

# Interagency Examination Procedures for the Affiliate Marketing Regulation

## Module 2: Obtaining Information and Sharing Among Affiliates

### Section 624 Affiliate Marketing Opt Out

Section 624 gives a consumer the right to restrict an entity, with which it does not have a pre-existing business relationship, from using certain information obtained from an affiliate to make solicitations to that consumer. This provision is distinct from Section 603(d)(2)(A)(iii) which gives consumer the right to restrict the sharing of certain consumer information amongst affiliates.<sup>1</sup>

Under Section 624, an entity may not use information received from an affiliate to market its products or services to a consumer, unless the consumer is given notice and a reasonable opportunity and a reasonable and simple method to opt out of the making of such solicitations. The affiliate marketing opt-out applies to both transaction or experience information and “other” information, such as information from credit reports and credit applications. On November 7, 2007, the federal financial institution regulators published final regulations in the Federal Register to implement this section (72 FR 62910).<sup>2</sup>

Exceptions to the notice and opt out requirements apply when an entity uses eligibility information in certain ways, as described later in these procedures.

#### Key Definitions (12 CFR 222.20).<sup>3</sup>

1. *Eligibility information (12 CFR 222.20(b)(3))* includes not only transaction and experience information, but also the type of information found in consumer reports, such as information from third party sources and credit scores. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.<sup>4</sup>

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<sup>1</sup> See Module 2, Section 603(d) Consumer Report and Information Sharing, for provisions pertaining to the sharing of consumer information. Under section 603(d)(2)(A)(iii) of the FCRA, entities are responsible for complying with the affiliate *sharing* notice and opt-out requirement, where applicable. Thus, under the FCRA, certain consumer information will be subject to two opt-outs, a sharing opt-out (section 603(d)) and a marketing use opt-out (section 624). These two opt-outs may be consolidated.

<sup>2</sup> See 12 CFR 222.20(a) for the scope of entities covered by Subpart C of 12 CFR 222.

<sup>3</sup> See 12 CFR 222.20 for other definitions.

<sup>4</sup> Specifically, “eligibility information” is defined in the affiliate marketing regulation 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 [Fair Credit Reporting] Act did not apply.”

2. *Pre-existing business relationship (12 CFR 222.20(b)(4))*<sup>5</sup> means a relationship between a person, such as a financial institution (or a person’s licensed agent), and a consumer based on:
  - a. A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by the affiliate marketing regulation;
  - b. The purchase, rental, or lease by the consumer of the person’s goods or services, or a financial transaction (including holding an active account or a policy in force, or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by the affiliate marketing regulation; or
  - c. An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by the affiliate marketing regulation.
  
3. *Solicitation (12 CFR 222.20(b)(5))* means the marketing of a product or service initiated by a person, such as a financial institution, to a particular consumer that is:
  - a. Based on eligibility information communicated to that person by its affiliate; and
  - b. Intended to encourage the consumer to purchase or obtain such product or service.

Examples of a solicitation include a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a particular consumer that is based on eligibility information received from an affiliate. A solicitation does not include marketing communications that are directed at the general public (e.g., television, general circulation magazine, and billboard advertisements).

Initial Notice and Opt-out Requirement (12 CFR 222.21(a), 222.24, and 222.25). A financial institution and its subsidiaries (“financial institution”) generally may not use eligibility information about a consumer that it receives from an affiliate to make a solicitation for marketing purposes to the consumer, unless:

1. It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that the financial institution may use eligibility information about that consumer that it received from an affiliate to make solicitations for marketing purposes to the consumer;
2. The consumer is provided a reasonable opportunity and a reasonable and simple method to “opt out” (that is, the consumer prohibits the financial institution from

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<sup>5</sup> See 12 CFR 222.20(b)(4)(ii) and (iii) for examples of pre-existing business relationships and situations where no pre-existing business relationship exists.

using eligibility information to make solicitations for marketing purposes to the consumer);<sup>6</sup> and

3. The consumer has not opted out.

For example, a consumer has a homeowner's insurance policy with an insurance company. The insurance company shares eligibility information about the consumer with its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its home equity loan products. The depository institution does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The depository institution may not use eligibility information it received from its insurance affiliate to make solicitations to the consumer about its home equity loan products unless the insurance company gave the consumer a notice and opportunity to opt out and the consumer does not opt out.

