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COALITION TO IMPLEMENT THE FACT ACT

August 16, 2004

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

Re: FACT Act Affiliate Marketing Rule [Docket No. R-1203]

To Whom It May Concern:

The Coalition to Implement the FACT Act ("Coalition") submits this comment letter in response to the Proposed Rule ("Proposal") issued by the Board of Governors of the Federal Reserve ("Board"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration (collectively, "Agencies") regarding the affiliate marketing provisions included in Section 624 of Fair Credit Reporting Act ("FCRA") as amended by the Fair and Accurate Credit Transactions Act ("FACT Act"). The Coalition represents a full range of trade associations and companies that furnish and use consumer information, as well as those who collect and disclose such information. The Coalition appreciates the opportunity to comment on the Proposal.

Background

The FACT Act added a new Section 624 to the FCRA. In general, any person that receives from an affiliate information that would be a "consumer report" but for the exceptions to that definition in Section 603(d)(2)(A) ("Eligibility Information"), may not use the information to make a solicitation for marketing purposes to a consumer about its products or services unless it is clearly and conspicuously disclosed to the consumer that the information may be shared for purposes of making solicitations and the consumer is provided an opportunity and simple method to opt out of receiving such solicitations. The FCRA states that a consumer's opt out must be effective for at least five years, although the consumer can extend the opt out in certain circumstances. Section 624 also provides several instances in which Section 624 will not apply. Congress provided that a notice required by Section 624 may be coordinated and consolidated with any other notice that must be provided to the consumer by law, such as the privacy notice required by the Gramm-Leach-Bliley Act ("GLBA").

Benefits of Affiliate Sharing

In a recent report to Congress titled "Security of Personal Financial Information," the Treasury Department concluded that "the sharing of information [including among affiliates]...has increased the access of more consumers to a wider variety of financial ser-

vices, at lower costs, than ever before." This conclusion is not surprising. In fact, one of the primary drivers behind the enactment of the GLBA was that consumers would benefit from increased products at lower costs that result from the synergies of affiliate relationships permitted as a result of the GLBA.

What is sometimes less understood is reasons why affiliated companies can provide consumers with increased access to products at lower costs. Although there are several reasons for this key consumer benefit, one critical reason is that affiliates are able to leverage existing relationships and delivery mechanisms to inform consumers about new or improved products in a more targeted and efficient manner than would otherwise be available. For example, affiliated companies, through their distinct and separate relationships with a single consumer, can better understand the needs or desires of that consumer and develop marketing materials based on that consumer's existing behavior. In this regard, a mortgage lender affiliated with a bank and an insurer can provide a consumer with an opportunity for a lower cost home-equity loan if the mortgage lender knows that the consumer has homeowners' insurance with the insurer and a higher cost personal line of credit with the bank. The mortgage lender affiliate in this example is able to leverage the consumer's existing relationships with its affiliates to provide a specialized product to the consumer in which the consumer is likely to have an interest. The mortgage lender's costs of acquisition and product delivery are also reduced as a result of more targeted marketing and the ability to use existing product delivery mechanisms. Therefore, the mortgage lender can afford to provide the product at a lower cost to the consumer in order to obtain a competitive advantage in the marketplace. As the Treasury Department noted, consumers are the true beneficiaries of these synergies in the form of both increased access to products and lower costs.

The Coalition believes it is important to recite the benefits associated with the sharing of information among affiliates for marketing purposes. Congress clearly did not intend to reduce these benefits unnecessarily so shortly after the GLBA was enacted. Rather, Congress simply wished to grant consumers additional control over the types of marketing they receive as a result of the sharing of Eligibility Information. We urge the Agencies to consider their Proposal in this light.

In General

The Coalition believes that Section 624 of the FCRA is relatively specific and precise with respect to the obligations it imposes. The clarity provided in the statute was the result of careful deliberation by Congress, and the statutory language reflects a clear congressional intent in most instances. Although the Coalition believes the Proposal includes many provisions that reflect the statutory requirements and the congressional intent, we respectfully suggest that the Proposal should be modified to reflect more accurately the plain language of the statute. The clarity provided by Congress with respect to Section 624 stands in contrast to the more general rulemaking directives provided by Congress in other provisions of the FACT Act. The Coalition believes that a final rule ("Final Rule") that adheres closely to the statutory language will, in most instances, provide clear guidance to those subject to the Final Rule and provide the necessary protections to consumers.

Examples (§ .2)

The Proposal states that "[t]he examples in [the Proposal] are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with [the Proposal]." The Coalition applauds the Agencies for providing guidance in the Proposal in the form of examples. We believe that the use of examples can be illustrative for persons seeking to comply with the Final Rule, and we urge the Agencies to retain the use of examples in the Final Rule. We also believe that it is appropriate to provide that compliance with an example, to the extent appropriate, constitutes compliance with the requirements. If the examples are to be useful, the Agencies must allow persons to rely on them for purposes of compliance. Therefore, we urge the Agencies to retain § ___.2 without revision.

Definitions (§ .3)

"Affiliate"

The definition of an "affiliate" under the Proposal is "any person that is related by common ownership or common corporate control with another person." The Agencies note in the Supplementary Information that the FCRA has several variations of how an affiliate is described in the statute, and that the FACT Act and the GLBA also have varying approaches. The Supplementary Information also describes the Agencies' intent to "harmonize the various definitions of affiliate [in the FCRA, the FACT Act, and the GLBA] as much as possible and construe the various FCRA and FACT Act definitions to mean the same thing" and the Agencies' desire for comment on "whether there is any meaningful difference between the FCRA, FACT Act, and [GLBA] definitions."

The Coalition commends the Agencies for seeking to apply a harmonized and consistent treatment of the term "affiliate" among the Agencies' regulations. Indeed, in light of the clear congressional intent to allow the affiliate marketing notice to be provided in conjunction with the GLBA privacy notice, it is important to provide consistent application of an "affiliate" across the GLBA and the FCRA. Therefore, we urge the Agencies to adopt the definition of "affiliate" as it has in its regulation implementing Title V, Subtitle A of the GLBA ("GLBA Rule"). The GLBA Rule defines "affiliate" to mean "any company that controls, is controlled by, or is under common control with another company." Although it would appear that this definition is generally consistent with the definition provided in the Proposal, we believe it is important to eliminate any ambiguity with respect to how the Agencies define "affiliate" across their regulations, and therefore the Final Rule should include a definition identical to the definition in the GLBA Rule.

