out may last for longer than five years at the company's discretion.[19]

Section xxx.25(d), however, provides that if a consumer terminates its business relationship with the *sharing entity* while the opt-out is in force, then the opt-out never expires *unless* the consumer revokes it. This provision is onerous and is not justified by the statute. The plain language of FCRA Section 624 restricts the use by the *receiving entity* of the information. The effectiveness of the opt-out does not depend on the consumer's relationship with the sharing entity (or lack thereof). Regardless of whether the consumer terminates his or her business relationship with the sharing entity, the statute provides that the opt-out period expires naturally, and the receiving affiliate may use eligibility information to solicit a consumer after the opt-out expires if another opt-out notice is provided and the consumer does not do so.

Moreover, this interpretation could create significant hardship for the mortgage industry. In the mortgage industry, consumer relationships are often short-lived. A consumer may close a loan with a lender that may intend to quickly sell the mortgage in the secondary market – sometimes in a matter of days or hours. If the opt-out notice is provided to the consumer post-closing, then the consumer relationship may end before the consumer has a reasonable time to respond to the opt-out. Under the proposed regulations, the mortgage company would be unable to share eligibility information to its affiliates for the purpose of soliciting the consumer even if the consumer had no intention of opting out.

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16 69 Fed. Reg. at 42507.
17 *Id.*
18 *See* 12 C.F.R. § xxx.25(a); 69 Fed. Reg. at 42511.
19 *Id.*

In such a case, the only way to provide the notice would be at closing, along with all the other documents that must be provided to the consumer. This is not a particularly effective way to communicate with consumers. Moreover, it may be impossible for the mortgage company to comply with the requirement to allow a reasonable period to opt-out while the relationship still exists. In such a case, the Agencies' proposed regulations create a significant burden on mortgage brokers and lenders without a corresponding consumer benefit.

This provision is not only burdensome, but unnecessary if the Agencies adopt the statutory interpretation requiring that the notice be provided, but without imposing that requirement on a particular entity. So long as the notice identifies the entity with which the consumer has or had a relationship, no violation should occur.

4) Definitions (§ xxx.3)

The Agencies' proposed regulations include definitions of relevant terms. 12 C.F.R. § xxx.3.

a) Consumer: Under the proposed regulations, "'consumer' means an individual." 12 C.F.R. § xxx.3(e). The Agencies should restrict this definition to individuals who have an account with an affiliate (as that term is defined in the proposed regulations) that is held for personal, household, or family purposes. This revision would help ensure that the rule is appropriately applied to consumer accounts. Individuals such as sole proprietors may have accounts with affiliates that are not held for personal, family, or household purposes, and which should not be addressed by this proposed regulation. Although the definition of eligibility information *implies* that the information is held for personal, family or household purposes since it applies to information that would be a "consumer report" (which, as defined, references consumer purposes) it nevertheless would clarify the regulations to explicitly reference this distinction.

b) Clear and conspicuous: The proposed regulations define "clear and conspicuous" to mean "reasonably understandable and designed to call attention to the nature and significance of the information presented"[20] and do not require segregation of Section 624 opt-outs from other opt-out notices. The Agencies have requested comment on "how an oral notice can satisfy the clear and conspicuous standard in the statute."[21]

FACTA Section 214 does not require that the notices be provided in writing. Accordingly, oral notices are not precluded by the statute and should be allowed. In the context of oral communications with consumers, oral disclosures could be made part of a telephone script that meets the "clear and conspicuous" standard. For example, a properly designed opt-out notice could occur during the course of a telephone call in connection with the receipt of an application for a mortgage.

[20] *See* 12 C.F.R. § xxx.3(c).
[21] 69 Fed. Reg. at 42507.

c) Pre-existing business relationship: The Agencies' proposed regulations define a "pre-existing business relationship" as a relationship between a person and a consumer based on any of several types of contracts, business relationships, or business inquiries.[22] The Agencies have asked if the definition of pre-existing business relationship should be expanded, and if so, how.[23] The MBA believes that the regulatory definition should not be narrower than what is provided in the statute. For example, the preamble to the regulation refers to "a person's licensed agent," as being equivalent to the "person," which could be interpreted as narrowing the scope of the business-relationship exception by restricting it to formal agency relationships that are recognized for other purposes. Accordingly, the regulatory definition should accurately track, or incorporate by reference, the statutory definition. Moreover, any commentary by the Agencies should clearly indicate that the definition is a clarification of the statutory language.

