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Federal Trade Commission

16 CFR Parts 680 and 698
Affiliate Marketing Rule; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Parts 680 and 698

[Regulation No. 411006]

RIN 3084-AA94

Affiliate Marketing Rule

AGENCY: Federal Trade Commission

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (FTC or Commission) is publishing a final rule to implement the affiliate marketing provisions in section 214 of the Fair and Accurate Credit Transactions Act of 2003, which amends the Fair Credit Reporting Act. The final rule generally prohibits a person from using information received from an affiliate to make a solicitation for marketing purposes 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 FACT Act requires certain other federal agencies to publish similar rules, and mandates that the FTC and other agencies consult and cooperate so that their regulations implementing this provision are consistent and comparable with one another.

DATES: This rule is effective on January 1, 2008. The mandatory compliance date for this rule is October 1, 2008.

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SUPPLEMENTARY INFORMATION:

I. Background

The Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA or Act), which was enacted in 1970, sets standards for the collection, communication, and use of information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. 15 U.S.C. 1681-1681x. In 1996, the Consumer Credit Reporting Reform Act extensively amended the FCRA. Pub. L. 104-208, 110 Stat. 3009.

The FCRA, as amended, provides that a person may communicate to an affiliate or a non-affiliated third party information solely as to transactions or experiences between the consumer and the person without becoming a consumer reporting agency.[1] In addition, the communication of such transaction or experience information among affiliates will not result in any affiliate becoming a consumer reporting agency. *See* FCRA §§ 603(d)(2)(A)(i) and (ii).

Section 603(d)(2)(A)(iii) of the FCRA provides that a person may communicate ''other'' information—that is, information that is not transaction or experience information—among its affiliates without becoming a consumer reporting agency if it is clearly and conspicuously disclosed to the consumer that such information may be communicated among affiliates and the consumer is given an opportunity, before the information is communicated, to ''opt out'' or direct that the information not be communicated among such affiliates, and the consumer has not opted out.

The Fair and Accurate Credit Transactions Act of 2003

The President signed into law the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) on December 4, 2003. Pub. L. 108-159, 117 Stat. 1952. In general, the FACT Act amends the FCRA to enhance the ability of consumers to combat identity theft, increase the accuracy of consumer reports, restrict the use of medical information in credit eligibility determinations, and allow consumers to exercise greater control regarding the type and number of solicitations they receive.

Section 214 of the FACT Act added a new section 624 to the FCRA. This provision gives consumers the right to restrict a person from using certain information obtained from an affiliate to make solicitations to that consumer. Section 624 generally provides that if a person receives certain consumer eligibility information from an affiliate, the person may not use that information to make solicitations to the consumer about its products or services, unless the consumer is given notice and an opportunity and a simple method to opt out of such use of the information, and the consumer does not opt out. The statute also provides that section 624 does not apply, for example, to a person using eligibility information: (1) to make solicitations to a consumer with whom the person has a pre-existing business relationship; (2) to perform services for another affiliate subject to certain conditions; (3) in response to a communication initiated by the consumer; or (4) to make a solicitation that has been authorized or requested by the consumer. Unlike the FCRA affiliate sharing opt-out and the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, (GLBA) non-affiliate sharing opt-out, which apply indefinitely, section 624 provides that a consumer's affiliate marketing opt-out election must be effective for a period of at least five years. Upon expiration of the opt-out period, the consumer must be given a renewal notice and an opportunity to renew the opt-out before information received from an affiliate may be used to make solicitations to the consumer.

Section 624 governs the *use* of information by an affiliate, not the *sharing* of information among affiliates, and thus is distinct from the affiliate sharing opt-out under section 603(d)(2)(A)(iii) of the FCRA. Nevertheless, the affiliate marketing and affiliate sharing opt-outs and the information subject to the two opt-outs overlap to some extent. As noted above, the FCRA allows transaction or experience information to be shared among affiliates without giving the consumer notice and an opportunity to opt out, but provides that ''other'' information, such as information from credit reports and credit applications, may not be shared among affiliates without giving the consumer notice and an opportunity to opt out. The new affiliate marketing opt-out applies to both transaction or experience information and ''other'' information. Thus, certain information will be subject to two opt-outs, a sharing opt-out and a marketing use opt-out.

Section 214(b) of the FACT Act requires the FTC, the Federal banking agencies,[2] the Securities and Exchange Commission (SEC), and the National Credit Union Administration (NCUA) to prescribe regulations, in consultation and coordination with each other, to implement the FCRA's affiliate marketing opt-out provisions. In adopting its regulation, the Commission must ensure that the affiliate marketing notification methods provide a simple means for consumers to make choices under section 624, consider the affiliate sharing notification practices employed on the date of enactment by persons subject to section 624, and ensure that notices may be coordinated and consolidated with other notices required by law.

