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**Hot Topics 4: FCRA/FACTA and Other Hot Topics**

**Affiliate Marketing**

**Tuesday, September 16**  
**11:15 am to 12:30 pm**

**I. Introduction**

This outline provides a brief overview of federal privacy laws and the general information sharing provisions of the federal Fair Credit Reporting Act (FCRA), and a more detailed summary of the affiliate marketing rule under the FCRA.

**II. Background and Overview of Federal Privacy Laws**

**A. *The Gramm-Leach-Bliley Act.***

1. General. As a result of the federal Financial Modernization Act of 1999, also known as the "Gramm-Leach-Bliley Act" or "the GLBA", banks, insurance companies, and securities brokerage firms were given the ability to merge and further affiliate with one another.

Due to concern that conglomerate financial institutions would have access to and share consumers' financial information, Title V (15 U.S.C. § 6801 et seq.) was included in the GLBA, and addressed the collection, use, and sharing of consumer nonpublic personal information among non-affiliated third parties.

While the privacy rules under the GLBA apply to the sharing of consumer nonpublic personal information with non-affiliated third parties, an overview of the GLBA privacy rules is helpful to compare with the consumer information

sharing rules under the FCRA, in part because opt-out notices under the FCRA provisions may be combined with privacy notices required under the GLBA.

2. *Privacy Elements.* There are three principal elements to the privacy requirements under Title V of the Gramm-Leach-Bliley Act: (a) the financial privacy provisions, (b) the safeguards provisions, and (c) the pre-texting provisions. The Federal Trade Commission (FTC) and the federal banking agencies adopted substantially similar rules to implement the financial privacy provisions of the GLBA. For ease of reference the rules are referred to in this outline as the “Financial Privacy Rule”.
3. *Financial Privacy Rule.*
  - a. The Financial Privacy Rule governs the disclosure by financial institutions to non-affiliated third parties of the nonpublic personal information of consumers and customers.
  - b. For purposes of the Financial Privacy Rule, “financial institutions” include not only banks, but also firms providing many other types of financial products and services to consumers. The term “financial institution” means any institution that is significantly engaged in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956, and certain related Federal Reserve Board rules.
    - i. Among these activities are lending, brokering, or servicing any type of consumer loan, transferring or safeguarding money, preparing individual tax returns, providing financial advice or credit counseling, providing residential real estate settlement services, collecting consumer debts, and an array of other activities. Many so-called “non-traditional financial institutions” (or non-banks) that engage in such activities are regulated by the FTC for purposes of the Financial Privacy Rule.
    - ii. Activities that are not financial institution activities include real estate brokerage and home construction. Entities that engage in such activities (and do not engage in financial institution activities), are not subject to the Financial Privacy Rule but may be subject to state privacy laws.
  - c. A financial institution may not disclose nonpublic personal information to a non-affiliated third party unless:
    - i. The entity clearly and conspicuously discloses to the consumer in writing or in electronic form that such information may be disclosed to a non-affiliated third party (such disclosure is referred to as a “privacy notice”);

- ii. The consumer is given a notice (referred to as an “opt-out notice”) explaining how the consumer can direct that the such information not be disclosed to any non-affiliated third party (i.e., to opt out of the disclosure);
  - iii. The consumer is given a reasonable opportunity, before the information is disclosed, to opt out of the disclosure; and
  - iv. The consumer does not opt out.
- g. There are exceptions to the Financial Privacy Rule’s restrictions on sharing consumer nonpublic personal information with non-affiliates. For example, a financial institution may provide a consumer’s nonpublic personal information to a non-affiliated third party if:
- i. The consumer consents to the disclosure.
  - ii. Disclosure of the information is necessary to effect, administer or enforce a transaction that the consumer requests or authorizes, or in connection with (A) servicing or processing a financial product or service that the consumer requests or authorizes, or (B) maintaining or servicing the consumer’s account with the financial institution.
  - iii. Disclosure of the information is made to a party that performs services for the financial institution, subject to the following conditions:
    - A. The financial institution still must provide a privacy notice; and
    - B. The financial institution must enter into a contractual agreement with the third party service provider that prohibits the third party from disclosing or using the information other than to carry out the purposes for which the information is disclosed.