Making Solicitations (12 CFR 222.21(b)).<sup>7</sup> A financial institution (or a service provider acting on behalf of the financial institution) makes a solicitation for marketing purposes if:

1. The financial institution receives eligibility information from an affiliate, including when the affiliate places that information into a common database that the financial institution may access;
2. The financial institution uses that eligibility information to do one or more of the following:
  - a. Identify the consumer or type of consumer to receive a solicitation;
  - b. Establish criteria used to select the consumer to receive a solicitation; or
  - c. Decide which of the financial institution's products or services to market to the consumer or tailor the financial institution's solicitation to that consumer; and
3. As a result of the financial institution's use of the eligibility information, the consumer is provided a solicitation.

A financial institution does *not* make a solicitation for marketing purposes (and therefore the affiliate marketing regulation, with its notice and opt-out requirements, does not apply) in the situations listed below, commonly referred to as "constructive sharing." Constructive sharing occurs when a financial institution provides criteria to an affiliate to use in marketing the financial institution's product and the affiliate uses the criteria to send marketing materials to the affiliate's own customers that meet the criteria. In this situation, the financial institution is not *using* shared eligibility information to make solicitations.

1. The financial institution provides criteria for consumers to whom it would like its affiliate to market the financial institution's products. Then, based on this criteria,

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<sup>6</sup> See 12 CFR 222.24 and 222.25 for examples of "a reasonable opportunity to opt out" and "reasonable and simple methods for opting out."

<sup>7</sup> See 12 CFR 222.21(b)(6) for examples of making solicitations.

the affiliate uses eligibility information that the affiliate obtained in connection with its own pre-existing business relationship with the consumer to market the financial institution's products or services (or directs its service provider to use the eligibility information in the same manner and the financial institution does not communicate with the service provider regarding that use).

2. A service provider, applying the financial institution's criteria, uses information from an affiliate, such as that in a shared database, to market the financial institution's products or services to the consumer, so long as it meets certain requirements, including:
  - a. The affiliate controls access to and use of its eligibility information by the service provider under a written agreement between the affiliate and the service provider;
  - b. The affiliate establishes, in writing, specific terms and conditions under which the service provider may access and use the affiliate's eligibility information to market the financial institution's products and services (or those of affiliates generally) to the consumer;
  - c. The affiliate requires the service provider, under a written agreement, to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the affiliate relating to the marketing of the financial institution's products or services;
  - d. The affiliate is identified on or with the marketing materials provided to the consumer; and
  - e. The financial institution does not directly use its affiliate's eligibility information in the manner described above under "Making Solicitations (12 CFR 222.21(b)),” item 2.

Exceptions to Initial Notice and Opt-out Requirements (12 CFR 222.21(c)).<sup>8</sup> The initial notice and opt-out requirements do not apply to a financial institution if it uses eligibility information that it receives from an affiliate:

1. To make a solicitation for marketing purposes to a consumer with whom the financial institution has a pre-existing business relationship;
2. To facilitate communications to an individual for whose benefit the financial institution provides employee benefit or other services pursuant to a contract with an employer;
3. To perform services on behalf of an affiliate (but this would not allow solicitation where the consumer has opted out);
4. In response to a communication about the financial institution's products or services initiated by the consumer;
5. In response to a consumer's authorization or request to receive solicitations; or
6. If the financial institution's compliance with the affiliate marketing regulation would prevent it from complying with State insurance laws pertaining to unfair

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<sup>8</sup> See 12 CFR 222.21(d) for examples of exceptions to the initial notice and opt-out requirement.

discrimination in any state in which the financial institution is lawfully doing business.

Contents of Opt-out Notice (12 CFR 222.23).

A financial institution must provide to the consumer a reasonable and simple method for the consumer to opt out. The opt-out notice must be clear, conspicuous, and concise, and must accurately disclose specific information outlined in 12 CFR 222.23(a), including that the consumer may elect to limit the use of eligibility information to make solicitations to the consumer. See Appendix C to the regulation for the model notices contained in the affiliate marketing regulation.

*Alternative contents.* An affiliate that provides a consumer a broader right to opt out than that required by the affiliate marketing regulation may satisfy the regulatory requirements by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights.