"Clear and Conspicuous"

The Proposal requires that the consumer receive a "clear and conspicuous" notice of certain information. Under the Proposal, "clear and conspicuous" means "reasonably understandable and designed to call attention to the nature and significance of the information

presented." The Supplementary Information provides detailed guidance with respect to how a person can make the required notice "clear and conspicuous." The guidance provided in the Supplementary Information is similar to language that had been proposed by the Board in its proposal to redefine "clear and conspicuous" under several other regulations and is similar to the definition of "clear and conspicuous" in the GLBA Rule.

The Coalition believes that the Agencies have based its definition of "clear and conspicuous," at least in part, on the definition provided under the GLBA Rule and the Board's proposal to redefine "clear and conspicuous" in other contexts. We do not believe that either of these circumstances provides an appropriate model for the Proposal. For example, the GLBA Rule is predicated on enforcement solely through administrative action—not private rights of action. However, in providing a similar definition to "clear and conspicuous" in the Proposal and the Supplementary Information, the Agencies will have created significant liability concerns for entities subject to Section 624, including class action liability. The practical reality of the Proposal would be that the plaintiffs' bar will view the Agencies' definition and extensive official guidance as required elements of a "clear and conspicuous" disclosure. Entities seeking to avoid class action liability with respect to this requirement will feel pressured to treat the Supplementary Information as substantive requirements. We also note that the Board has officially withdrawn its proposal with respect to redefining "clear and conspicuous" in the context of other regulations. The Board withdrew the proposal in response, at least in part, to concerns about the compliance burdens and litigation risks generated by its proposal.

The Coalition requests that the Agencies delete the definition of "clear and conspicuous" in its Final Rule. Not only would this mitigate the compliance and litigation concerns described above, but we do not believe a definition is necessary to ensure that consumers receive a clear and conspicuous notice as required under Section 624 of the FCRA. In this regard, a similar "clear and conspicuous" affiliate sharing notice and opt-out requirement has operated in the FCRA for several years without a regulatory definition of "clear and conspicuous." The Agencies have not provided any evidence that entities have not properly complied with this requirement, nor has it been the subject of significant litigation.

If the Agencies feel compelled to provide "specific guidance," as described in Section 624(a)(2)(B) of the FCRA, with respect to how an entity may comply with the requirement to provide a clear and conspicuous notice, we request that the Agencies provide such guidance in a manner similar to how they provide guidance for the requirement that the notice be "concise." Specifically, the Agencies note that "concise" means only "reasonably brief." Therefore, it would appear that the Agencies do not believe that the detail provided with respect to what could be "clear and conspicuous" is necessary for purposes of meeting the direction provided under Section 624(a)(2)(B). If guidance for "clear and conspicuous" is retained, we ask that it be given in a manner similar to that given for "concise," such as describing it as meaning "reasonably understandable" or "readily understandable."

"Eligibility Information"

Section 624 of the FCRA pertains to the use of "information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A)" of the FCRA. Therefore, in order to be covered under the statute, the information would need to meet the "baseline" definition of a consumer report, *i.e.*, bear on certain qualities such as credit worthiness *and* be collected, used, or expected to be used for certain eligibility determinations. Information that does not meet *both* of these criteria would not be covered by the statute. We are pleased that the Agencies have reflected this concept in the Supplementary Information.

The Agencies, in their Proposal, intend to use the term "eligibility information" to describe information that would be a consumer report but for the exceptions in Section 603(d)(2)(A) of the FCRA. We applaud the Agencies for defining the term in a manner that does not alter the scope of the statutory language. We also believe the Agencies should retain a relatively simple term, such as "eligibility information," to describe the information covered by the Final Rule. The Coalition believes that a simpler approach is appropriate for purposes of understanding the Final Rule, and that using the more complicated language of the statute is not necessary.

"Pre-Existing Business Relationship"

The concept of a "pre-existing business relationship" is critical to Section 624 of the FCRA. In this regard, the section does not apply to a person using Eligibility Information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship. Therefore, a Receiving Affiliate could use Eligibility Information to make a solicitation to a consumer with whom it has a pre-existing business relationship, regardless of whether the consumer has received a notice and opportunity to opt out.

For purposes of Section 624, the statute 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 [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 [Section 624]."

We believe that the plain language of the statute provides sufficient guidance to the Agencies in defining this term. Indeed, the Agencies have included much of the statutory language in the Proposal, and we urge that such language be retained in the Final Rule.

The Coalition is concerned, however, that the Agencies have deleted an important component of the statutory definition of a "pre-existing business relationship." In particular, the FCRA states that such a relationship includes a relationship between "a person, *or a person's licensed agent*, and a consumer" based on certain interactions. (Emphasis added.) However, the definition in the Proposal does not include the concept that the relationship can be between a person's licensed agent and the consumer. The Agencies provide no explanation for this omission, and we assume it to be inadvertent. We strongly urge the Agencies to define a "pre-existing business relationship" as one including a relationship between a person's licensed agent and the consumer. Not only was this the clear and unambiguous intent of Congress, but such a definition is important to allow certain entities to continue to provide full-service treatment to their customers.

The Agencies have indicated their desire to interpret the definition of "pre-existing business relationship" in a manner consistent with the similar concept (an "established business relationship") embodied in the Telemarketing Sales Rule ("TSR") issued by the Federal Trade Commission ("FTC"). Under the TSR, an "established business relationship" remains for 18 months after the purchase, rental or lease, or other financial transaction between the customer and seller. According to the FTC in the TSR's Supplementary Information, "[i]n instances where consumers pay in advance for future services (*e.g.*, purchase a two-year magazine subscription or health club membership), the seller may claim the exemption for 18 months from the last payment or shipment of the product." The FTC correctly reasoned that "[f]or such ongoing relationships, it makes little difference to likely consumer expectations whether the purchase was financed over time or paid for up front." We agree with this interpretation, and we urge the Agencies to adopt it explicitly in the Final Rule.

The Coalition also requests the Agencies to clarify the application of a "pre-existing business relationship" with respect to certain types of transactions. For example, if a consumer purchases a product, the consumer would have a pre-existing business relationship with the seller of that product, as well as with the manufacturer of that product (if the manufacturer and seller are two different entities). In this regard, the consumer purchased services from the seller and goods of the manufacturer. We submit that the pre-existing business relationship would continue with the manufacturer. One example of this continuing relationship is in instances where the manufacturer provides a warranty on the product purchased by the consumer. An application of this clarification could involve the purchase of a car. If a consumer buys a car, the consumer would have a relationship with the auto dealer as well as the car manufacturer. The manufacturer while not a direct seller of its product to

the consumer nevertheless has an ongoing relationship with the consumer well after the vehicle is first obtained from the franchised dealer. The relationship includes warranty obligations, recalls, and other communications relevant to the safety and use of the vehicle whether carried out directly or through its franchised dealer. In this relationship, the determination of the time at which the 18 month period begins should be based on a consideration of when all ongoing relationships between the buyer and the manufacturer cease. In this regard, it seems intuitive that the consumer expects a continuing relationship not only with the auto dealer, but also with the company that is providing the consumer with warranty coverage, recall notices, and other important product information on a continuing basis.