The definition of pre-existing relationship should also include any situation in which statements are sent out in the affiliate's name or the customer otherwise could reasonably be expected to perceive a relationship. For example, although a home equity line of credit ("HELOC") may be originated and owned by an affiliated bank, the customer may have obtained the line of credit through a mortgage company loan officer and perceive that his or her relationship is with the mortgage company. Such situations should be covered by the definition of pre-existing relationship because the consumer is receiving the notice in connection with a transaction in which he or she is currently involved. If the consumer perceives that he or she is primarily dealing with the mortgage company, there is no invasion of privacy when the mortgage company uses information that, in some theoretical sense, was "obtained" from the bank. Similarly, if the customer perceives a mortgage servicer as the "lender," he or she should be held to have a pre-existing relationship with the servicer rather than with the legal owner of the loan, which may be a securitization trust that the consumer has never heard of. Accordingly, to maximize the likelihood that the consumer will receive a notice that is likely to catch his or her attention, the MBA believes that the parties subject to the rule should have the option of providing the opt-out in the name of the person with whom the consumer would perceive a relationship, even if that entity is not the entity with whom the formal relationship is maintained.

d) Solicitation: The proposed definition of "solicitation" "means marketing 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 part; and (ii) Intended to encourage the consumer to purchase such product or service."[24] It does, however, exclude "communications that are directed at the general public and distributed without the use of eligibility information communicated by an

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[22] 12 C.F.R. § xxx.3(m).
[23] 69 Fed. Reg. at 42505.
[24] 12 C.F.R. § xxx.3(n)(1).

> affiliate," such as TV ads, billboards, or other methods.[25] The Agencies requested comments regarding whether it should expand the definition of solicitation.[26]

The Agencies should clarify the examples provided in this section. In particular, the regulations should plainly indicate that the exclusions clearly encompass *all* communications directed to a consumer that are distributed without the reference to eligibility information communicated by an affiliate. Section 624 restricts the use of eligibility information and is worded so that the methods of communication are not otherwise restricted. "Any person that receives from [an affiliate] a communication of [eligibility information] may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless. . . ."[27] For example, an affiliate may purchase a mailing list from an outside source and provide direct mail solicitations to such individuals. If that list contains individuals who are customers of their affiliates and who have opted-out, the soliciting entity will not be in violation of Section 624. Accordingly, the regulations should note that such communications are prohibited only if they are initiated through the improper use of eligibility information.

5) General Duties of Persons Communicating Eligibility Information for Marketing Purposes (12 C.F.R. § xxx.20(a))

The general duty to provide consumers with notice and the ability to opt-out from information sharing is found in 12 C.F.R. Section xxx.20(a). Although "[p]aragraph (a) contemplates that the opt-out notice will be provided to the consumer in writing or, if the consumer agrees, electronically,"[28] the Agencies seek comments on whether oral notices should be acceptable.[29]

The statute clearly permits oral, written, or electronic notices, provided that they meet the substantive requirements of Section 624. Section 624 does not require that the opt-out notice be provided in writing. Instead, it requires that "it is clearly and conspicuously disclosed to the consumer. . . .".[30] Accordingly, FACTA permits the use of oral notices for the opt-out provisions.

While many companies may prefer to use written or electronic disclosures to document their compliance, a company could demonstrate that oral disclosures were made properly, through the use of scripts and monitoring or recording of calls. There is no reason to assume that an oral disclosure – which could be provided as early as the consumer's first contact with the company – is less effective than a written one, which, in the mortgage context, could be included in the many government-mandated documents presented to the consumer at closing.