3. *Safeguards Provisions.*

- a. The safeguards provisions of the GLBA require all financial institutions to develop, implement, and maintain reasonable administrative, technical and physical safeguards to protect the security, confidentiality and integrity of customer information.

- b. The safeguards provisions apply not only to financial institutions that maintain information from their own customers, but also to financial institutions that receive customer information from other financial institutions.

4. *Pretexting.*

- a. Pretexting is the act of obtaining customer nonpublic personal information under false pretenses. The GLBA has provisions designed to protect customers from pretexting.

B. *FCRA and the FACT Act.*

1. *Background.*

- a. The FCRA became effective on April 25, 1971. Major amendments were made to the FCRA in 1996, and again with the enactment of the FACT Act in 2003.
- b. The FCRA was enacted by Congress to:
  - i. Ensure that consumer reporting agencies provide information that is fair and equitable to consumers, and fair and accurate for report users;
  - ii. Prohibit consumer reporting agencies from taking actions that are unfair and that adversely affect a consumer's credit and ability to obtain credit; and
  - iii. Restrict the availability and use of consumer reports.

2. *Scope.* The FCRA applies to consumer report information, and consumers for purposes of the FCRA are individuals and not entities. While the FCRA imposes significant requirements on consumer reporting agencies, the FCRA also applies to users of consumer reports and parties that furnish information to consumer reporting agencies. Parties such as mortgage lenders and brokers generally are not considered to be consumer reporting agencies; however, their information sharing practices could result in them being deemed a consumer reporting agency, even if they do not intend this result.

3. *Approach.* Rather than restricting the sharing of consumer report information in the manner of the Financial Privacy Rule under the GLBA, the FCRA creates a substantial disincentive to sharing such information by providing that if a party shares consumer report information outside of certain exceptions, then the party is deemed to be a consumer reporting agency and subject to the significant, substantive requirements of the FCRA applicable to those entities.

4. *Exceptions.*

- a. The FCRA excludes from the definition of consumer report, a report that contains information solely as to the transactions or experiences between a consumer and the party making the report. Thus, for example, a lender may disclose information regarding its transactions or experiences with a consumer to an affiliate or nonaffiliate without the risk of being deemed a consumer reporting agency.
- b. In 1996, the FCRA was amended to also exclude from the definition of consumer report:
  - i. The communication of a party's transaction or experience information with a consumer among affiliates of the party.
  - ii. The communication by a party of its non transaction or experience information (that otherwise would be consumer report information) to the party's affiliates if:
    - A. It is clearly and conspicuously disclosed to the consumer that such information regarding the consumer may be communicated among the party's affiliates;
    - B. The consumer is given the opportunity, before the information is initially communicated, to direct that such information not be shared with the party's affiliates (i.e., to opt out of the disclosure); and
    - C. The consumer does not opt out.

5. *Affiliate Marketing.*

- a. The Fair and Accurate Credit Transactions Act of 2003 (FACT Act) further amended the FCRA to add provisions regarding the use of a party's consumer report information for purposes of solicitations for marketing purposes by the party's affiliates.
  - i. In the Fall of 2007, the FTC and the federal banking agencies adopted rules to implement the new FCRA provisions.
  - ii. The affiliate marketing rules became effective on January 1, 2008, with a mandatory compliance date of October 1, 2008.

- iii. The new affiliate marketing requirements do not supercede or replace the existing general information sharing provisions of the FCRA. Compliance with both the general information sharing provisions and affiliate marketing requirements is necessary.

### **III. FCRA Covered Information and General Information Sharing**

#### **A. *Consumer Report Information.***

1. The FCRA governs consumer report information, and consumer report information is a broadly defined term that includes more than simply information in a credit report on a consumer.
2. A “consumer report” is defined to include information bearing on one or more of seven factors regarding a consumer that is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for (a) credit or insurance to be used primarily for personal, family or household purposes, (b) employment purposes, (c) any other purpose authorized under the FCRA as a permissible purpose for a consumer reporting agency to furnish a consumer report.
3. The seven factors are a consumer’s:
  - a. Credit worthiness.
  - b. Credit standing.
  - c. Credit capacity.
  - d. Character.
  - e. General reputation.
  - f. Personal characteristics.
  - g. Mode of living.
4. As noted above, the FCRA excludes from the definition of “consumer report information,” information relating solely to a party’s transactions or experiences with the consumer. Neither the FCRA nor any rule defines what constitutes transaction or experience information excluded from the definition, and so-called “other information” that is covered by the definition.
  - a. In October 2000, the federal banking agencies proposed rules under the FCRA with respect to the exception noted above that permits an affiliate to share “other information” regarding a consumer with its affiliates if a notice and opt-out procedure are followed and the consumer does not opt out. Under the GLBA Financial Privacy Rule, if party relies on the FCRA notice and opt out procedure to share “other information” with affiliates, the privacy notice of the party must include information regarding the procedure. The agencies believed that issuing a rule regarding the FCRA