We also ask the Agencies to reconsider their guidance in the Supplementary Information 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. Specifically, the Agencies state that an "inquiry" for purposes of the Proposal 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." We strongly urge the Agencies to delete this concept 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 states that the inquiry must be "regarding a product or service offered by that person." Second, the inquiry must be made "during the 3-month period immediately preceding" the solicitation. Therefore, it appears that Congress specified the types of inquiries that would constitute a "pre-existing business relationship." Had Congress intended to further define such inquiries, it could have done so. Furthermore, had Congress intended to have the Agencies narrow the types of inquiries for purposes of the definition, it could have done so. Indeed, the next subparagraph in the statute grants the Agencies the authority to *expand* the definition of a "pre-existing business relationship." We are not aware of any statutory evidence suggesting Congress intended the Agencies to narrow the scope of the definition, nor is there a statutory basis for the Agencies to do so.

The Coalition is also concerned that the Agencies have established a standard in the Proposal that creates unnecessary uncertainty for entities wishing to comply with the law, *i.e.*, that the inquiry is such that "the consumer would reasonably expect to receive information from the affiliate about its services." Whether or not a consumer would "reasonably expect to receive information" is an inherently subjective standard that will be subject to varying interpretations, including those of the plaintiffs' bar.

The Agencies state that, apparently 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." If the Agencies decide to narrow the exception provided in the statute, we urge the Agencies to delete their exam-

ples 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, a consumer may call to express dissatisfaction with the features of a particular product. It would not seem unreasonable to provide information to the consumer about other products 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 to signify that the consumer reasonably expects to receive information. For example, a consumer with a bank account may call the bank's credit card 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. However, in no way should that be an indicia of whether or not the consumer would reasonably expect to receive information from the affiliate.

"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." We applaud the Agencies for distinguishing such marketing from "solicitations" as that term is used in Section 624 of the FCRA, and for excluding television, magazine, and billboard advertisements from the definition. Not only did Congress not intend to cover marketing directed at the general public, but it would also be impossible to allow consumers to opt out of receiving such marketing messages. The Coalition believes, however, that the Proposal has inadvertently misstated the types of marketing that would not be a "solicitation." In this regard, 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.) In short, we believe marketing should be excluded 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]." In other words, 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.

The Agencies also solicit comment on "whether, and to what extent, various tools used in Internet marketing, such as pop-up ads, may constitute solicitations as opposed to

communications directed at the general public, and whether further guidance is needed to address Internet marketing." The Coalition strongly urges the Agencies to avoid discussion of particular Internet marketing practices. We believe the Proposal provides sufficient clarity with respect to its applicability that further discussion of particular delivery mechanisms would be counterproductive. Furthermore, we do not believe Congress intended for "special" provisions to apply to Internet advertising relative to other advertising mechanisms. Therefore, we request that the Agencies refrain from specifically addressing the various ways advertisements may be made on the Internet.

Duties of the Disclosing Affiliate (§ .20(a))

In General

Congress amended the FCRA to prohibit a Receiving Affiliate from using Eligibility Information to make a solicitation unless the consumer has received a notice and opportunity to opt out. The FCRA, however, does not impose any direct obligation on a specific party to provide the consumer with a notice and opportunity to opt out. Rather, 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 Proposal imposes a requirement on a specific entity to provide the consumer with a notice and opportunity to opt out. In particular, the Proposal 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 explain 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 [Disclosing Affiliate] and certain duties on the [Receiving Affiliate] with the intent to use that information to make or send solicitations to consumers."

The Coalition respectfully suggests that the Agencies have mistaken the congressional intent to provide flexibility with respect to the notice and opt-out process, and the focus on the Receiving Affiliate's duties, as "ambiguity." The statute is not ambiguous. In fact, the plain language of the statute imposes duties and liability solely on the Receiving Affiliate. The statute does not impose a duty on a specific party to provide the notice, nor does it need to do so in order to operate as intended. We strongly believe that the Final Rule should reflect the obligations imposed under the statute, and therefore we ask that the Agencies delete any obligation on a specific party to provide the notice and opportunity to opt out to the consumer. There is simply no statutory authority to impose liability on the Disclosing Affiliate.

"Constructive Sharing"

In the Supplementary Information the Agencies explain situations in which Section 624 of the FCRA, and therefore the Proposal, would not be implicated. For example, the Agencies state that "[s]ome organizations may choose to share eligibility information among affiliates but not allow the affiliates that receive that information to use it for marketing purposes. In that case, [the Proposal] would not apply and an opt-out notice would not be required if none of the affiliates that receive eligibility information use it to make or send solicitations to consumers." The Coalition generally agrees with this interpretation, and we hope the Agencies will retain it in the Final Rule. We note that the last prepositional phrase in the first sentence quoted immediately above, "for marketing purposes," should be amended to say "to make solicitations for marketing purposes."

The Agencies ask for comment on what they term "constructive sharing." The Supplementary Information explains that the Proposal "would not apply if, for example, an insurance company asks its affiliated bank to include insurance company marketing material in periodic statements sent to consumers by the bank without regard to eligibility information." The Coalition agrees. However, the Agencies also invite comment on whether, given the policy objectives of section 214 of the FACT Act, [the Proposal] 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 [the Proposal] 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 deposit balances in excess of $50,000, and average monthly demand account deposits 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.

The Coalition believes that the plain language of the statute, which also clearly defines the congressional policy objectives, dictates that the scenario described by the Agencies would not be subject to Section 624 of the FCRA. In this regard, the law states simply 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. Therefore, there must be an exchange of Eligibility Information among affiliates and the Receiving Affiliate must use that information to make a solicitation in order for Section 624 to apply. There must also be a "solicitation" which, by statutory definition, is marketing based on the use of Eligibility Information by the Receiving Affiliate.

As a primary matter, there is no exchange of Eligibility Information among affiliates in the example provided by the Agencies. In fact, it is *the consumer* who provides information to an affiliate that may reveal that the consumer has a $3,000 line of credit. Furthermore, information provided by a consumer about the consumer does not meet the "baseline" definition of a consumer report, and therefore the information provided to the insurance company in the Agencies' example is not Eligibility Information.

