



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

### **FCRA Affiliate Marketing Rule**

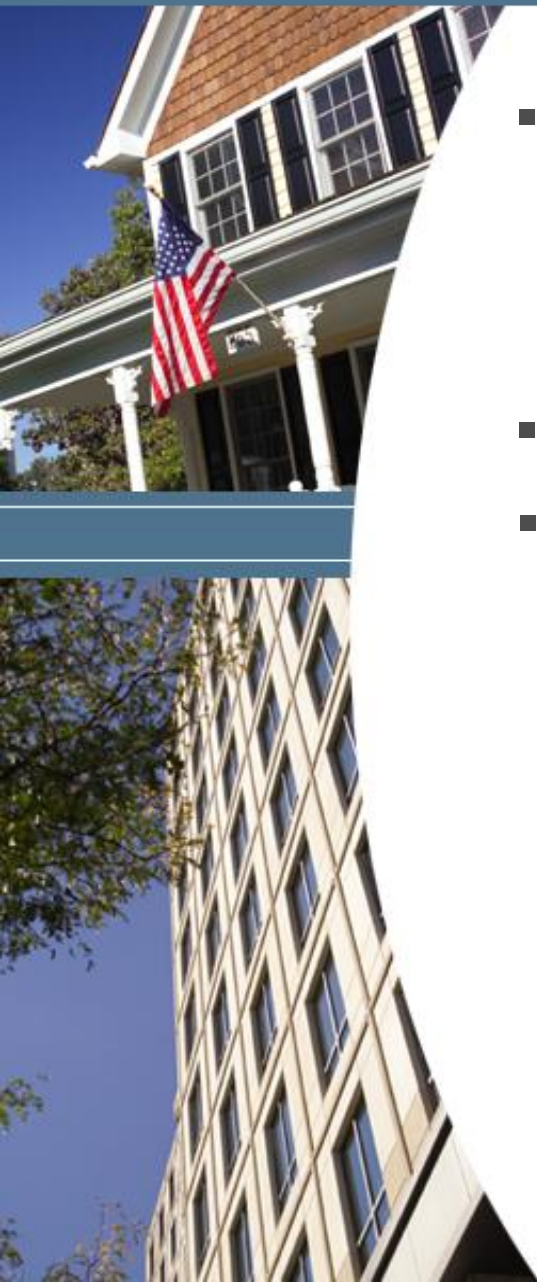
**Richard Andreano, Jr.**

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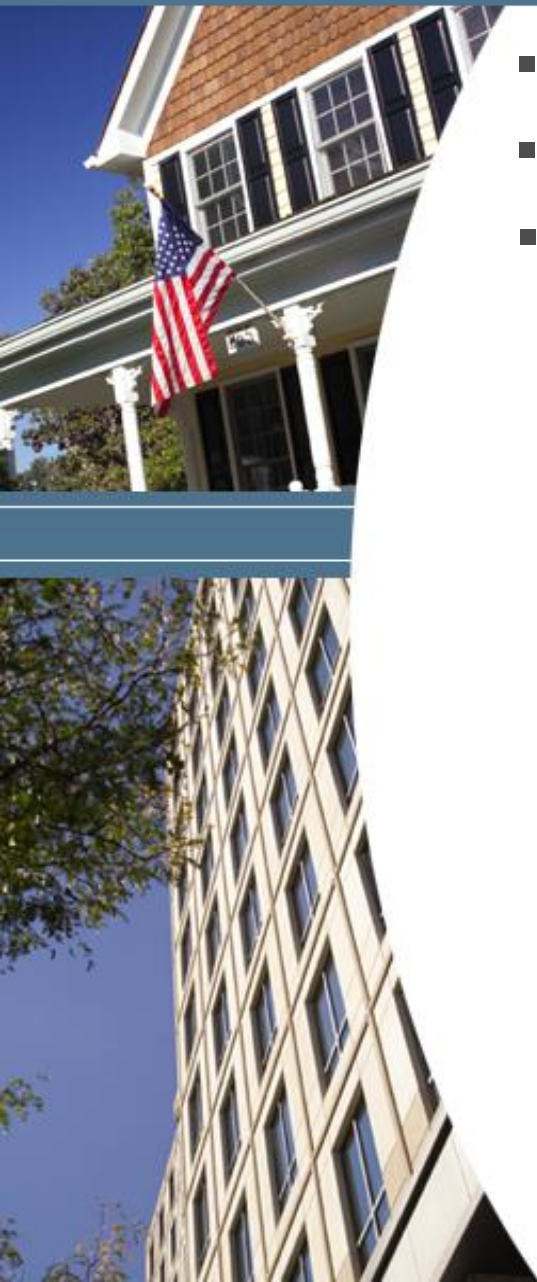