[25] 12 C.F.R. § xxx.3(n)(2).
[26] 69 Fed. Reg. at 42508.
[27] 15 U.S.C. § 1681s-2(a)(1).
[28] 69 Fed. Reg. at 42507.
[29] *Id.*
[30] 15 U.S.C. § 1681s-3(a)(1).

6) Exceptions to Notice and Opt-Out (12 C.F.R. § xxx.20(c))

The proposed rules provide several exceptions to the notice and opt-out procedure. The regulation does not apply and an affiliate may use eligibility information:

- To make or send a marketing solicitation to a consumer if the receiving affiliate has a pre-existing business relationship.[31]

- To facilitate communications to an individual for whose benefit the affiliate provide employee benefit or other services under a contract with an employer related to and arising out of a current employment relationship or an individual's status as a participant or beneficiary of an employee benefit plan.[32]

- To perform services for another affiliate, unless the services involve sending solicitations on behalf of the other affiliate and such affiliate is not permitted to send the solicitations due to the opt-out.[33]

- In response to a communication initiated by the consumer orally, electronically, or in writing.[34]

- In response to an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation.[35]

- If compliance with the regulation would prevent the affiliate from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which the company is lawfully doing business.[36]

The Agencies have requested comment on these exceptions.[37] The MBA offers some suggestions on consumer-initiated communications, consumer authorizations and the relationship with the do-not-call registry and the telemarketing rule below.

a) Exception for Consumer-Initiated Communications

The Agencies propose clarifying the regulations to note an exception from the right to opt out if the consumer initiates a communication with the company, to state that the solicitation must be responsive to the consumer's inquiry. The proposed rule states that an inquiry from a customer in response to a message left in a marketing call is not "initiated" by the customer, and, therefore, does not trigger the exemption. It also states

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[31] 12 C.F.R. § xxx.20(c)(1).
[32] 12 C.F.R. § xxx.20(c)(2).
[33] 12 C.F.R. § xxx.20(c)(3).
[34] 12 C.F.R. § xxx.20(c)(4).
[35] 12 C.F.R. § xxx.20(c)(5).
[36] 12 C.F.R. § xxx.20(c)(6).
[37] 69 Fed. Reg. at 42508.

that a consumer's calling a company to learn a store's hours, without inquiring about a product or service, does not trigger the exception to the opt-out right.

These examples could be read to narrow the statutory exception considerably. The statute simply excludes "using information in response to a communication initiated by the consumer." The first example in the proposed rule of an inquiry not "initiated by the consumer" is the consumer's *response* to a marketing call. This could be read to make the exception inapplicable even if the consumer's responds to the call by requesting information about products or services offered by the affiliate. In that situation, the consumer's response is clearly a "communication initiated by the consumer," within the meaning of Section 624, in the same way that the consumer's response to an advertisement is a "communication initiated by the consumer." Whether the consumer was prompted to make the inquiry by a marketing call, an advertisement, word of mouth, or otherwise is irrelevant to whether the consumer "initiated" the communication.

If interpreted in this way, this example would require companies to determine whether incoming calls were generated by a marketing call (in which, by definition, the affiliate could not have used eligibility information) or from some other source, creating an operational nightmare. As a practical matter, companies would probably have to establish separate lines for employees to leave messages in marketing calls, but even that would not fully protect them from liability for violating Section 624, because the consumer might choose to return the call on a different number.

We understand the rationale for the second example of a communication not initiated by the consumer (*e.g.*, where the customer calls to inquire about hours), but recommend that it be clarified to state that the exception applies even if the affiliate initiates a discussion of products or services (without using eligibility information) and the consumer responds by requesting information about those products or services.

The exception for consumer-initiated communications reflects the recognition that, once the consumer requests information about a product or service, it is in the consumer's interest for the affiliate to be able to use information obtained from an affiliate in responding to that inquiry. For example, in the mortgage context, a bank's mortgage company affiliate may have access to a common database with basic information, including eligibility information, that allows the mortgage company to process an inquiry about refinancing almost instantaneously, rather than obtaining the information from the consumer and ordering a new credit report. The rule should carry out the goal of the statute and not impose unnecessary additional requirements on affiliates.

b) Exception for Consumer's Affirmative Request or Authorization

The proposal also implements the statutory exception that allows an affiliate to use eligibility information to make solicitations in response to a consumer's affirmative request or authorization for a solicitation.[38] This is essentially an "*opt-in*" exception from Section 624.