Furthermore, in order for Section 624 to apply, the Receiving Affiliate must make a "solicitation." However, a "solicitation" is marketing made based on the use of Eligibility Information. In the Agencies' example, the marketing sent to consumers cannot *by definition* be a solicitation, since it was not made based on the Receiving Affiliate's use of Eligibility Information.

Assuming, strictly *arguendo*, that a communication of information from the consumer to the finance 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.*

The Coalition also notes that the example provided by the Agencies would be expressly exempt from coverage under the statute. One of the exceptions to the notice and opt-out requirements is the use of Eligibility Information in response to a communication initiated by the consumer. In the Agencies' example, there is no exchange of Eligibility Information between affiliates. To the extent there is any exchange of information, it does not take place until the consumer initiates a communication with the insurance company in response to the marketing material. Said differently, if the consumer does not respond, there is simply no conceivable argument to suggest that the insurance company receives Eligibility Information. In essence, the insurance company does not receive, *and therefore cannot use*, Eligibility Information until the consumer initiates a communication with the insurance company. Therefore the notice and opt-out requirements would not apply in the Agencies' example because the insurance company is using Eligibility Information only in response to the communication initiated by the consumer.

Form of Notice

Section 624 of the FCRA requires simply that "it is clearly and conspicuously disclosed to the consumer that [Eligibility Information] may be communicated among" affiliates. The Agencies themselves note in the Supplementary Information

that "nothing in Section 624 of the [FCRA] requires that the notice be provided in writing." Yet, also according to the Agencies, the Proposal "contemplates that the opt-out notice will be provided to the consumer in writing or, if the consumer agrees, electronically." The Agencies, however, seek comment on whether "there are circumstances in which it is necessary and appropriate to *allow* an oral notice." (Emphasis added.)

The Coalition respectfully notes that the question of whether an oral notice is permitted has been answered by the Agencies themselves and by Congress. In this regard, it has already been noted that the Agencies have recognized that "nothing in Section 624 of the [FCRA] requires that the notice be provided in writing." Furthermore, Congress modeled the notice requirement in Section 624 of the FCRA on the notice requirement in Section 603(d)(2)(A)(iii) of the FCRA that excludes certain information from the definition of a "consumer report" "if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among" affiliates. In using this language in the FACT Act, Congress recognized that companies currently comply with Section 603(d)(2)(A)(iii) by providing oral notices, and intended for the same result now and in the future when it enacted the same language in Section 624 of the FCRA.

The Agencies appear to express some concern with respect to oral notices by asking whether "there exists any practical method for meeting the 'clear and conspicuous' standard in oral notices." The Coalition believes that, like with written notices, compliance with a "clear and conspicuous" requirement is a fact-based inquiry and that oral notices can meet this objective. Furthermore, the Coalition respectfully notes that the FTC has imposed "clear and conspicuous" requirements in connection with other oral notices, such as some provided under the TSR. The OCC has imposed similar requirements under its regulations governing national bank's sale of debt cancellation contracts and debt suspension agreements. Specifically, national banks are permitted to provide certain notices orally, but such notices must be "conspicuous, simple, direct, readily understandable, and designed to call attention to the nature and significance of the information provided." We are not aware of any difficulties the FTC or the OCC has had in enforcing those requirements despite the fact that the notices are provided orally with relatively little guidance from the respective regulator as to how to provide such notices.

Duties of the Receiving Affiliate (§ .20(b))

The Proposal states that the Receiving Affiliate "may not use the information to make or send solicitations to a consumer, unless the consumer has been provided an opt-out notice, as described in paragraph (a) of this section, that applies to [the Receiving Affiliate's] use of eligibility information and the consumer has not opted-out." With the exception of the reference to paragraph (a), we believe this portion of the Proposal reflects the true intent of Congress with respect to the duties and obligations imposed under Section 624 of the FCRA. With the inclusion of this portion

of the Proposal, the Agencies do not need to impose duties on the Disclosing Affiliate. We therefore urge the Agencies to retain this provision while deleting the reference to paragraph (a).

Exceptions and Examples of Exceptions (§ .20(c) and (d))

Section 624 of the FCRA includes several circumstances in which Section 624 does not apply. The Proposal includes variations on these exceptions, most of which we address below.

Pre-Existing Business Relationship

The Proposal would not apply if the Receiving Affiliate uses Eligibility Information "to make or send a marketing solicitation to a consumer with whom [the Receiving Affiliate] ha[s] a pre-existing business relationship." This exception is consistent with the statutory language in the FCRA. We have provided detailed comments on the definition of a "pre-existing business relationship" above. Otherwise, we urge the Agencies to retain this exception in the Final Rule as proposed. The Coalition also generally concurs with the Agencies' examples of a "pre-existing business relationship," with the exception of the example provided in § ___.20(d)(iii). As discussed above, we do not believe the Agencies have interpreted the statute's intent correctly with respect to whether a consumer must provide contact information as part of an inquiry in order for a pre-existing business relationship to have been established.

Service Providers

Section 624 of the FCRA does not apply to a person "using information to perform services on behalf of another [affiliate], except that this [exception] shall not be construed as permitting a person to send solicitations on behalf of another person, if such other person would not be permitted to send the solicitation on its own behalf as a result of" the consumer opting out. This exception is intended to allow a company to use its own affiliates to perform services that the company could perform itself. Congress ensured that a company could not circumvent the requirements of the statute by having an affiliate send the solicitation on the company's behalf if the company could not send the solicitation itself as a result of the consumer's opt out.

We believe the Proposal implements this exception in a manner that causes unnecessary confusion. In this regard, although the exception applies only to using information to perform services on behalf of another, the Proposal discusses issues related to marketing consumers on one's own behalf. We believe that the clarification of the exception should be no broader than the exception itself, and we urge the Agencies to revise this provision accordingly.

Communications Initiated by the Consumer

Another exception to the requirements in Section 624 is the use of Eligibility Information "in response to a communication initiated by the consumer." The plain language of the Proposal appears to implement the exception as intended by Congress. However, the Proposal states that the communication must be initiated "orally, electronically, or in writing." We agree that most, if not all, communications will be initiated orally, electronically, or in writing. However, the Coalition is not aware of any reason to limit the communication to one of the listed methods. Indeed, to limit the scope of the exception to oral, electronic, or written communications may create unnecessary compliance questions, either now or in the future. Therefore, we suggest deleting the words "orally, electronically, or in writing".

Although the language of the Proposal itself appears to implement the statutory exception, the Agencies' discussion of this exception in the Supplementary Information suggests 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 opine that "[t]he time period during which solicitations remain responsive to the consumer's communication will depend on the facts and circumstances."