# Three Federal Privacy Concepts

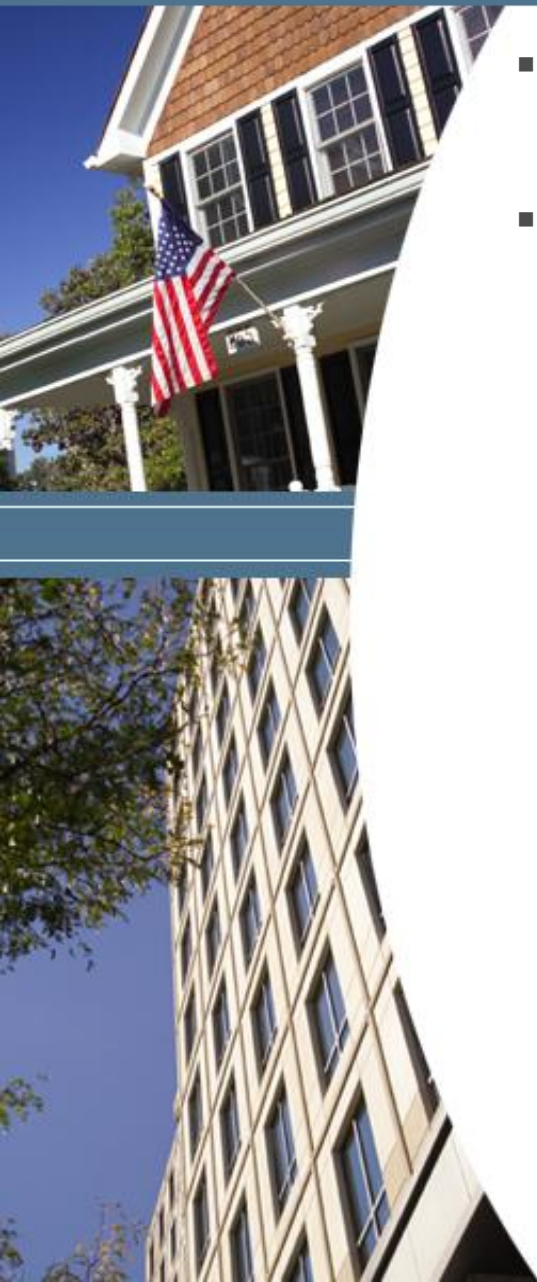
- Gramm Leach Bliley Act (GLBA) privacy rule.
- Fair Credit Reporting Act (FCRA) general sharing provisions.
- FCRA affiliate marketing rule.

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- Applies to your sharing of nonpublic personal information (NPPI) with non-affiliates.
    - Does not restrict your sharing of information with affiliates.
  - NPPI is broadly defined.
  - You may share NPPI with non-affiliates if:
    - You disclose to the consumer the intent to share.
    - You provide the consumer with an opt-out notice and a reasonable opportunity to opt out.
    - The consumer does not opt out.