The Agencies' commentary states that a pre-selected check box or boilerplate language in a disclosure or contract would not be an affirmative authorization or request.[39] MBA believes that there may be circumstances in which a pre-selected check box or other method could be a reasonable way for a consumer to "opt-in."

Rather than focusing on the mechanism of obtaining a consumer's opt-in (or opt-out), the MBA believes that it is more fruitful to focus on whether the method is employed in a manner that satisfies Section 624. If the method clearly indicates that the consumer affirmatively consents, then it is, by definition, clear and conspicuous. If the notice is clear and conspicuous and a consumer affirmatively acts to submit an electronic form while choosing not to deselect a check box on an electronic form (for example, by reviewing appropriate disclosures and pressing a button labeled "I agree"),[40] it is difficult to see why such an action would not constitute a knowing act by the consumer. Accordingly, the MBA recommends that the Agencies delete this example from the rule.

7) Mandatory Compliance Date (12 C.F.R. § xxx.20(e))

The Agencies have requested comments on whether mandatory compliance date should be different from the regulations' final effective date – and if so, how it should vary.[41] Despite the fact that the Agencies have provided model forms for compliance with the new regulations, initial analysis of the proposed regulations would require significant time to design, test and implement the systems necessary to ensure compliance.

The model forms may not be appropriate to all situations. Companies will need to evaluate these forms in light of their own business practices to ensure that their disclosures are compliant and accurate. In addition, companies will need to reprogram systems and train compliance staff and other personnel. Of course, all aspects of the compliance program, from the text of the disclosures to the implementation and mailing, may require some amount of legal review to ensure that the compliance program meets the rules' requirements. These efforts will take time, especially for large entities that must coordinate their efforts across several affiliated companies. Therefore, we believe that compliance should not be required for at least one year after the regulations' final effective date, or fifteen months after the final regulations are published. This effective date would also ensure that companies can combine the new notices with existing notices if they wish.

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[38] *See* 12 C.F.R. § xxx.20(c)(5).

[39] 69 Fed. Reg. at 33330.

[40] In other situations, a pre-selected check box may be inadequate. The MBA agrees that the Agencies would be right to discourage their use in such situations.

[41] 69 Fed. Reg. at 42512.

8) Contents of Opt-Out Notice (§ xxx.21)

The Agencies have provided a model opt-out notice for compliance with the proposed regulations.[42] Use of the model form is not mandatory, but does satisfy the regulation's requirements.[43] We suggest that Model Form A-1 be revised to refer to "financial information," rather than simply "information," to clarify the types of information subject to the opt-out. In addition, we also propose that the form be rephrased in the passive voice. While the present wording is consistent with the current approach in the proposal of assigning responsibility to the entity with the initial consumer relationship, converting A-1 to the passive voice is more consistent with the statutory language, which, as noted, does not assign such responsibility.[44]

9) Period for Opt-Out (12 C.F.R. § xxx.22)

The proposed rules require that the consumer have "a reasonable opportunity, following the delivery of the opt-out notice, to opt out of such use by [a company's] affiliates."[45] The proposed rules provide "examples" of such reasonable opportunities of a 30-day period in mailing and some electronic contexts.[46] If an electronic transaction provides a "speedbump," (*i.e.*, a web form that cannot be bypassed while completing a transaction) that may also be appropriate in some circumstances.[47]

The MBA concurs with the Agencies' assessment that the "reasonableness" of an opt-out time period may vary based upon the circumstances. Shorter time periods, and perhaps even no waiting period, may be entirely appropriate in some contexts, including in appropriately designed electronic, telephone, or in-person transactions or exchanges. The MBA urges the Agencies to judge the sufficiency of the opt-out time period based upon the facts and circumstances of the particular transactions and consumer relationships at issue.