notice and opt out procedure would ease compliance and promote consistency with regard to the GLBA and FCRA requirements.

- b. The proposal addressed what the agencies considered to be “other information”. It appeared that the agencies’ view, reflected in the proposal, of what constitutes “other information” likely differed from, and was broader than, what the industry considered to be other information.
- c. The agencies withdrew the proposal in March of 2001, and have not proposed rules in this area since then.

B. *General Information Sharing Provisions.* As noted above, the FCRA allows:

1. The communication of a party’s transaction or experience information regarding a consumer to affiliates and non-affiliates.
2. The communication of a party’s transaction or experience information regarding a consumer among affiliates of the party.
3. The communication of so-called “other information” (i.e., non-transaction or experience information that otherwise would be consumer report information) by a party to the party’s affiliates if:
  - a. It is clearly and conspicuously disclosed to the consumer that such information regarding the consumer may be communicated among the party’s affiliates;
  - b. The consumer is given the opportunity, before the information is initially communicated, to direct that such information not be shared with the party’s affiliates (i.e., to opt out of the disclosure); and
  - c. The consumer does not opt out.

#### **IV. Affiliate Marketing Rule—Background and Comparison**

A. *General.*

1. As noted above, the FCRA was amended in 2003 to add provisions regarding the use of a party’s consumer report information for purposes of solicitations for marketing purposes by the party’s affiliates.
2. The FTC and federal banking agencies adopted affiliate marketing rules to implement the provisions last Fall. The rules were effective on January 1, 2008, and the mandatory compliance date is October 1, 2008.
  - a. FTC, 16 CFR Part 680.

- b. Comptroller of the Currency, 12 CFR Part 41.
  - c. Federal Reserve Board, 12 CFR Part 222.
  - d. FDIC, 12 CFR Part 334.
  - e. Office of Thrift Supervision, 12 CFR Part 571.
  - f. National Credit Union Administration, 12 CFR Part 717.
3. For ease of reference, the rules are referred to in this outline as the “Affiliate Marketing Rule”. Note that this summary is based on the FTC’s rule, which differs in certain technical respects from the rules of the banking agencies.

B. *Comparison With GLBA and FCRA General Information Sharing Provisions.*

1. The Financial Privacy Rule under the GLBA primarily addresses sharing of a consumer’s nonpublic personal information with non-affiliated third parties. Subject to exceptions, such information cannot be shared with non-affiliated third parties unless (a) a consumer is provided with a notice of the intent to share, a notice of the right to opt out of such sharing, and a reasonable opportunity to opt out, and (b) the consumer does not opt out.
2. The FCRA general information sharing provisions create exceptions under which a party may share information without being deemed a consumer reporting agency. Specifically:
  - a. A party can share its transaction or experience information regarding a consumer with affiliates and non-affiliates.
  - b. The party’s affiliates can share such transaction or experience information with each other.
  - c. A party can share with its affiliate “other information” (i.e., non transaction or experience information that would be consumer report information without the exception) if the notice an opt-out procedures summarized above are followed, and the consumer does not opt out.
3. In contrast, the Affiliate Marketing Rule governs the use, not the sharing, of consumer report information.
  - a. The Affiliate Marketing Rule applies to both a party’s transaction or experience information regarding a consumer, and “other information” regarding a consumer. For ease of reference, such information is termed “eligibility information” under the Affiliate Marketing Rule.
  - b. While an affiliate of a party is not restricted by the Affiliate Marketing Rule from receiving from the party eligibility information regarding a consumer, the affiliate may not use such eligibility information to make a solicitation for marketing purposes to the consumer, unless

- i. It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that the affiliate may use eligibility information about that consumer received from the party to make solicitations for marketing purposes to the consumer;
- ii. The consumer is provided a reasonable opportunity, and a reasonable and simple method, to “opt out,” or prohibit the affiliate from using eligibility information to make solicitations for marketing purposes to the consumer; and
- iii. The consumer does not opt out.