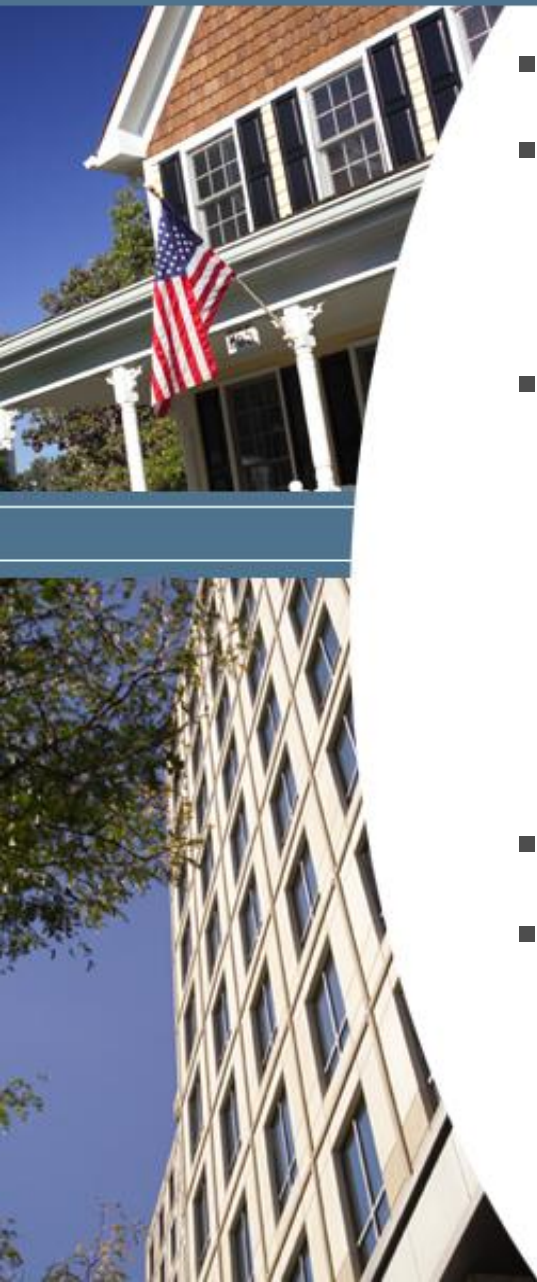
# FCRA General Sharing Provisions

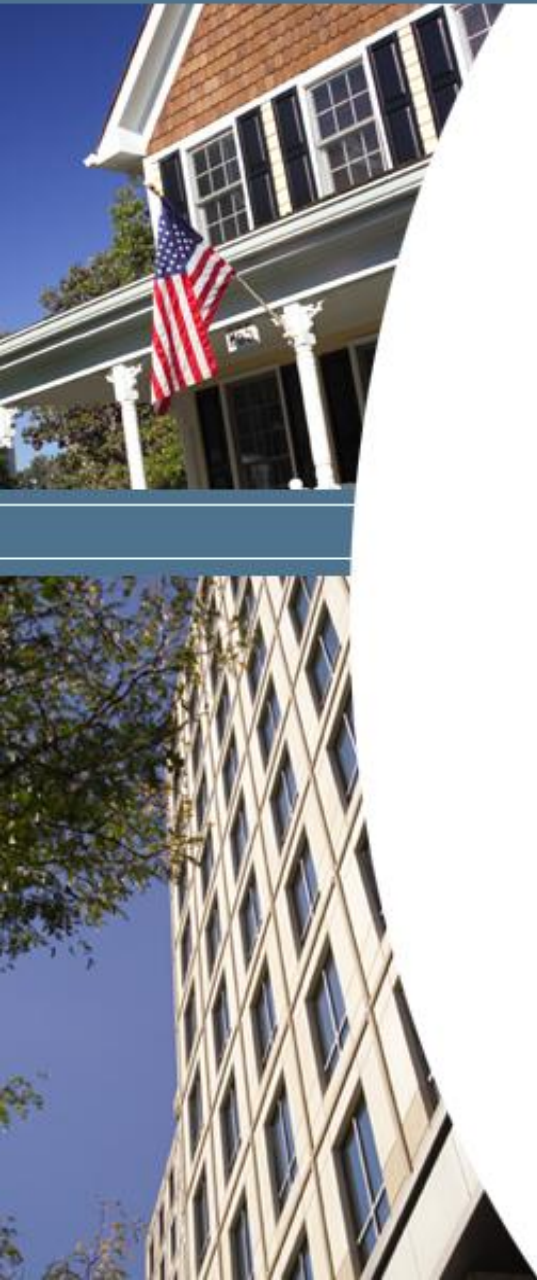
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- Apply to consumer report information.
  - Consumer report information is a broad concept:
  - Includes information used, expected to be used or collected to serve as a factor in establishing a consumer's eligibility for credit or insurance, for employment purposes or for certain other purposes, and bearing upon the consumer's:
    - Credit worthiness
    - Credit standing
    - Credit capacity
    - Character
    - General reputation
    - Personal characteristics
    - Mode of living