[1] The FCRA creates substantial obligations for a person that meets the definition of a ''consumer reporting agency'' in section 603(f) of the statute.

[2] The Federal banking agencies are the Board of Governors of the Federal Reserve System (Board), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS).

II. The Proposed Regulation

The Commission published its notice of proposed rulemaking in the **Federal Register** on June 15, 2004 (69 FR 33324) to implement section 214 of the FACT Act.[3]

The proposal defined the key terms ''pre-existing business relationship'' and ''solicitation'' essentially as defined in the statute. The Commission did not propose to include additional circumstances within the meaning of ''pre-existing business relationship'' or other types of communications within the meaning of ''solicitation.''

To address the scope of the affiliate marketing opt-out, the proposal defined ''eligibility information'' to mean 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 that is subject to the affiliate-sharing opt-out did not apply. The Commission substituted the term ''eligibility information'' for the more complicated statutory language regarding the communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A) of the FCRA.[4] In addition, the proposal incorporated each of the scope limitations contained in the statute, such as the pre-existing business relationship exception.

Section 624 does not state which affiliate must give the consumer the affiliate marketing opt-out notice. The proposal provided that the person communicating information about a consumer to its affiliate would be responsible for satisfying the notice requirement, if applicable. A rule of construction provided flexibility to allow the notice to be given by the person that communicates information to its affiliate, by the person's agent, or through a joint notice with one or more other affiliates. The Commission designed this approach to provide flexibility and to facilitate the use of a single coordinated notice, while taking into account existing affiliate sharing notification practices. At the same time, the approach sought to ensure that the notice would be effective because it generally would be provided by or on behalf of an entity from which the consumer would expect to receive important notices, and would not be provided along with solicitations.

The proposal also provided guidance on the contents of the opt-out notice, what constitutes a reasonable opportunity to opt out, reasonable and simple methods of opting out, and the delivery of opt-out notices. Finally, the proposal provided guidance on the effect of the limited duration of the opt-out and the requirement to provide an extension notice upon expiration of the opt-out period.

III. Overview of Comments Received

The Commission received 49 comments. In addition, the Commission considered the comments submitted to the Federal banking agencies, the NCUA, and the SEC. Many commenters sent copies of the same letter to more than one agency. The Commission received comments from a variety of banks, thrifts, credit unions, credit card companies, mortgage lenders, other non-bank creditors, and industry trade associations. The Commission also received comments from consumer groups, the National Association of Attorneys General (''NAAG''), and individual consumers.

Most industry commenters objected to several key aspects of the proposal. The most significant areas of concern raised by industry commenters related to which affiliate would be responsible for providing the notice, the scope of certain exceptions to the notice and opt-out requirement, and the content or the inclusion of definitions for terms such as ''clear and conspicuous'' and ''pre-existing business relationship.'' Consumer groups and NAAG generally supported the proposal, although these commenters believed that the proposal could be strengthened in certain respects. A more detailed discussion of the comments is contained in the Section-by-Section Analysis below.

IV. Section-by-Section Analysis

Section 680.1 Purpose and Scope

Section 680.1 of the proposal set forth the purpose and scope of the regulation. The Commission received few comments on this section. Section 680.1(b) of the final rule identifies the persons covered by this part of the Commission's rule.

Section 680.2 Examples

Proposed § 680.2 described the scope and effect of the examples included in the proposed rule. Most commenters supported the proposed use of non-exclusive examples to illustrate the operation of the rule. One commenter, concerned that the use of examples would increase the risk of litigation, urged the Commission to delete all examples.

The Commission does not believe the use of illustrative examples will materially increase the risk of litigation, but rather will provide useful guidance for compliance purposes, which may alleviate litigation risks for institutions.

As § 680.2 states, examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in the part. Similarly, the examples do not illustrate any issues that may arise under other laws or regulations.

Section 680.3 Definitions

Section 680.3 of the proposal contained definitions for the following terms: ''Act,'' ''affiliate'' (as well as the related terms ''company'' and ''control''); ''clear and conspicuous''; ''consumer''; ''eligibility information''; ''person''; ''pre-existing business relationship''; ''solicitation''; and, ''you.''

Those definitions that elicited comment are discussed below.

Affiliate, Common Ownership or Common Corporate Control, and Company

The proposed rule included definitions for ''affiliate'' as well as for the related terms ''control'' and ''company.'' For the reasons discussed below, the final rule substituted ''common ownership or common corporate control'' as a substitute for the definition of ''control,'' and renumbered it as § 680.3(d). The term ''company'' is renumbered as § 680.3(e).