C. *Prospective Application.*

The Affiliate Marketing Rule does not apply to eligibility information that an affiliate receives from another affiliate before October 1, 2008 (which is the mandatory compliance date). For common database situations, a party is deemed to receive eligibility information when such information is placed into a common database and is accessible by the party.

V. **Affiliate Marketing Rule—Summary**

A. *Definitions.*

1. *Eligibility Information.* As noted above, the Affiliate Marketing Rule applies to “eligibility information,” which means any information the communication of which would be a “consumer report” if the statutory exclusions from the definition of “consumer report” in section 603(d)(2)(A) of the FCRA for “transaction or experience information” and for “other information” did not apply. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.
2. *Consumer.* A “consumer” is defined as an individual. The preamble to the rule notes that an individual acting through a legal representative qualifies as a consumer.
3. *Affiliate.* An “affiliate” is defined as any company that is related by common ownership or common corporate control with another company.
  - a. *Common Ownership or Corporate Control.* “Common ownership or common corporate control” means a relationship between two companies under which: (i) one company has, with respect to the other company: (A) ownership, control, or the power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, directly

or indirectly, or acting through one or more other persons; (B) control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or (C) the power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the FTC or applicable banking agency determines; or (2) any person has, with respect to both companies, a relationship as described in (A) through (C).

4. *Solicitation.* The Affiliate Marketing Rule applies to the use of an affiliate's eligibility information to make a solicitation for marketing purposes.

a. *Definition.* A party makes a solicitation for marketing purposes to a consumer if:

i. The party receives eligibility information from an affiliate;

ii. The party uses the eligibility information to:

A. Identify the consumer or type of consumer to receive a solicitation;

B. Establish the criteria used to select the consumer to receive a solicitation; or

C. Decide which of its products or services to market to the consumer or tailor its solicitation to that consumer; and

iii. As a result of the party's use of the eligibility information, the consumer is provided a solicitation about the party's products or services.

b. *Contrast Between Making and Sending Solicitations.* Making and sending solicitations are different activities and the focus of the Affiliate Marketing Rule is primarily on the making of solicitations. If one entity sends a solicitation on behalf of another entity, the entity on whose behalf the solicitation is sent will be deemed to be making the solicitation.

B. *Restriction.*

1. An affiliate of a party may not use eligibility information about a consumer that it receives from the party to make a solicitation for marketing purposes to the consumer, unless:

a. It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that the affiliate

may use eligibility information about that consumer received from the party to make solicitations for marketing purposes to the consumer;

- b. The consumer is provided a reasonable opportunity, and a reasonable and simple method, to “opt out,” or prohibit the affiliate from using eligibility information to make solicitations for marketing purposes to the consumer; and
- c. The consumer does not opt out

C. *Initial Opt-Out Notice.*

- 1. *Contents.* An initial opt-out notice must be clear, conspicuous, and concise, and must accurately disclose:
  - a. The name of the affiliate(s) providing the notice;
  - b. A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer;
  - c. A general description of the types of eligibility information that may be used to make solicitations to the consumer;
  - d. That the consumer may elect to limit the use of eligibility information to make solicitations to the consumer;
  - e. That the consumer’s election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires;
  - f. If the notice is provided to consumers who may have previously opted-out, such as if a notice is provided to consumers annually, that the consumer who has chosen to limit solicitations does not need to act again until the consumer receives a renewal notice; and
  - g. A reasonable and simple method for the consumer to opt out.
- 2. *Party Providing Notice.* The initial opt-out notice must be provided by:
  - a. *One-Party Notice.* An affiliate that has or previously had a pre-existing business relationship with the consumer; or
  - b. *Joint Notice.* As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on

the joint notice has or previously had a preexisting business relationship with the consumer:

- i. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as “ABC,” then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by “all of the ABC companies,” “the ABC banking, credit card, insurance, and securities companies,” or by listing the name of each affiliate providing the notice.
  - ii. If the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by “all of the ABC and XYZ companies” or by “the ABC banking and credit card companies and the XYZ insurance companies.”
3. *Two or More Consumers Involved.* If two or more consumers jointly obtain a product or service, a single opt-out notice may be provided to the joint consumers. Any of the joint consumers may exercise the right to opt out.
  - a. The opt-out notice must explain how an opt-out direction by a joint consumer will be treated. An opt-out direction by a joint consumer may be treated as applying to all of the joint consumers, or each joint consumer may be permitted to opt out separately.
  - b. If each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the consumers, and the joint consumers must be permitted to exercise their separate rights to opt out in a single response.
  - c. It is impermissible to require all joint consumers to opt out before implementing any opt-out direction.
4. *Coordinated and Consolidated With Other Notices.* The opt-out notice under the Affiliate Marketing Rule may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of the law by the party providing the notice, including without limitation a GLBA privacy notice or the affiliate sharing notice under the general FCRA information sharing provisions. (Unlike a GLBA privacy notice, an opt-out notice need not be sent annually.)
5. *Model Notices.* Model notices were developed for purposes of the Affiliate Marketing Rule, including a model initial opt-out notice provided by a single

party, and a model initial opt-out notice provided jointly by two or more affiliates. Use of a model notice is not required, but using a model notice complies with the requirement for a clear, conspicuous and concise notice.

D. *Delivery of Opt-Out Notices.*

1. *General.* The affiliate sharing opt-out notice may not be provided orally. The opt-out notice must be provided so that each consumer can reasonably be expected to receive actual notice. For opt-out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in the Affiliate Marketing Rule or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, (“E-SIGN” Act, 15 U.S.C. 7001 *et seq.*).
2. *Examples.* The following are examples of situations in which a consumer may reasonably be expected to receive actual notice:
  - a. *Hand-Delivery.* The affiliate hand-delivers a printed copy of the notice to the consumer.
  - b. *Mail.* The affiliate mails a printed copy of the notice to the last known mailing address of the consumer.
  - c. *Email.* The affiliate provides a notice by email to a consumer who has agreed to receive electronic disclosures by email from the affiliate.
  - d. *Web.* The affiliate posts a notice on the Internet Web site at which the consumer obtained a product or service electronically and requires the consumer to acknowledge receipt of the notice.

E. *Reasonable Opportunity to Opt Out*

1. *General.* The Affiliate Marketing Rule does not set forth specific requirements that must be met to provide the consumer with a reasonable opportunity to opt out. However, examples of what would constitute a reasonable opportunity in certain situations are provided.
2. *Examples.*
  - a. *Mail.* An opt-out notice is mailed to a consumer, and the consumer is given 30 days from the date the notice is mailed to elect to opt out by any reasonable means.

- b. *Electronic.*
    - i. *Web Posting.* An opt-out notice is provided electronically to the consumer, such as by posting the notice on an Internet Web site at which the consumer has obtained a product or service, and (A) the consumer acknowledges receipt of the electronic notice and (B) the consumer is given 30 days after the date of the acknowledgment to elect to opt out by any reasonable means.
    - ii. *Email.* An opt-out notice is provided to the consumer by email where the consumer has agreed to receive disclosure by email from the person sending the notice, and the consumer is given 30 days after the email is sent to elect to opt out by any reasonable means.
  - c. *Including in a GLBA Privacy Notice.* An opt-out notice is included in a GLBA privacy notice, and the consumer is allowed to exercise the opt out within a reasonable period of time and in the same manner as the opt out under that privacy notice.
  - d. *Electronic—At Time of Transaction.* An opt-out notice is provided electronically to the consumer, such as a transaction conducted on an Internet Web site. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, and there is a simple process that the consumer may use to opt out at that time by using the same mechanism through which the transaction is conducted.
  - e. *In Person—At Time of Transaction.* An opt-out notice is provided to the consumer in writing at the time of an in-person transaction. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, and is not permitted to complete the transaction without making a choice. There is a simple process that the consumer may use during the course of the in-person transaction to opt out, such as completing a form that requires consumers to write a “yes” or “no” to indicate their opt-out preference or that requires the consumer to check one of two blank check boxes, with one check box allowing consumers to indicate that they want to opt out and one check box allowing consumers to indicate that they do not want to opt out.
3. *Opt-Out Right Continuation.* A consumer may opt out at any time. Thus, if a consumer does not initially opt out, even if eligibility information is used to make solicitations for marketing purposes, a consumer can subsequently elect to opt out of such use of the information in the future.