# FCRA General Sharing Provisions

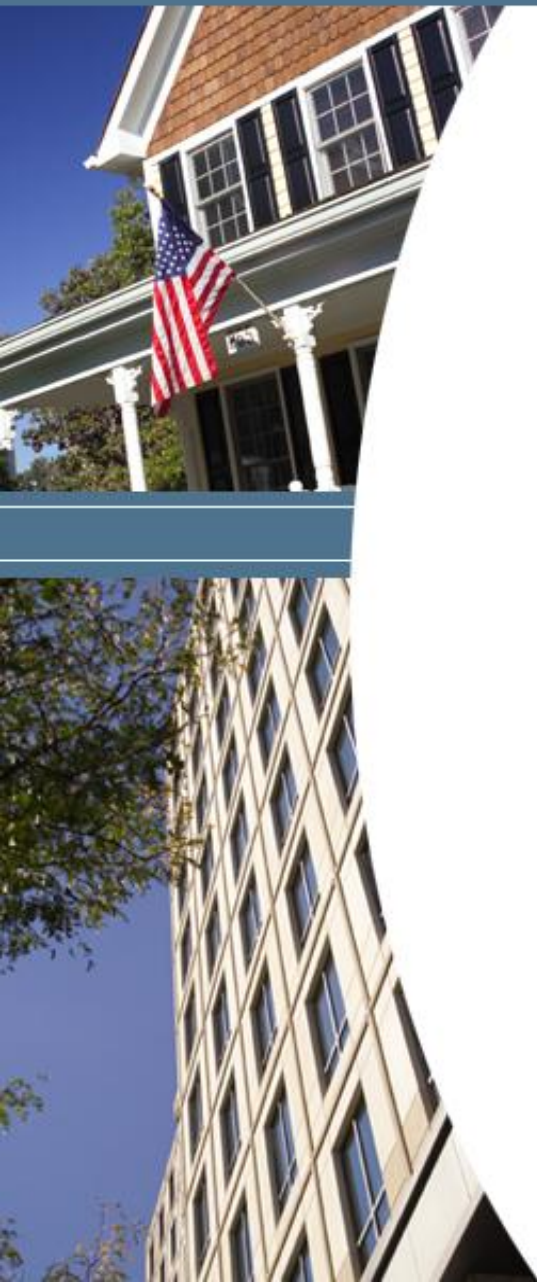
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- If you share consumer report information with others, you can become a consumer reporting agency.
  - Exclusions:
    - You may share your consumer transaction or experience information with affiliates and non-affiliates.
    - Your affiliates may share your transaction or experience information with each other.
    - You may share other consumer report information with your affiliates if:
      - You disclose to the consumer the intent to share;
      - You provide the consumer with an opt-out notice and reasonable opportunity to opt out; and
      - The consumer does not opt out.