The Coalition strongly urges the Agencies to reject this interpretation in the Final Rule. First, we do not believe that the Agencies' interpretation implements the statutory language or the congressional intent of the law. 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 the Agencies have 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. The end result will not be a reduction of interruptions in the consumer's life, but a reduction in opportunities to learn of better products or lower costs.

We are also concerned that the Agencies' interpretation creates a vague standard that will subject companies to inappropriate compliance risk. The Agencies do not provide a clear definition of what will be "responsive" to the consumer, nor can they. The determination will vary by the facts and circumstances. However, if the Agencies retain this interpretation, a company can never be certain that it will be in compliance with the law. Furthermore, the standard proposed by the Agencies will not necessarily lend itself to customer service scripts and other methods of employee training. Therefore, companies may be discouraged from making use of the exception granted by Congress for fear that customer service representatives do not know

how to comply with the Agencies' interpretation.

The Supplementary Information also includes the Agencies' view that if an affiliate calls the consumer and leaves a message for the consumer to call back, and the consumer calls the affiliate back, the consumer's call would not constitute a communication initiated by the consumer. We disagree. If the consumer decides to initiate contact with a company, the exception should apply. A call by a consumer is a communication initiated by the consumer, regardless of whether the consumer is responding to a television advertisement to "Call now!," or whether he or she is responding to a voice mail urging the same action. The fact that the consumer has decided to call the affiliate is sufficient for purposes of the statute. It would seem the consumer has ample opportunity to "opt out" of any solicitation from the affiliate by not picking up the telephone and calling the affiliate.

Solicitations Authorized or Requested by the Consumer

Congress provided an exception to the notice and opt-out requirements of Section 624 of the FCRA if the Receiving Affiliate uses Eligibility Information for "solicitations authorized or requested by the consumer." In other words, Congress stated that if a consumer authorizes or requests the solicitations, a Receiving Affiliate's use of Eligibility Information to make such solicitations would not be governed by Section 624.

Although the statute provides only that the solicitations be "authorized" or "requested" by the consumer for the exception to apply, the Proposal requires that there be "an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation." The Agencies further explain in the Supplementary Information that "a pre-selected check box or boilerplate language in a disclosure or contract would not constitute an affirmative authorization or request."

The Coalition believes that the Proposal has inappropriately limited the scope of the exception provided in the plain language of the statute. In this regard, Congress specified that the consumer need only authorize or request the solicitations. Had Congress intended to create a more limited exception, such as requiring that the authorization or request be provided in a specific manner, it could have done so. In fact, by declining to specify how the authorization or request should be presented by the consumer, Congress did not intend to narrow the scope of the exception. We do not believe it is appropriate for the Agencies to do so arbitrarily. Furthermore, as discussed in greater detail below in connection with the "opt in" example in § ___.22, the Agencies have declared that the resolution of what constitutes consumer's consent, at least in the context of the GLBA Rule, "is appropriately left to the particular circumstances of a given transaction." We are unaware of any policy distinction with respect to Section 624 of the FCRA, or any compliance issues arising under the GLBA Rule, to alter the Agencies' prior position.

We also note that the Proposal appears to contradict the interpretation provided by federal courts and senior staff of the FTC with respect to a similar requirement in the FCRA with respect to permissible purposes for obtaining consumer reports. In this regard, one of the permissible purposes for obtaining a consumer's consumer report is "[i]n accordance with the written instructions of the consumer to whom it relates." According to Clarke W. Brinckerhoff of the FTC, in a letter written to Gregory J. Shibley on June 8, 1999, this requirement can be met "if a consumer signs a document that clearly '*authorizes*' a party to procure his or her credit report." (Emphasis added.) Mr. Brinckerhoff then references a federal case, *Hammons v. Enterprise Leasing Co.*, 993 F. Supp. 1388 (1998), to support his interpretation. That case involved a consumer agreeing to a rental car contract that included "boilerplate" language authorizing the rental company to obtain the consumer's credit report. The court found for the defendant due to "the broad written *authorization* Hammons gave Enterprise." *Id.* at 1390. (Emphasis added.) We believe that the court and Mr. Brinckerhoff generally interpreted the statute correctly with respect to obtaining "written instructions," *i.e.*, that the consumer's authorization could be obtained through boilerplate language. In a letter dated May 24, 2001 to Mr. Walter Zalenski, Mr. Brinckerhoff further clarified that as a result of the federal E-SIGN Act, an electronic signature could substitute for one written on paper for purposes of obtaining the consumer's authorization.

We do not understand the Agencies' apparent rationale for drawing a distinction in which obtaining the consumer's authorization to obtain the consumer's consumer report is not sufficient for purposes of authorizing solicitations. In effect, the Proposal would create two differing views with respect to what constitutes "authorization," providing for the anomalous result of making it easier to obtain the consumer's permission to obtain his or her consumer report in at least some circumstances than to provide the consumer certain solicitations. For example, under the *Hammons* decision (supplemented by the Shibley letter) and the E-SIGN Act, it would appear that a consumer could electronically agree to boilerplate language in a contract (or a pre-selected checkbox) and have it constitute the consumer's "written instructions" because, to use the *Hammons* court's and Mr. Brinckerhoff's rationale, such an arrangement would signify the consumer's "authorization" to obtain the consumer's consumer report. Yet, the exact same scenario would appear to fail the Agencies' "authorization" standard the Proposal. We do not believe that such a divergent result is appropriate, nor do we believe the discrepancy to be intended by the Agencies.

Prospective Application (§ .20(e))

Congress provided that the requirements of Section 624 would not apply with respect to "information...received prior to the date on which persons are required to comply with" the Final Rule. The prospective application of the law is necessary in light of the practical realities associated with complying with the new

requirement. In particular, it would be difficult for a family of companies to deconstruct its existing databases to determine the exact origin of information so that the statute could be applied appropriately to all information in the family's possession. It is more reasonable to expect a family of companies to develop a compliance program on a prospective basis for information received by the entities within the corporate family after the mandatory compliance date. Therefore, Congress intended to exempt information that had been received by the family of companies prior to the compliance deadline.

The Proposal provides that it does not prohibit a Receiving Affiliate from using eligibility information communicated by the Disclosing to make or send solicitations to a consumer if such information was received by the Receiving Affiliate prior to the mandatory compliance date provided in the Final Rule. The Coalition urges the Agencies to revise the Proposal to provide a prospective application of the Final Rule to information received by any entity within the corporate family prior to the mandatory compliance date. We believe that such an approach more faithfully reflects the statutory language and legislative intent. If the Agencies retain the notion that the information must be received by the Receiving Affiliate prior to the mandatory compliance deadline, we ask the Agencies to clarify that any information provided to a centralized database or repository that can be accessed by an affiliate, such as may be provided by a service provider, be deemed to have been provided to such affiliate for purposes of the prospective application of the Proposal. Without this clarification it would be unclear whether companies would need to deconstruct their databases in a manner intended to be avoided by Congress.