Also, Section xxx.22(b)(2) states that a consumer has a reasonable opportunity to opt-out if the consumer is notified electronically and is given the opportunity to opt out by any reasonable means, within 30 days after the consumer "acknowledges receipt" of the electronic notice.[48] As explained in more detail below, the regulations' example is inappropriate because it imposes a requirement that is inconsistent with the ESIGN Act, and the Agencies are not permitted to adopt such a regulation.[49]

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[42] 12 C.F.R. Part xxx App. A-11.
[43] 12 C.F.R. § xxx.21(b)(3).
[44] *See* discussion at pages 4-6 above.
[45] 12 C.F.R. § xxx.22(a).
[46] 12 C.F.R. § xxx.22(b). The NOPR indicates that the examples in rules in § xxx.22(b)(1)-(b)(2) are designed to parallel examples in GLB privacy rules. 69 Fed. Reg. at 42509.
[47] *Id.*
[48] 12 C.F.R. § xxx.22(b)(2).
[49] 15 U.S.C. § 7001 *et seq.*

10) Delivery of Opt-Out Notices (12 C.F.R. § xxx.24)

Section xxx.24 requires that the opt-out notice be delivered in a manner such that each consumer "can reasonably be expected to receive actual notice."[50] Moreover, a company is not required to identify each affiliate in a joint notice by name unless their names are dissimilar.[51] The MBA commends this approach to joint notices. Individually listing each company could result in notices that are overly long and confusing.

The MBA suggests, however, that the Agencies revise the rule to explicitly acknowledge that companies may generically identify the types of affiliates with which they may share information to allow the notices to apply to affiliates that become affiliated after the notice is provided (*i.e.*, after-acquired affiliates, newly-formed affiliates, or consolidations of other affiliates). As merger and acquisition activity continues, it is likely that the corporate structure of many companies will change during the course of a five (or even one) year period. As presently drafted, the regulations do not address this issue, and it is unclear whether an entity would be able to allow an affiliate acquired after a consumer receives an opt-out notice (and does not opt-out) to use eligibility information for solicitation purposes. If such consumers do not object to such use with the existing corporate structure, it is unclear why they would object to its use by after-acquired affiliates. Moreover, prohibiting after-acquired affiliates from using such information could lead to a confusing array of internal rules on the use of eligibility information based solely upon the affiliates' acquisition dates, rather than on consumer preference.

Accordingly, to help ensure compliance, the Agencies should allow companies to cover potential future acquisitions and acquirers in their opt-out notice, which would be updated in each new disclosure provided to consumers.

a) Electronic Delivery of Opt-Out Notices

The proposed regulations could be construed to require compliance with either the ESIGN Act provisions [52] requiring a company to obtain consumer consent before delivering a disclosure electronically, or, alternatively, special consent procedures provided in the regulation. Although the Agencies state that Section xxx.20(a) "contemplates that the opt-out notice will be provided to the consumer in writing,"[53] it also notes that nothing in the statute requires a written notice, and, therefore, the consumer consent provisions of the ESIGN Act do not apply. The ESIGN Act also prevents the Agencies from requiring consumer consent to receive electronic disclosures by regulation. Under Section 104(b)(2) of the ESIGN Act[54] "a Federal regulatory agency shall not adopt any regulation, order, or guidance" that is inconsistent with Section 101 of the ESIGN Act[55] or adds to its requirements. Moreover, the agency must find that there

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50 12 C.F.R. § xxx.24(a).
51 12 C.F.R. § xxx.24(c)(2).
52 Electronic Signatures in Global and National Commerce Act ("ESIGN"), 15 U.S.C. §§ 7001 *et seq.*
53 69 Fed. Reg. at 42507 (emphasis added).
54 15 U.S.C. § 7004(b)(2).
55 15 U.S.C. § 7001.

is substantial justification for the regulation and that "the methods selected to carry out [its] purpose . . . are substantially equivalent to the requirements imposed on [non-electronic] records . . . and will not impose unreasonable costs on the acceptance and use of electronic records."