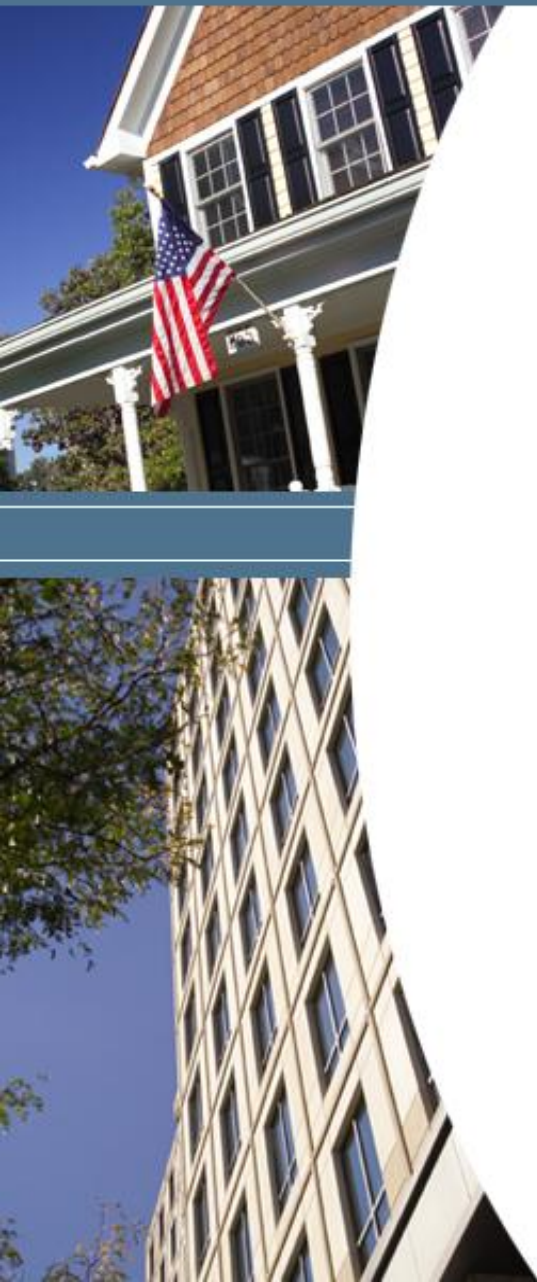
# FCRA Affiliate Marketing Rule

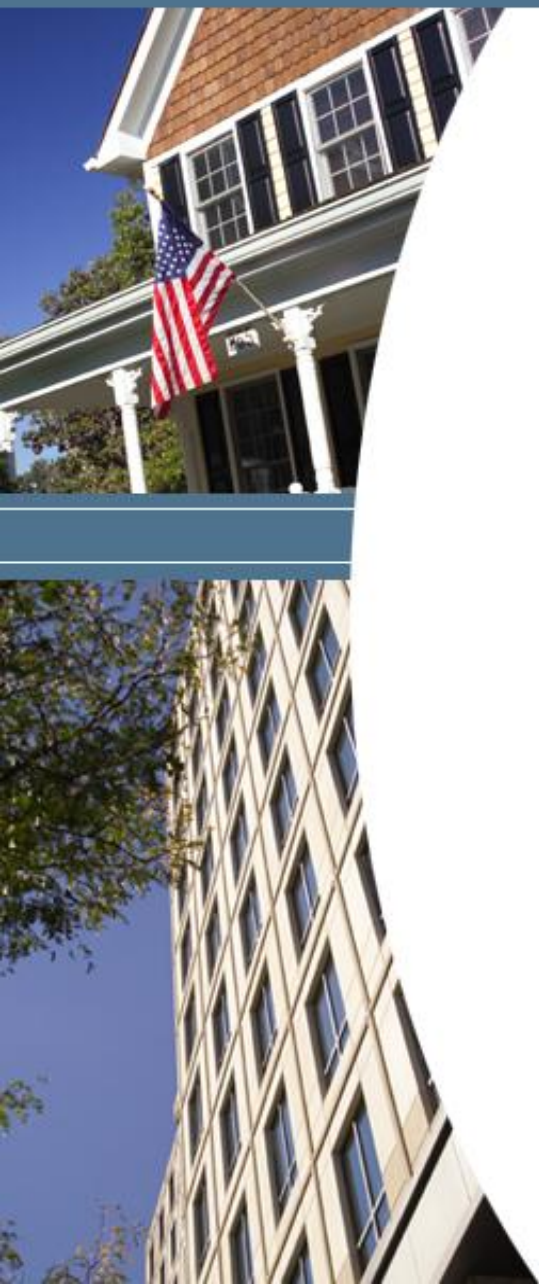
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- Different approach.
  - Restricts the ability of your affiliates to *use* eligibility information on consumers received from you to solicit the consumers for marketing purposes.
  - Eligibility information consists of consumer report information, including the information covered by the exclusions applicable to the general FCRA sharing provisions.
    - Thus, your transaction or experience information is part of the covered eligibility information.
  - Mandatory compliance date of October 1, 2008.
  - Information received by your affiliates before this date is not subject to the rule.



- An affiliate would make a solicitation covered by the rule if, based on eligibility information received from you, the affiliate:
  - Identifies the consumer or type of consumer to receive a solicitation; or
  - Establishes criteria used to select the consumer to receive a solicitation; or
  - Decides which of its products or services to market to the consumer or tailor its solicitation to the consumer; and
  - As a result of the affiliate's use of the eligibility information, the consumer is provided with a solicitation.
- Solicitations include a telemarketing call, direct mail or email, or another form of marketing communication directed to a particular consumer based on eligibility information received from an affiliate.

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- Unless an exception applies or an alternative arrangement is used, an affiliate (or its service provider) may not use eligibility information from you to make a solicitation for marketing purposes unless:
    - It is disclosed to the consumer that the affiliate may use eligibility information received from you to make solicitations for marketing purposes to the consumer;
    - The consumer is provided with a reasonable opportunity, and a reasonable and simple method, to opt out of such use; and
    - The consumer does not opt out.
  - An opt-out must be effective for at least five years.