Relation to Affiliate-Sharing Notice and Opt-Out (§ .20(f))

The Proposal states that nothing in the Proposal "limits the responsibility of a company to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the [FCRA] before it shares information other than transaction or experience information to avoid becoming a consumer reporting agency." The Coalition requests that the Agencies delete this provision. We are not aware of any interpretation of Section 624 of the FCRA, or of the Proposal, which could result in the conclusion that the provision of a notice and opt out under Section 624 relieves a company of any obligation related to Section 603(d)(2)(A)(iii). Therefore, the clarification provided in the Proposal is unnecessary and could create unintended confusion with respect to the scope of the Proposal.

If the Agencies decide to retain the disclaimer with respect to the notice and opt out described in Section 603(d)(2)(A)(iii), we ask for two revisions. First, the Proposal implies that a notice and opt out would be required for the sharing of any information other than transaction and experience information among affiliates. We urge the Agencies to clarify that the notice and opt out described in Section 603(d)(2)(A)(iii) only applies with respect to the sharing of information which would otherwise meet the definition of a consumer report. Second, the Proposal

suggests that any sharing of consumer reports among affiliates would automatically cause the Disclosing Affiliate to become a consumer reporting agency. While we agree that an entity that discloses a consumer report to an affiliate *runs the risk* of becoming a consumer reporting agency, such a result is not certain. For example, the entity must also "regularly engage[]" in making such disclosures "for monetary fees, dues, or on a cooperative nonprofit basis." Also, disclosures made pursuant to the joint user exception would not cause the disclosing entity to become a consumer reporting agency. Therefore, if the provision is retained, we ask that the Proposal be amended to state "in order to avoid *the risk* of becoming a consumer reporting agency."

Contents of Opt-Out Notice (§ .21)

Under the FCRA, the notice provided pursuant to Section 624 must disclose to the consumer that Eligibility Information may be shared among affiliates for the purpose of making solicitations to the consumer and provide an opportunity and simple method to opt out of receiving such solicitations. The notice must be "clear, conspicuous, and concise." It may also "be coordinated and consolidated with any other notice required to be issued under any other provision of law." The legislative history indicates that Congress specifically intended the notice to be of the type that could be coordinated and consolidated with the privacy notices provided under the GLBA. The notice must allow the consumer to opt out of all solicitations referred to in the notice, but may provide the consumer with a menu of options.

Generally, we believe the Agencies have accurately captured the requirements with respect to the contents of the opt-out notice. In this regard, the Proposal states that the notice must inform the consumer of the ability to prevent an entity from using Eligibility Information to make a solicitation to the consumer. The notice must include a reasonable and simple method for the consumer to opt out and, if applicable, that the consumer's election will apply for a specified period of time and that the consumer will be permitted to extend the opt out. The Proposal states that the notice must be "clear, conspicuous, and concise," the latter of which is defined as being "reasonably brief." All required disclosures must also be accurate. The Proposal also states that if a menu of opt-out choices is provided, the consumer must have a single alternative to opt out "with respect to all affiliates, all eligibility information, and all methods of delivery."

With respect to the requirement that the notice accurately disclose that the opt out may have an expiration, we urge the Agencies to clarify that if a company initially discloses an opt-out of limited duration, but then determines to increase the length of the duration (or make the opt out permanent), that the consumer would not be entitled to an additional notice describing such a change. We do not believe there are any consumer benefits to such a requirement that would justify the cost of providing a revised notice.

The Coalition also notes that the statute does not require that the opt-out notice provide "as one of the alternatives the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery." First, Congress required only that the notice allow the consumer to opt out of all covered solicitations—not that one of the options had to be a complete opt out. Second, the requirement pertained only to the solicitations described in the notice, not any potential solicitation pertaining to "all affiliates, all eligibility information, and all methods of delivery." We ask the Agencies to revise the Proposal to reflect more accurately the statutory requirements. As discussed below, we also note the need to allow companies to implement an opt out on an account-by-account basis. By suggesting that the opt-out notice include a provision for "all eligibility information," the Proposal suggests the consumer must be given the opportunity to opt out for all eligibility information pertaining to the consumer, across all affiliates and all relationships, in perpetuity. For the reasons discussed below, we do not think this is appropriate, nor do we believe it is the intent of the Agencies.

Reasonable Opportunity to Opt Out (§ .22)

In General

Section 624 prevents a Receiving Affiliate from making a solicitation to a consumer in certain circumstances unless "the consumer is provided an opportunity...to prohibit the making of such solicitations to the consumer by" the Receiving Affiliate. The Agencies have interpreted this language to require that the consumer receive "a reasonable opportunity, following the delivery of the opt-out notice, to opt out of such use" of Eligibility Information by the Receiving Affiliate. The Proposal then provides examples of reasonable opportunities to opt out. The examples are generally similar to those used in connection with a similar regulatory requirement imposed under the GLBA Rule and imply that the rule of thumb would be to give the consumer 30 days to opt out.

Although the Supplementary Information indicates that the Agencies "believe that a reasonable opportunity to opt out should be construed as a general test that avoids setting a mandatory waiting period in all cases," the Coalition is concerned that the Proposal would establish a 30-day floor in virtually all cases. For example, the Agencies provide that a 30-day period is appropriate when the notice is provided by mail or electronically. The only example to the contrary is limited in scope to notices provided to consumers at the time of an electronic transaction that requests the consumer to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction so long as a simple process is provided "at the Internet web site." Despite the Agencies' stated intent to "avoid[] setting a mandatory waiting period in all cases," we believe that these examples will be used by the plaintiffs' bar and others to establish a *de facto* 30-day requirement for purposes of opting out.

If the Agencies retain the examples, we urge the Agencies to continue to provide examples that are consistent with those provided in the GLBA Rule. We believe that, given the clear congressional intent to allow the FCRA and GLBA notices to be provided together, the examples of reasonable opportunities to opt out should be consistent. For this reason, we particularly applaud the Agencies for providing for *per se* compliance, as applicable, if the consumer is permitted to exercise the opt out within a reasonable period of time and in the same manner as the opt out provided under the GLBA Rule. However, we ask the Agencies to broaden the scope of the example provided in § ___.22(b)(3). In this regard, the example should reflect its applicability to any transaction, not just those conducted in an electronic environment. We are unaware of a justification to differentiate between transactions conducted electronically and those conducted in person, for example, with respect to requesting that the consumer decide as a necessary part of the transaction whether to opt out before completing the transaction.