F. *Reasonable and Simple Methods to Opt Out.*

1. *General.* As is the case with the need to provide a reasonable opportunity to opt out, the Affiliate Marketing Rule does not set forth specific requirements that must be met to provide the consumer with a reasonable and simple method to opt out. However, examples of what would constitute a reasonable and simple method to opt out are provided.
2. *Specific Means.* A consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for the consumer.
3. *Examples.* Reasonable and simple methods to opt out include:
  - a. Designating a check-off box in a prominent position on the opt-out form.
  - b. Including a reply form and a self-addressed envelope together with the opt-out notice.
  - c. Providing an electronic means to opt out, such as a form that can be electronically mailed or processed at an Internet Web site, if the consumer agrees to the electronic delivery of information.
  - d. Providing a toll-free telephone number that consumers may call to opt out.
  - e. Allowing consumers to exercise all of their opt-out rights described in a consolidated opt-out notice that include the privacy opt out under the GLBA, the affiliate sharing opt-out under the general FCRA information sharing provisions, and the affiliate marketing opt-out under the Affiliate Marketing Rule, by a single method, such as by calling a single toll-free telephone number.

G. *Scope of Opt-Out.*

1. *General.* Unless an exception applies or an alternative arrangement provided for in the Affiliate Marketing Rule is used, an election by a consumer to opt out prohibits any affiliate covered by the opt-out notice from using eligibility information received from another affiliate (as described in the notice) to make solicitations to the consumer.
2. *Continuing Relationship Options.* If a consumer establishes a continuing relationship with a party or the party's affiliate, an opt-out notice may apply to eligibility information obtained in connection with:
  - a. A single continuing relationship or multiple continuing relationships that the consumer establishes with the party or any affiliate(s) of the party,

including continuing relationships established subsequent to the delivery of the opt-out notice, so long as the notice adequately describes the continuing relationships covered by the opt-out; or

- b. Any other transaction between the consumer and the party or any affiliate(s) of the party as described in the notice.
3. *No Continuing Relationship.* If there is no continuing relationship between a consumer and a party or an affiliate of the party, and the party or the party's affiliate obtains eligibility information about the consumer in connection with a transaction with the consumer, such as an isolated transaction or a credit transaction that is denied, an opt-out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.
  4. *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:
    - a. 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;
    - b. Electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information; or
    - c. Electing to prohibit solicitations by certain methods of delivery but not other methods of delivery.

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

5. *Special Rule—New Continuing Relationship.* If, after all continuing relationships with a party or the party's affiliate(s) are terminated, a consumer establishes another continuing relationship with the party or an affiliate of the party, a new opt-out notice must be provided to the consumer before eligibility information may be used to make a solicitation to the consumer.
  - a. At a minimum, the new opt-out notice must apply to eligibility information obtained in connection with the new continuing relationship.
  - b. The consumer's decision not to opt out after receiving the new opt-out notice does not override a prior opt-out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship.

- i. A consumer must revoke a prior opt-out election for the election to not be effective. If a consumer opted-out in connection with a terminated relationship, providing a new opt-out notice in connection with a new relationship that purports to cover a terminated relationship does not result in a revocation of the prior election if the consumer elects not to opt out.

H. *Duration of Opt-Out.*

1. *Five-Year Minimum.* A consumer's election to 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.
2. *Revocation.* A consumer may revoke an opt-out election in writing or, if the consumer agrees, electronically.
3. *Longer Period.* An opt-out period of more than five years may be established, including an opt-out period that does not expire unless revoked by the consumer.