Several FCRA provisions apply to information sharing with persons ''related by common ownership or affiliated by corporate control,'' ''related by common ownership or affiliated by common corporate control,'' or ''affiliated by common ownership or common corporate control.'' *E.g.*, FCRA, sections 603(d)(2), 615(b)(2), and 625(b)(2). Each of these provisions was enacted as part of the 1996 amendments to the FCRA. Similarly, section 2 of the FACT Act defines the term ''affiliate'' to mean ''persons that are related by common ownership or affiliated by

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[3] On July 15, 2004, the Federal banking agencies and the NCUA published their proposed affiliate marketing rule in the **Federal Register** (69 FR 42502). The SEC published its proposed affiliate marketing rule in the **Federal Register** on July 14, 2004 (69 FR 42301).

[4] Under section 603(d)(1) of the FCRA, a ''consumer report'' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which 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 credit or insurance to be used primarily for personal, family, or household purposes, employment purposes, or any other purpose authorized in section 604 of the FCRA. 15 U.S.C. 1681a(d).

corporate control.'' In contrast, the GLBA defines ''affiliate'' to mean ''any company that controls, is controlled by, or is under common control with another company.'' *See* 15 U.S.C. 6809(6).

In the proposal, the Commission sought to harmonize the various FCRA and FACT Act formulations by defining ''affiliate'' to mean ''any person that is related by common ownership or common corporate control with another person.'' Industry commenters generally supported the Commission's goal of harmonizing the various FCRA definitions of ''affiliate'' for consistency. Many of these commenters, however, believed that the most effective way to do this was for the Commission to incorporate into the FCRA the definition of ''affiliate'' used in the GLBA privacy regulations. In addition, a few industry commenters urged the Commission to incorporate into the definition of ''affiliate'' certain concepts from California's Financial Information Privacy Act so as to exempt certain classes of corporate affiliates from the restrictions on affiliate sharing or marketing.[5]

The Commission does not believe there is a substantive difference between the FACT Act definition of ''affiliate'' and the definition of ''affiliate'' in section 509 of the GLBA. The Commission is not aware of any circumstances in which two entities would be affiliates for purposes of the FCRA but not for purposes of the GLBA privacy rule, or vice versa. Also, even though affiliated entities have had to comply with different FCRA and GLBA formulations of the ''affiliate'' definition since 1999, commenters did not identify any specific compliance difficulties or uncertainty resulting from the fact that the two statutes use somewhat different wording to describe what constitutes an affiliate.

Consistent with the definition of ''affiliate'' adopted by the Federal banking agencies in the final medical information rules, the Commission declines to incorporate into the definition of ''affiliate'' exceptions for entities regulated by the same or similar functional regulators, entities in the same line of business, or entities that share a common brand or identity. *See* 70 FR 70664-70665 (Nov. 22, 2005). These exceptions were incorporated into the California Financial Information Privacy Act in August 2003.[6] Congress, however, did not incorporate these exceptions from California law into the definition of ''affiliate'' when it enacted the FACT Act at the end of 2003. Accordingly, the Commission believes that the approach adopted here best effectuates the intent of Congress.

Under the GLBA privacy rule, the definition of ''control'' determines whether two or more entities meet the definition of ''affiliate.''[7] The Commission included the same definition of ''control'' in the proposal and received no comments on the proposed definition. The Commission interprets the phrase ''related by common ownership or common corporate control'' used in the FACT Act to have the same meaning as ''control'' in the GLBA privacy rule. For example, if an individual owns 25 percent of two companies, the companies would be affiliates under both the GLBA and FCRA definitions. However, the individual would not be considered an affiliate of the companies because the definition of ''affiliate'' is limited to companies.

The proposal also defined the term ''company'' to mean any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization. The proposed definition of ''company'' excluded some entities that are ''persons'' under the FCRA, including estates, cooperatives, and governments or governmental subdivisions or agencies, as well as individuals.

Clear and Conspicuous

Proposed § 680.3(c) defined the term ''clear and conspicuous'' to mean reasonably understandable and designed to call attention to the nature and significance of the information presented. Under this definition, institutions would retain flexibility in determining how best to meet the clear and conspicuous standard. The supplementary information to the proposal provided guidance regarding a number of practices that institutions might wish to consider in making their notices clear and conspicuous. These practices were derived largely from guidance included in the GLBA privacy rule.