The Agencies' proposal, if read to require consent under either ESIGN or the regulations, are inconsistent with Section 101 of the ESIGN Act and add to its requirements. Accordingly, requiring consumer consent under this rule is inconsistent with Section 101 of the ESIGN Act. Because the proposed regulations impose greater requirements on electronic opt-out notices than non-electronic notices, the Agencies are precluded by the ESIGN Act from stating in the rule that e-mail delivery of the disclosures is not actual notice absent consumer consent. Furthermore, the Agencies have not made any of the findings required by ESIGN before a requirement that is different from (but not more burdensome than) the requirements for non-electronic records can be imposed by regulation.

The requirement for a consumer acknowledgement of electronic disclosures also imposes a greater burden on disclosures made electronically than on written disclosures, and, therefore, is also inconsistent with Section 104 of the ESIGN Act. The consumer acknowledgement requirement implies that, even if a company can prove that the customer received an electronic notice, it still could face liability for violating FCRA if it could not produce a consumer acknowledgement. This requirement imposes an excessive burden on electronic disclosures, especially in light of frequent reports that consumers rarely read paper notices.

b) <u>Notices to Joint Account Holders</u>

The Agencies also have set forth guidance for providing notice to joint accountholders.[56] Under Section xxx.24(d), companies may provide a single opt-out notice, and may either permit each account holder to opt-out separately or allow one account holder to act on behalf of all account holders, as long as the disclosure indicates how the opt-out will be treated. The Agencies, however, have asked for input on methods of dealing with joint account holders if one of several joint account holders opts-out and the remaining account holders do not.[57]

The MBA supports the Agencies' flexible approach to dealing with joint account holders. The regulations may be further improved by providing consumers with the flexibility to opt-out in certain circumstances, while retaining the ability to receive valuable information in others. For example, a parent may have a joint account or co-sign a loan with a family member (such as an adult child), and may choose to opt-out as a result of the nature of that account. The parent may also have an individual account with the same institution. If the parent would like to receive marketing information from the institution

[56] 12 C.F.R. § xxx.24(d).
[57] 69 Fed. Reg. at 42511.

that makes use of eligibility information generated by the individual account, the regulations should provide for that flexibility.

11) Extension of Opt-out (12 C.F.R. § xxx.26)

The proposed regulations require that the person that originally sends the opt-out notice must send an extension notice every five years if it wants the opt-out to expire, allowing affiliates to use eligibility information for solicitations after expiration. Essentially, the consumer must have the opportunity to "re-up" the opt-out every five years. If no extension notice is sent, then the opt-out period continues indefinitely.

Moreover, the notice must be provided by "the person responsible for providing the initial opt-out notice, or its successor. . ."[58] As a result, if that "person" no longer exists, or if the consumer no longer has a relationship with that person, the opt-out is extended indefinitely.

As noted above, the MBA believes that the Agencies are reading into the statute a requirement that does not exist – that the sharing company must provide the notice. The consequence of this interpretation is that the five-year limit on the opt-out will become inoperative in many cases. A company's structure may change during the five years following an initial notice, and the organization that previously sent the notice may not be the appropriate entity in the future. It would not only be consistent with the statute, but beneficial as a matter of policy, to require that the opt-out extension notice be furnished but allow each entity to determine for itself how best to distribute opt-out extension notices. Doing so will allow companies to develop models that are most appropriate and efficient for their structures, allowing them to comply in a cost-efficient manner.[59]

Similarly, the MBA does not find any statutory basis for the requirement that the opt-out continue indefinitely if the consumer's relationship with the entity terminates during the five year period. While the statute states that the consumer's election "to prohibit the making of solicitation shall be effective for at least 5 years . . ."[60] nothing in the statute appears to mandate the extension of the opt-out if the consumer's relationship with an entity terminates during that period. The MBA suggests that the regulation hew closely to the text of the statute in this regard.