I. *Renewal of Opt-Out.*

1. *General.* If an opt-out was effective for a specific period of time (which must be at least five years), after the opt-out period expires a party still may not make solicitations based on eligibility information received from an affiliate, unless:
  - a. *Exception or Alternative Arrangement.* An exception applies or an alternative arrangement provided for in the Affiliate Marketing Rule is used; or
  - b. *Renewal Notice.* The consumer is given a renewal notice, and a reasonable opportunity, and a reasonable and simple method, to renew the opt-out, and the consumer does not renew the opt-out.
2. *Renewal Period.* Each opt-out renewal must be effective for a period of at least five years.
3. *Contents of Renewal Notice.* A renewal opt-out notice must be clear, conspicuous, and concise, and must accurately disclose:
  - a. The name of the affiliate(s) providing the notice;
  - b. A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer;

- c. A general description of the types of eligibility information that may be used to make solicitations to the consumer;
  - d. That the consumer previously elected to limit the use of certain information to make solicitations to the consumer;
  - e. That the consumer's election has expired or is about to expire;
  - f. That the consumer may elect to renew the consumer's previous election;
  - g. 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; and
  - h. A reasonable and simple method for the consumer to opt out.
4. *Party Providing Notice.* The renewal notice must be provided by:
- a. *Single Party.* The affiliate that provided the previous opt-out notice, or its successor; or
  - b. *Joint Notice.* Jointly by two or more affiliates, or their successors, that jointly provided the previous opt-out notice.
    - i. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as "ABC," then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by "all of the ABC companies," "the ABC banking, credit card, insurance, and securities companies," or by listing the name of each affiliate providing the notice.
    - ii. If the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by "all of the ABC and XYZ companies" or by "the ABC banking and credit card companies and the XYZ insurance companies."
5. *Application of Initial Notice Provisions.* The provisions of the Affiliate Marketing Rule regarding (a) the delivery of an initial opt-out notice, (b) providing a reasonable opportunity to opt out and (c) providing a reasonable and simple method to opt out, also apply to a renewal notice.

6. *Timing of Renewal Notice.*

a. *General.* A renewal notice may be provided to the consumer either:

- i. A reasonable period of time before the expiration of the opt-out period; or
- ii. 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.

b. *Combination With GLBA Notice.* In all cases, for a party that provides a GLBA annual privacy notice to a consumer, providing a renewal notice with the last annual privacy notice provided to the consumer before the expiration of the opt-out period is a reasonable period of time before the expiration of the opt-out.

c. *No Effect on Opt-Out Period.* An opt-out period may not be shortened by sending a renewal notice to the consumer before the expiration of the opt-out period, even if the consumer does not renew the opt-out.

7. *Model Notices.* Model notices were developed for purposes of the Affiliate Marketing Rule, including a model renewal opt-out notice provided by a single party, and a model renewal opt-out notice provided jointly by two or more affiliates. Use of a model notice is not required, but using a model notice complies with the requirement for a clear, conspicuous and concise notice.

J. *Exceptions.* The requirements of the Affiliate Marketing Rule do not apply to a party if the party uses eligibility information from an affiliate:

1. *Pre-existing Business Relationship.* To make a solicitation for marketing purposes to a consumer with whom the party has a pre-existing business relationship.

a. *Definition.* A “pre-existing business relationship” is defined as a relationship between a party, or a party’s licensed agent, and a consumer based on the following: (i) a financial contract between the party and the consumer that is in force on the date on which the consumer is sent a solicitation covered by the Affiliate Marketing Rule, (ii) the purchase, rental, or lease by the consumer of that party’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 party, during the 18-month period immediately preceding the date on which a solicitation covered by the Affiliate Marketing Rule is sent to the consumer, or (iii) an inquiry or application by the consumer regarding a product or service offered by that party during the three-month period

immediately preceding the date on which a solicitation covered by the Affiliate Marketing Rule is sent to the consumer.

- b. *Example.* A party is an insurance company and its affiliate is a mortgage lender. A consumer has a mortgage loan with the affiliate and purchases a homeowner's insurance policy from the party. The party may use eligibility information regarding the consumer from the lender affiliate to market additional insurance products to the consumer without triggering the notice and opt-out requirements (as long as this occurs during the existence of the pre-existing business relationship).

2. *Consumer-Initiated Communication.* In response to a communication about the party's products or services initiated by the consumer.

a. *Examples.*

- i. A party is an insurance company and its affiliate is a mortgage lender. A consumer applies to the affiliate for a mortgage loan and calls the party to ask about homeowner's insurance. The party may use eligibility information regarding the consumer from the lender affiliate to respond to the communication without triggering the notice and opt-out requirements.

- ii. A party is an insurance company and its affiliate is a mortgage lender. A consumer applies to the affiliate for a mortgage loan and calls the party to ask about office locations and hours, but does not request information about products or services. Because the communication from the consumer does not relate to the party's products or services, the party may not use eligibility information regarding the consumer from the lender affiliate to respond to the communication without triggering the notice and opt-out requirements.