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- Exceptions to the rule include when the affiliate:
    - Has a pre-existing business relationship with the consumer;
    - Responds to a communication about its products or services initiated by the consumer; or
    - Responds to an authorization or request by the consumer to receive solicitations.
  - A pre-existing business relationship is a relationship between a person (or the person's licensed agent) and a consumer based on one or more of the following:



- A financial contract between the person and the consumer that is in force on the date on which the consumer is sent a solicitation; or
- The purchase, rental, or lease by the consumer of the person's goods or services, or a financing transaction (including holding an active account or 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; or
- An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding that date on which the consumer is sent a solicitation.

## Pre-existing business relationship example:

- You are a lender and your affiliate is an insurance company.
- A consumer has a mortgage loan with you and just purchased a homeowner's insurance policy from your affiliate.
- Your affiliated insurance company may use eligibility information from you to market additional products to the consumer without triggering the notice and opt-out requirements of the rule.

## Consumer initiated communication examples:

- A consumer applies to you for a mortgage loan and calls your insurance affiliate to ask about homeowner's insurance.
- Your affiliated insurance company may use eligibility information from you to respond to the consumer's request without triggering the notice and opt-out requirements of the rule.

## Consumer initiated communication examples:

- A consumer applies to you for a mortgage loan and calls your insurance affiliate to ask about office locations and hours, without requesting information about products or services.
- Because the communication does not relate to your affiliated insurance company's products or services, the insurance company may not use eligibility information from you to respond to the consumer's request without triggering the notice and opt-out requirements of the rule.

## Consumer authorization or request example:

- A consumer applies to you for a mortgage loan and either:
  - Authorizes your insurance affiliate to contact the consumer regarding homeowner's insurance; or
  - Requests the receipt from your insurance affiliate of information about homeowner's insurance.
- Your affiliated insurance company may use eligibility information from you to respond to the consumer's authorization or request without triggering the notice and opt-out requirements of the rule.

## Alternative Arrangement:

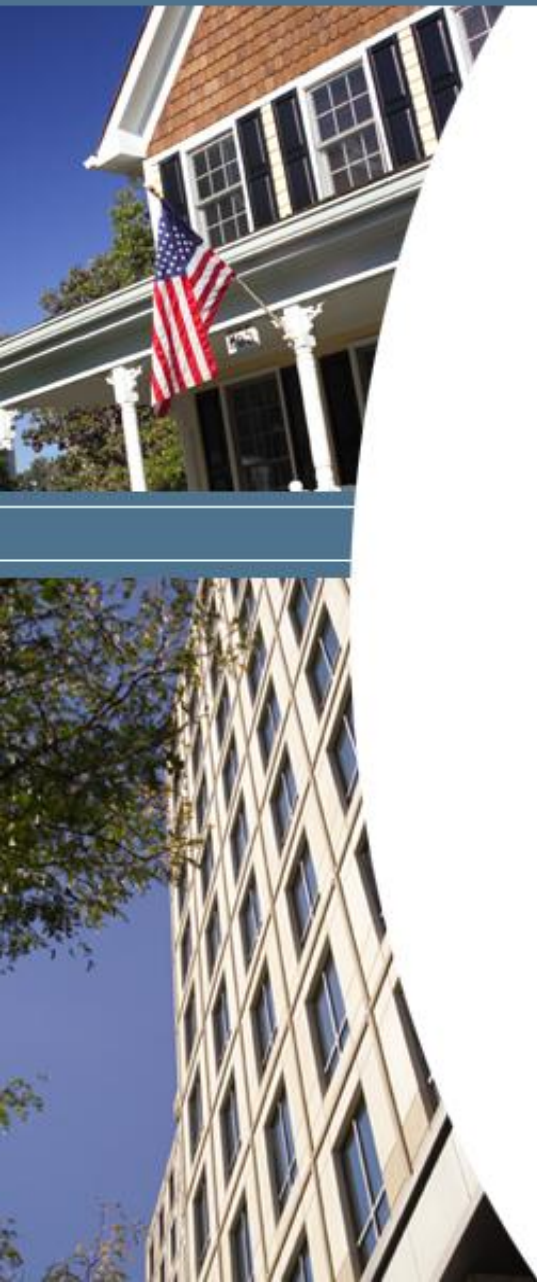
- Significantly, as long as an affiliate does not “use” your eligibility information, your own use of that information obtained in connection with a pre-existing business relationship with a consumer to market a product or service of an affiliate to the consumer does not trigger the need to comply with the notice and opt-out procedure.
- Again, an affiliate “uses” your eligibility information if, based on the information, it:
  - Identifies the consumer or type of consumer to receive a solicitation; or
  - Establishes criteria used to select the consumer to receive a solicitation; or
  - Decides which of its products or services to market to the consumer or tailors its solicitation to the consumer.