Providing for an Opt In

The Proposal provides as an example of providing for a reasonable opportunity to opt out that a company could provide an opt in. Although a solicitation should be permitted as a result of the consumer's authorization or request (*i.e.*, the consumer's opt in), such an occurrence would exclude the solicitation from the obligations of Section 624, and therefore the Proposal, altogether. Therefore, in order to avoid confusion, we ask the Agencies to delete the reference to an opt in with respect to how a company could comply with the requirements of the Proposal.

We also note that the Agencies' discussion of an opt in suggests that the opt in must result from an "affirmative" act by the consumer. In addition to the arguments we present above as to why "affirmative" consent was not intended by Congress, we also note that the Agencies' discussion of an "affirmative" act to constitute consent in § ___.22(b)(5) appears to contradict the example pertaining to compliance with the GLBA Rule in § ___.22(b)(4). In this regard, the Agencies appear to equate obtaining an opt in as an opt out for purposes of the Proposal. Furthermore, the Agencies in § ___.22(b)(4) appear to endorse compliance with the GLBA Rule as compliance with the Proposal for purposes of the opt out (and therefore for the opt in).

The GLBA Rule specifically permits a financial institution to obtain the consumer's "consent" (*i.e.*, opt in), and therefore obtaining consent under the GLBA Rule would appear, at least under § ___.22(b)(4), to constitute compliance with the Proposal. However, in the context of the GLBA Rule, the Agencies affirmatively rejected the notion that the consent must be obtained in any particular way. Specifically, the Agencies stated that they "have declined to elaborate on the requirements for obtaining consent or the consumer safeguards that should be in place when a consumer consents. *The Agencies believe that the resolution of this issue is appropriately left to the particular circumstances of a given transaction.* The Agencies

note that any financial institution that obtains the consent of a consumer to disclose nonpublic personal information should take steps to ensure that the limits of the consent are well understood by both the financial institution and the consumer." (Emphasis added.) Therefore, it would appear that a company could meet the standard established under § ___.22(b)(4) for obtaining consent while falling short of the example provided under § ___.22(b)(5). We urge the Agencies to delete the reference to an "affirmative" opt in order to eliminate this ambiguity and to make the Proposal more consistent with the Agencies' approach under the GLBA Rule.

Disclosure of How Long the Consumer Has to Opt Out

The Agencies note that the Proposal does not require institutions to disclose in their opt-out notices how long a consumer has to respond to the opt-out notice before Eligibility Information can be used by the Receiving Affiliate to make a solicitation. The Coalition applauds the Agencies for adopting this approach in the Proposal. We agree for several reasons that such a disclosure should be required in the Final Rule. First, Congress specified what should be included in the notice provided to consumers pursuant to Section 624, and Congress did not specify that the notice should include such information. Second, as a general matter, we believe that consumers who are interested in opting out will do so shortly after receiving the notice, regardless of whether the "waiting period" is disclosed. Third, Congress intended for the notice to be one that could be "consolidated" in the notice required by the GLBA Rule. We believe it would be awkward to require a company to disclose how long a consumer has to opt out under one provision in the notice, but not another provision in the notice, especially if the time periods could vary. Finally, the Agencies have indicated that they do not seek to set a mandatory waiting period in all cases. Therefore, it would appear that the Agencies expect that the waiting period could vary, at least depending on the method the notice was delivered. We believe that companies will want to draft and print *one* notice for purposes of Section 624. However, if the company must disclose the "waiting period" to the consumer, the notice that must be given to the consumer may vary depending on the product or the method by which the notice was provided. We believe this causes an unnecessary compliance burden that does not provide benefits to the consumer.

Reasonable and Simple Methods of Opting Out (§ .23)

Congress required that any opportunity provided to the consumer to opt out be "simple." The Proposal has implemented this requirement by requiring the opt-out method to be "reasonable and simple." The Proposal then states that a company provides a "reasonable and simple method" to opt out if it does one of four things. The Proposal also provides that a company does not provide a "reasonable and simple method" if it does one of three things.

The Agencies were directed by Congress to provide "specific guidance regarding how to" provide a simple method of opting out. In so doing, we urge the

Agencies to clarify that the Final Rule is providing *examples* of compliance. As drafted, the plain language of the Proposal could be read to mean that the four methods listed for complying with the requirement are exclusive. We do not believe this was the Agencies' intent. Furthermore, we strongly urge the Agencies to use the same examples for purposes of the Final Rule as are provided in the GLBA Rule. It does not make sense that Congress would intend to allow coordinated and consolidated notices with respect to the Final Rule and the GLBA Rule, but require different methods of opting out. For example, the Agencies should delete the requirement to provide a self-addressed envelope under the Final Rule, since there is no similar requirement under the GLBA Rule. We also strongly urge the Agencies to delete the provision that would require an electronic opt-out mechanism for consumers who receive notices electronically. We are not aware of any justification for such a requirement (would consumers who receive the notices in paper form be permitted to opt out only using paper and not a telephone?), nor is the limitation present in the GLBA. We also do not believe that Congress intended to force financial institutions who provide their GLBA notices electronically to develop electronic opt-out mechanisms in order to coordinate their FCRA and GLBA notices.

The Coalition also requests that the Agencies clarify that if a reasonable and simple method of opting out is designated, that a company is not required to honor opt out requests that are provided through other mechanisms. For example, the GLBA Rule specifically states that a financial institution "may require each consumer to opt out through a specific means, as long as the means is reasonable for that consumer." For the reasons why the Agencies adopted this provision in the GLBA Rule, we believe a similar provision is appropriate for the Final Rule.

Delivery of Opt-Out Notices (§ .24)

The Proposal would require that the notice be provided "so that each consumer can reasonably be expected to receive actual notice." This is a standard that is also imposed under the GLBA Rule. We believe the Agencies have appropriately recognized that a stricter standard, such as requiring actual notice, would not be possible to achieve, and therefore we generally urge the Agencies to retain the proposed standard.

Duration and Effect of the Opt Out (§ .25)

In General

Section 624 requires that the consumer's opt out must last for at least five years "beginning on the date on which the [Receiving Affiliate] receives the election of the consumer," unless the consumer revokes the opt out. Therefore, Congress established that an opt out would last for five years, although the consumer could revoke the opt out earlier and companies could provide for a longer duration.

Opt-Out Period

The Proposal indicates that an opt out must be effective for a period of at least five years "beginning as soon as reasonably practicable after the consumer's opt-out election is received." It would appear that the Proposal creates some ambiguity with respect to when the opt out period actually begins. Congress determined that the opt out period would begin "on the date on which" the opt out is received. The Proposal, however, refers to a period "beginning as soon as reasonably practicable" after the opt out is received. The Coalition requests that the Agencies amend the Proposal to clarify that the opt-out period in fact begins on the date on which the opt out is received.