*Coordinated, consolidated, and equivalent notices.* Opt-out and renewal notices may be coordinated and consolidated with any other notice or disclosure required under any other provision of law, such as the Gramm-Leach-Bliley Act (GLBA), 15 USC 6801 et seq. Renewal notices, which have additional required content (12 CFR 222.27), may be consolidated with the annual GLBA privacy notices.

Delivery of the Opt-out Notice (12 CFR 222.21(a)(3) and 222.26).<sup>9</sup> An affiliate that has or previously had a pre-existing business relationship with the consumer must provide the notice either individually or as part of a joint notice from two or more members of an affiliated group of companies. The opt-out notice must be provided so that each consumer can reasonably be expected to receive actual notice. A consumer may not reasonably be expected to receive actual notice if, for example, the affiliate providing the notice sends the notice via e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice.<sup>10</sup>

Scope of Opt-out (12 CFR 222.22(a) and 222.23(a)(2)).<sup>11</sup> As a general rule, the consumer's election to opt out prohibits any affiliate covered by the opt-out notice from using eligibility information received from another affiliate, described in the notice, to make solicitations to the consumer. If two or more consumers jointly obtain a product or service, any of the joint consumers may exercise the right to opt out. It is impermissible to require all joint consumers to opt out before implementing any opt-out direction.

*Menu of alternatives.* A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by:

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<sup>9</sup> See 12 CFR 222.26(b) and (c) for examples of "reasonable expectation of actual notice" and "no reasonable expectation of actual notice."

<sup>10</sup> For opt-out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions of 12 CFR 222.24(b)(2) and 222.24(b)(3) or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq.

<sup>11</sup> See 12 CFR 222.22(a) for examples of the scope of the opt-out, including examples of continuing relationships.

1. electing to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice,
2. electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information, or
3. electing to prohibit solicitations by certain methods of delivery but not other methods of delivery.

One of the alternatives, however, must allow the consumer to prohibit all solicitations from all of the affiliates that are covered by the notice.

*Continuing relationship.* If the consumer establishes a continuing relationship with a financial institution or its affiliate, an opt-out notice may apply to eligibility information obtained from one or more continuing relationships (such as a deposit account, a mortgage loan, or a credit card), if the notice adequately describes the continuing relationships covered. The opt-out notice can also apply to future continuing relationships if the notice adequately describes the continuing future relationships that would be covered.

*Special rule for a notice following termination of all continuing relationships.* After all continuing relationships with a financial institution or its affiliate(s) are terminated, a consumer must be given a new opt-out notice if the consumer later establishes another continuing relationship with the financial institution or its affiliate(s) and the consumer's eligibility information is to be used to make a solicitation. The consumer's decision not to opt out after receiving the new opt-out notice would not override a prior opt-out election that applies to eligibility information obtained in connection with a terminated relationship.

*No continuing relationship (isolated transaction).* If the consumer does not establish a continuing relationship with a financial institution or its affiliate, but the financial institution or its affiliate obtains eligibility information about the consumer in connection with a transaction with the consumer (such as an ATM cash withdrawal, purchase of traveler's checks, or a credit application that is denied), an opt-out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

Time, Duration, and Renewal of Opt-out (12 CFR 222.22(b) and (c) and 222.27). A consumer may opt out at any time. The opt-out must be effective for a period of at least five years beginning when the consumer's opt-out election is received and implemented, unless the consumer later revokes the opt-out in writing or, if the consumer agrees, electronically. An opt-out period may be set at more than five years, including an opt-out that does not expire unless the consumer revokes it.

*Renewal after opt-out period expires.* After the opt-out period expires, a financial institution may not make solicitations based on eligibility information it receives from an affiliate to a consumer who previously opted out, unless:

1. The consumer receives a renewal notice and opportunity to opt out, and the consumer does not renew the opt-out; or
2. An exception to the notice and opt-out requirements applies.<sup>12</sup>

*Contents of renewal notice.* The renewal notice must be clear, conspicuous, and concise, and must accurately disclose most of the elements of the original opt-out notice, as well as the facts that

1. the consumer previously elected to limit the use of certain information to make solicitations to the consumer;
2. the consumer's election has expired or is about to expire;
3. the consumer may elect to renew the consumer's previous election; and
4. if applicable, that the consumer's election to renew will apply for the specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires.