3. *Consumer Authorization or Request.* In response to an authorization or request by the consumer to receive solicitations.

- a. *Example.* A party is an insurance company and its affiliate is a mortgage lender. A consumer applies to the affiliate for a mortgage loan and either (i) authorizes the party to contact the consumer regarding homeowner's insurance or (ii) requests the receipt from the party of information about homeowner's insurance. The party may use eligibility information regarding the consumer from the lender affiliate to respond to the authorization or request without triggering the notice and opt-out requirements. The authorization or request can be provided by the consumer to the lender affiliate or the party.

4. *Performance of Services.* To perform services on behalf of an affiliate, except this exception does not permit the party to send solicitations on behalf of an affiliate if the affiliate would not be permitted to send the solicitation as result of the election of the consumer to opt out under the Affiliate Marketing Rule.
5. *Employee Benefits or Employer Services.* To facilitate communications to an individual for whose benefit the party provides employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan.
6. *State Insurance Law Compliance.* If the party's compliance with this part would prevent the party from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which the party is lawfully doing business.

K. *Alternative Arrangement.*

1. *Affiliate Uses its Own Information on Behalf of Another Affiliate.* As long as a party does not "use" eligibility information received from an affiliate, a party does not make a solicitation subject to the Affiliate Marketing Rule if the affiliate uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market the party's products or services to the consumer.
  - a. *Use of Information.* As noted above, a party "uses" eligibility information received from an affiliate if based on the information the party:
    - i. Identifies the consumer or type of consumer to receive a solicitation;
    - ii. Establishes the criteria used to select the consumer to receive a solicitation; or
    - iii. Decides which of its products or services to market to the consumer or tailor its solicitation to that consumer.
2. *Affiliate's Service Provider Uses Affiliate's Information on Behalf of Another Affiliate.* As long as a party does not "use" eligibility information received from an affiliate and certain conditions are satisfied, a party does not make a solicitation subject to the Affiliate Marketing Rule if:
  - a. The affiliate directs its service provider to use the affiliate's own eligibility information that it obtained in connection with a pre-existing business relationship the affiliate has or had with the consumer to market the party's products or services to the consumer;

- b. The party does not communicate directly with the service provider regarding that use; and
  - c. Certain conditions regarding the service provider are satisfied.
3. *Service Provider-Related Conditions.* When an affiliate directs its service provider to use the affiliate's own eligibility information that it obtained in connection with a pre-existing business relationship the affiliate has or had with consumers to market the party's products or services to the consumers, the following conditions must be satisfied to avoid the solicitation from constituting the use of the eligibility information by the party:
- a. The party's affiliate must control access to and use of its eligibility information by the service provider (including the right to establish specific terms and conditions under which the service provider may use such information to market the entity's products or services). This requirement must be set forth in a written agreement between the party's affiliate and the service provider.
  - b. The party's affiliate must establish the specific terms and conditions under which the service provider may access and use that eligibility information to market the party's products or services (or those of affiliates generally) to the consumers, and periodically evaluate the service provider's compliance with those terms and conditions. These terms and conditions may include the identity of the affiliated companies whose products or services may be marketed to the consumers by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the consumers may receive marketing materials. The specific terms and conditions established by the entity's affiliate must be set forth in writing, but need not be set forth in a written agreement between the party's affiliate and the service provider.
  - c. The party's affiliate requires the service provider 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 party's products or services. This requirement must be set forth in a written agreement between the party's affiliate and the service provider.
  - d. The party's affiliate is identified on or with the marketing materials provided to the consumer. This requirement will be construed flexibly. For example, the party's affiliate may be identified directly on the marketing materials, on an introductory cover letter, on other documents included with the marketing materials, such as a periodic statement, or on the envelope that contains the marketing materials.

- e. The party does not “use” the eligibility information. Again, a party “uses” eligibility information received from an affiliate if based on the eligibility information the party:
  - i. Identifies the consumer or type of consumer to receive a solicitation;
  - ii. Establishes the criteria used to select the consumer to receive a solicitation; or
  - iii. Decides which of its products or services to market to the consumer or tailor its solicitation to that consumer.