The Proposal does not refer to the fact that a consumer can revoke his or her opt out prior to the expiration of the opt-out period. In fact, the Supplementary Information states that "[n]o opt-out period...may be less than 5 years," which appears to suggest that the consumer could not revoke the opt out during the five years after it has been provided. We believe that Congress explicitly provided that the consumer could revoke the opt out at any time, and we urge the Agencies to revise the Proposal accordingly.

The Coalition is also concerned with the Agencies' interpretation of the statute in the context of relationships that terminate. The Proposal states that if the consumer's relationship terminates with the Disclosing Affiliate while the consumer's opt out is in force, the opt out will continue to apply indefinitely unless revoked by the consumer. The Coalition does not believe that such an approach is consistent with the statute, nor is it appropriate. In this regard, Congress provided that a consumer's opt out be honored for "at least 5 years." We are unaware of any authority for the Agencies to extend, by regulation, the duration of the opt-out period so long as it lasts for "at least 5 years." We also do not believe it is necessary to make the opt-out period permanent after the Disclosing Affiliate no longer has a relationship with the consumer. In particular, the statute provides sufficient assurances that the consumer must receive another notice and opportunity to opt out if the Receiving Affiliate wishes to use Eligibility Information to make a solicitation once the opt out expires.

Effect of Opt Out

The Agencies explain in the Supplementary Information that the opt-out is tied to the consumer, not to the information. Thus, if a consumer initially elects to opt out, but does not extend the opt out upon expiration of the opt out period, a receiving affiliate may use all eligibility information it has received about the consumer from its affiliate, including eligibility information that it received during the opt-out period. However, if the consumer subsequently opts out again some time after the initial opt out period has lapsed, a receiving affiliate may not use any eligibility information about the consumer it has received from an affiliate on or after the

mandatory compliance date for the [Final Rule], including information it received during the period in which no opt out election was in effect.

With the exception of the applicability of the non-retroactivity provision in relation to the mandatory compliance date discussed above, we agree with the general concept espoused by the Agencies with one important revision. The Agencies are correct in explaining that the opt out is not tied to the information. However, we do not agree that the opt out should be tied broadly to the consumer. Rather, it would be more appropriate to allow companies to implement a consumer's opt-out directions on an account-by-account basis. In this circumstance the consumer's opt out would be tied to a particular *account*. This approach is consistent with the approach taken by the Agencies under the GLBA Rule. We also believe it is consistent with the statutory language that companies be permitted to provide options to the consumer with respect to "the types of...information covered" (*e.g.*, information relating to specific accounts) by the consumer's opt out. Indeed, it would be difficult if not impossible for many companies to implement an opt out that follows the consumer when the consumer may have a variety of relationships with multiple companies in a single corporate family.

Time to Implement the Opt Out

The Coalition also asks the Agencies to clarify the timeframe in which a consumer's opt out must be implemented. For example, under the GLBA Rule, the Agencies require a financial institution to "comply with a consumer's opt-out direction as soon as reasonably practicable after [the financial institution] receive[s] it." We believe that this is an appropriate standard, as to require an opt out to be implemented earlier than "reasonably practicable" would appear to be, by definition, unreasonable. This clarification would apply with respect to the consumer's initial opt out, as well as any extensions to the initial opt out. For the same reasons the Agencies included such a clarification in the GLBA Rule, we ask that the same clarification be provided in the Final Rule.

Extension of the Opt Out (§ .26)

As discussed above, the FCRA provides that if a consumer has opted out, and the opt out is no longer effective, a Receiving Affiliate cannot use Eligibility Information in certain circumstances to make a solicitation to the consumer "unless the consumer receives a notice and an opportunity to extend the opt-out...*pursuant to the procedures described in paragraph (1)*." (Emphasis added.) The "procedures described in paragraph (1)" are those that describe providing the notice and opportunity to opt out to the consumer. Therefore, it would appear that Congress intended for the notice and opt-out requirement to be the same, regardless of whether the notice is the first one received by the consumer or one received as a result of the consumer's opt-out election expiring.

The Proposal, on the other hand, contemplates a different notice requirement that deviates from the "procedures described in paragraph (1)" of Section 624(a) of the FCRA. In particular, the Proposal would require that an "extension notice" be provided to the consumer. Unlike the notice requirement described in Section 624(a)(1), which requires only that the consumer be notified of the sharing of Eligibility Information among consumers and that the consumer be given the opportunity to opt out, the Proposal would require that an "extension notice" include notifying the consumer that the consumer's opt-out election has expired or is about to expire. We urge the Agencies to refine the Proposal with respect to how notice is to be provided to consumers *in all instances* to make it more consistent with the requirements described by Congress in Section 624(a)(1).

Consolidated and Equivalent Notices (§ .27)

The Proposal states that a notice required by the Final Rule may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law, including notices provided pursuant to the GLBA Rule. The Proposal also provides that a notice or other disclosure that is equivalent to the notice required by the Final Rule, and that is provided to a consumer with disclosures required by any other provision of law, satisfies the Final Rule. These provisions are consistent with the statute, and we urge that they be retained in the Final Rule.

Effective Date

The FCRA requires that the Final Rule be issued by September 4, 2004 and that it become effective no later than six months after it is issued. The Agencies request comment on "what the mandatory compliance date should be and whether it should be different form the effective date of the" Final Rule. We believe that companies will need more than six months to review the Final Rule, determine how it will affect their business model, implement the necessary systems changes, and provide notices to consumers (as needed). Therefore, although the Final Rule may become "effective" six months after it is issued, we ask that compliance not be required for at least an additional six months, and longer if necessary to incorporate the affiliate marketing notice in the next GLBA notice provided after that time. We believe such an approach will provide a more appropriate time period for companies to comply with the Final Rule. We also believe that Congress recognized that an effective date is not necessarily the same as a mandatory compliance date. In this regard, it is not uncommon for banking regulations to have effective dates and mandatory compliance dates that differ. Congress enacted the FACT Act will full knowledge of this practice. Furthermore, the statute explicitly recognizes that the effective date may not necessarily be the date on which compliance is required (compare Section 624(a)(5) of the FCRA to Section 214(b)(4)(B) of the FACT Act).

Thank you again for allowing the Coalition to comment on this issue. Please do not hesitate to contact me at 202 464 8815 if the Coalition can be of further assistance.

Sincerely,

Jeffrey A. Tassey
Executive Director