See 12 CFR 222.27(b) for all the content requirements of renewal notice.

*Renewal period.* Each opt-out renewal must be effective for a period of at least five years.

*Affiliate who may provide the notice.* The renewal notice must be provided by the affiliate that provided the previous opt-out notice, or its successor; or as part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt-out notice.

*Timing of the renewal notice.* A renewal notice may be provided to the consumer either a reasonable period of time before the expiration of the opt-out period<sup>13</sup> or any time after the expiration of the opt-out period but before solicitations that would have been prohibited by the expired opt-out are made to the consumer.

Prospective application (12 CFR 222.28(c)). A financial institution may use eligibility information received from an affiliate to make solicitations to a consumer if it received such information prior to October 1, 2008, the mandatory compliance date of the affiliate marketing regulation. An institution is deemed to have received eligibility information when such information is placed into a common database and is accessible by the institution prior to that date.

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<sup>12</sup> See 12 CFR 222.21(c) for exceptions.

<sup>13</sup> An opt-out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt-out period, even if the consumer does not renew the opt-out. If a financial institution provides an annual privacy notice under the Gramm-Leach-Bliley Act, providing a renewal notice with the last annual privacy notice provided to the consumer before expiration of the opt-out period is a reasonable period of time before expiration of the opt-out in all cases. 12 CFR 222.27(d)

Model forms for opt-out notices (12 CFR 222, Appendix C). Appendix C of the affiliate marketing regulation contains model forms that may be used to comply with the requirement for clear, conspicuous, and concise notices. The five model forms are:

- C-1 Model Form for Initial Opt-out Notice (Single-Affiliate Notice)
- C-2 Model Form for Initial Opt-out Notice (Joint Notice)
- C-3 Model Form for Renewal Notice (Single-Affiliate Notice)
- C-4 Model Form for Renewal Notice (Joint Notice)
- C-5 Model Form for Voluntary “No Marketing” Notice

Use of the model forms is not required and a financial institution may make certain changes to the language or format of the model forms without losing the protection from liability afforded by use of the model forms. These changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Institutions making such extensive revisions will lose the safe harbor that Appendix C provides. Examples of acceptable changes are provided in Appendix C to the regulation.

## **Section 624 Affiliate Marketing Opt Out**

### **Examination Procedures**

1. Determine whether the financial institution receives consumer eligibility information from an affiliate. Stop here if it does not because Subpart C of 12 CFR 222 does not apply.
2. Determine whether the financial institution uses consumer eligibility information received from an affiliate to make a solicitation for marketing purposes that is subject to the notice and opt-out requirements. If it does not, stop here.
3. Evaluate the institution's policies, procedures, practices and internal controls to ensure that, where applicable, the consumer is provided with an appropriate notice, a reasonable opportunity, and a reasonable and simple method to opt out of the institution's using eligibility information to make solicitations for marketing purposes to the consumer, and that the institution is honoring the consumer's opt-outs.
4. If compliance risk management weaknesses or other risks requiring further investigation are noted, obtain and review a sample of notices to ensure technical compliance and a sample of opt-out requests from consumers to determine if the institution is honoring the opt-out requests.
  - a. Determine whether the opt-out notices are clear, conspicuous, and concise and contain the required information, including the name of the affiliate(s) providing the notice, a general description of the types of eligibility information that may be used to make solicitations to the consumer, and the duration of the opt out. (12 CFR 222.23(a))
  - b. Review opt-out notices that are coordinated and consolidated with any other notice or disclosure that is required under other provisions of law for compliance with the affiliate marketing regulation. (12 CFR 222.23(b))
  - c. Determine whether the opt-out notices and renewal notices provide the consumer a reasonable opportunity to opt out and a reasonable and simple method to opt out. (12 CFR 222.24 and .25)
  - d. Determine whether the opt-out notice and renewal notice are provided (by mail, delivery or electronically) so that a consumer can reasonably be expected to receive that actual notice. (12 CFR 222.26)
  - e. Determine whether, after an opt-out period expires, a financial institution provides a consumer a renewal notice prior to making solicitations based on eligibility information received from an affiliate. (12 CFR 222.27)