12) Consolidated and Equivalent Notices (12 C.F.R. § xxx.27)

The new regulations will allow opt-out notices to be consolidated with other notices, such as Gramm-Leach-Bliley Act ("GLB") notices. The Agencies have requested comment regarding whether consolidation would be helpful to consumers; whether they have

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58 12 C.F.R. § xxx.26(a).

59 As noted above on page 3, FACTA does not empower the Agencies to determine which entity is required to provide the notice. In addition, to the extent that the regulations focus on the identity of the person providing the notice, the regulations stray from the regulations' mission – ensuring that consumers are able to control the use of eligibility information in developing and providing solicitations. *Id.*

60 FCRA § 624(a)(3)(A).

provided sufficient guidance on consolidated notices; and whether the notices will be consolidated with GLB Act privacy notice or the FCRA notices under 603(d)(2)(A)(iii).[61]

The MBA believes that notice consolidation can be beneficial to consumers. Combining the notices increases the likelihood that consumers will read them while reducing the cost of compliance by allowing companies to make one mailing for several required notices, requiring less paper and postage.[62] Sending several disclosures, particularly those touching on different aspects of consumer privacy, may confuse consumers and/or increase the likelihood that a consumer will simply ignore them. As noted above, Congress specified that notices may be consolidated.

13) "Constructive Sharing" of Information

The Agencies propose that, if a company sends out information on behalf of an affiliate to all its customers (or at least without regard to "eligibility" information), it would not be subject to this rule. The MBA supports this interpretation because it is consistent with both the statutory text and the policy behind Section 624. The Agencies have expressed concern that this exception could lead to "constructive sharing" of the information:

> The Agencies invite comment on whether, given the policy objectives of section 214 of the FACT Act, proposed paragraph (a) 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. For example, the Agencies request commenters to consider the applicability of paragraph (a) in the following circumstance. A consumer has a relationship with a bank, and the bank is affiliated with an insurance company. The insurance company provides the bank with specific eligibility criteria, such as consumers having combined balances in excess of $50,000, and average monthly demand deposit accounts in excess of $10,000, for the purpose of having the bank make solicitations on behalf of the insurance company to consumers that meet those criteria. Additionally, the consumer responses provide the insurance company with discernible eligibility information, such as a response form that is coded to identify the consumer as an individual who meets the specific eligibility criteria.[63]

This "constructive sharing" should not be a concern under the proposed regulations. First, Section 624 restricts an affiliate's use, not sharing, of information absent the consumer's decision to not opt-out from such use. At the time of the solicitation, the affiliate does not know the identity of any of the individuals that are receiving the

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[61] *See* 69 Fed. Reg at 42513.

[62] *See id.* These savings, however, will only be realized by those companies who are in fact already subject to other regulatory requirements that require mailings, such as the Gramm-Leach-Bliley Act and its implementing regulations. *See*, *e.g.*, 16 C.F.R. Part 313.

[63] 69 Fed. Reg. at 42507.

accounted for. At the very least, systems will need to be designed and implemented to track opt-outs, which may be handled differently from any other responses received from consumers in GLB compliance efforts. Moreover, as noted above, complying with the new regulations will require significant database programming, coordination across several business entities, legal and managerial review, employee training and business process changes. Discussions with our members reveal that these changes will be neither quick nor inexpensive. Accordingly, the total costs of complying will be much greater than the estimates shown in the NOPR.

In addition, the Agencies implicitly acknowledge that the 18 hour estimate does not accurately reflect the burden needed to implement the systems described above. Because the "average" figured is reduced by including the compliance "burden" of the estimated significant number of companies that the Agencies believe will not need to provided these notices.[70] In other words, the average of hours per company providing the notice likely is significant more than 18 hours.

The new opt-out created by Section 624 differs from both of the opt-out rights that have previously existed under federal law. The existing GLBA opt-out from sharing of information does not apply to sharing any type of information with affiliates. The existing right in FCRA to opt-out of sharing of information with affiliates applies only to the sharing of "consumer report" information, including information from credit reports and, according to the Agencies, financial information, such as the consumer's income, assets, or credit history, that is obtained from sources such as the consumer's credit application. The existing FCRA right does not apply to the sharing of "transaction-and-experience" information with affiliates. Therefore, an organization in which affiliates do not share information about consumers with unaffiliated third parties and only share transaction-and-experience experience with their affiliates has not previously needed an opt-out procedure.