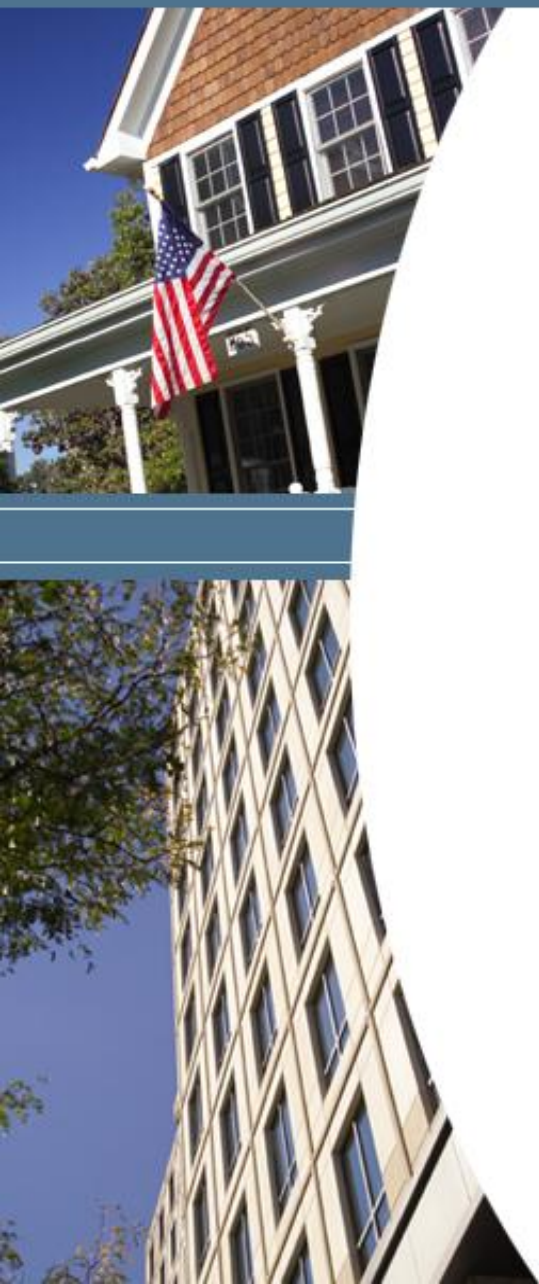
## Alternative Arrangement Example:

- Consumers have loans with a creditor, and the creditor places eligibility information regarding the consumers in a common corporate database.
- An affiliated insurance company develops selection criteria to market its products to the consumers, but does not “use” the eligibility information to do so.
- The insurance company provides the criteria and marketing materials to the creditor, and the creditor uses its own eligibility information to determine which consumers should receive the marketing materials and sends the materials to the consumers.
- This is not a solicitation that triggers the notice and opt-out requirements of the rule.

## Alternative Arrangement—Service Providers:

- If you supply a service provider with eligibility information regarding consumers that you obtained in connection with a pre-existing business relationship with the consumers, the alternative arrangement also can be used for marketing on behalf of an affiliate if certain conditions are satisfied.
- Conditions:
- By a written agreement, you must control the access to and use of the eligibility information by the service provider.
  - You must have the right to establish the specific terms and conditions under which the service provider may use the information to market an affiliate's products or services.

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- Conditions (continued):
  - In writing, you must establish the specific terms and conditions under which the service provider may access and use the eligibility information to market an affiliate's products and services to the consumers, such as:
    - The specific affiliates whose products and services may be marketed,
    - The types of products and services that may be marketed, and
    - The number of times the consumers may receive marketing materials.
  - You must periodically evaluate the service providers compliance with the established terms and conditions.



- Conditions (continued):
- By a written agreement, you must require the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the eligibility information in accordance with the established terms and conditions.
- The affiliate may not communicate directly with the service provider regarding the “use” of the eligibility information.
- The affiliate may not “use” the eligibility information.
- The affiliate must be identified on or with the marketing materials provided to the consumers.
- Note: The service provider may be an affiliate or an unrelated third party.

**Thank You.**

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