Many of our members, including some relatively large mortgage bankers and servicers, had previously chosen not to share information with unaffiliated third parties (triggering the GLB opt-out right) or to use "consumer report" information from affiliates (triggering the FCRA opt-out right). Some of these companies, however, have been using transaction-and-experience information from affiliates to target their marketing efforts. If they wish to continue doing so, they will have to make major investments in revising their systems and training employees in avoiding solicitations of consumers who have opted out. If they choose not to continue using affiliate information for marketing purposes, they will have to find other, more costly ways to acquire new customers.

To give some idea of the magnitude of these costs, *one* MBA member, a medium-sized mortgage banker that is part of a large diversified financial organization (but itself is not among the top ten mortgage originators or mortgage servicers in the country) estimates that it would cost it at least $5 million in direct costs to modifying its data warehouse computer system to accommodate the opt-outs and to send disclosures to all customers of

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[70] *Id.* at 42513-14.

the organization. The company also believes that it would incur hundreds of thousands of dollars in indirect costs resulting from diverting management's attention from other tasks. If, on the other hand, that single company were to decide to abandon its use of affiliate information in obtaining customers, it believes that it would lose tens of millions of dollars in revenue that it now obtains from cross-selling to customers of its financial affiliates. If these costs are projected to the entire mortgage industry, it is easy to conceive of hundreds of millions or even billions of dollars of added expense or lost revenues generated by Section 624.

Even companies that are now providing either GLBA or FCRA opt-out notices will incur significant costs in modifying their systems, for two reasons. First, unlike the GLBA opt-out right, the Section 624 opt-out applies to sharing of information with affiliates, and, therefore, affects organizations that give their member companies access to a common database containing information from different corporate entities. Second, unlike the existing FCRA opt-out right, the Section 624 opt-out right applies to transaction-and-experience information – the day-to-day record of a customer's transactions with the institution. Many companies that maintain common databases have complied with the existing FCRA opt-out right by flagging accounts in a way that prevents employees of affiliates from accessing "consumer report" information (such as a FICO score or information from a credit application), while still giving them access to daily transaction information from affiliates. It will be much more difficult to comply with Section 624 by blocking transaction-and-experience information based on which corporate entity was the source of the information, because employees may need that information to service the account. For example, if a bank deposit customer maintains a HELOC with an affiliated mortgage company, the bank may allow automatic transfers to make each month's minimum payment. In that situation, both the bank and the mortgage company may need access to information about both the deposit account and the HELOC balances in order to confirm whether the payment was made or resolve disputes.[71]

But employees of the mortgage company may wish to use some of the same information in the common database to solicit business from the consumer. For example, a loan officer employed by the mortgage company may wish to contact bank customers and solicit mortgage business from them. The mortgage company will now have to take steps to make sure that loan officers do not use the information in the database that comes from an affiliate in connection with marketing solicitations, if the consumer has exercised the Section 624 opt-out right. This will involve software modifications to identify both the data items that come from an affiliate and flag any accounts in which the consumer has opted-out, as well as training of employees in understanding when they may and may not use the information.

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[71] This type of use of affiliate information is, of course, specifically permitted under the proposal. *See* proposed 12 C.F.R. § xxx.20(b)(3).

For these reasons, the Agencies should revisit their estimates of the time and effort of compliance with the proposed regulations when finalizing these rules.[72]

15) Conclusion

The MBA thanks the Agencies for the opportunity to provide comments on the proposed affiliate data sharing regulations. Should you have any questions, please do not hesitate to contact Mary Jo Sullivan at 202.557.2859.

Most sincerely,

Jonathan L. Kempner
President and Chief Executive Officer

[72] Moreover, as noted above in section 7), the Agencies should account for the time necessary to design, test and implement the compliance systems when establishing the mandatory compliance date.