Industry commenters urged the Commission not to define ''clear and conspicuous'' in the final rule. The principal objection these commenters raised was that this definition would significantly increase the risk of litigation and civil liability. Although these commenters recognized that the proposed definition was derived from the GLBA privacy regulations, they noted that compliance with the GLBA privacy regulations is enforced exclusively through administrative action, not through private litigation. These commenters also stated that the Federal Reserve Board had withdrawn a similar proposal to define ''clear and conspicuous'' for purposes of Regulations B, E, M, Z, and DD, in part because of concerns about civil liability. Some industry commenters believed that it was not necessary to define the term in order for consumers to receive clear and conspicuous disclosures based on industry's experience in providing clear and conspicuous affiliate sharing opt-out notices. Consumer groups believed that incorporation of the standard and examples from the GLBA privacy regulations was not adequate because they did not believe that the existing standard has proven sufficient to ensure effective privacy notices.

Except for certain non-substantive changes made for purposes of clarity, the definition of ''clear and conspicuous'' is the same as in the proposal and is substantively the same as the definition used in the GLBA privacy rule. The Commission believes that the clear and conspicuous standard for the affiliate marketing opt-out notices should be substantially similar to the standard that applies to GLBA privacy notices because the affiliate marketing opt-out notice may be provided on or with the GLBA privacy notice.

In defining ''clear and conspicuous,'' the Commission believes it is more appropriate to focus on the affiliate marketing opt-out notices that are the subject of this rulemaking, rather than adopting a generally applicable definition governing all consumer disclosures under the FCRA. This approach gives the Commission the flexibility to refine or clarify the clear and conspicuous requirement for different disclosures, if necessary.

The statute directs the Commission to provide specific guidance regarding how to comply with the clear and conspicuous standard. *See* 15 U.S.C. 1681s-3(a)(2)(B). For that reason, the Commission does not agree with commenters that requested the elimination of the definition of ''clear and conspicuous'' and related guidance. Rather, the Commission believes it is necessary to define ''clear and conspicuous'' in the final rule and provide specific guidance for how to satisfy that standard in connection with this notice.

[5] These commenters noted that the California law places no restriction on information sharing among affiliates if they: (1) are regulated by the same or similar functional regulators; (2) are involved in the same broad line of business, such as banking, insurance, or securities; and (3) share a common brand identity.

[6] *See* Cal. Financial Code § 4053(c).

[7] *See* 16 C.F.R. 313.3(g).

Accordingly, the final rule contains two types of specific guidance on satisfying the requirement to provide a clear and conspicuous opt-out notice. First, as in the proposal, the supplementary information to the final rule describes certain techniques that may be used to make notices clear and conspicuous. These techniques are described below. Second, the Commission has adopted model forms that may, but are not required to, be used to facilitate compliance with the affiliate marketing notice requirements. The requirement for clear and conspicuous notices would be satisfied by the appropriate use of one of the model forms.

As noted in the supplementary information to the proposal, institutions may wish to consider a number of methods to make their notices clear and conspicuous. The various methods described below for making a notice clear and conspicuous are suggestions that institutions may wish to consider in designing their notices. Use of any of these methods alone or in combination is voluntary. Institutions are not required to use any particular method or combination of methods to make their disclosures clear and conspicuous. Rather, the particular facts and circumstances will determine whether a disclosure is clear and conspicuous.

A notice or disclosure may be made reasonably understandable through various methods that include: using clear and concise sentences, paragraphs, and sections; using short explanatory sentences; using bullet lists; using definite, concrete, everyday words; using active voice; avoiding multiple negatives; avoiding legal and highly technical business terminology; and avoiding explanations that are imprecise and are readily subject to different interpretations. In addition, a notice or disclosure may be designed to call attention to the nature and significance of the information in it through various methods that include: using a plain-language heading; using a typeface and type size that are easy to read; using wide margins and ample line spacing; and using boldface or italics for key words. Further, institutions that provide the notice on a Web page may use text or visual cues to encourage scrolling down the page, if necessary, to view the entire notice and may take steps to ensure that other elements on the Web site (such as text, graphics, hyperlinks, or sound) do not distract attention from the notice. When a notice or disclosure is combined with other information, methods for designing the notice or disclosure to call attention to the nature and significance of the information in it may include using distinctive type sizes, styles, fonts, paragraphs, headings, graphic devices, and appropriate groupings of information. However, there is no need to use distinctive features, such as distinctive type sizes, styles, or fonts, to differentiate an affiliate marketing opt-out notice from other components of a required disclosure, for example, where a GLBA privacy notice combines several opt-out disclosures in a single notice. Moreover, nothing in the clear and conspicuous standard requires segregation of the affiliate marketing opt-out notice when it is combined with a GLBA privacy notice or other required disclosures.

The Commission recognizes that it will not be feasible or appropriate to incorporate all of the methods described above all the time. The Commission recommends, but does not require, that institutions consider the methods described above in designing their opt-out notices. The Commission also encourages the use of consumer or other readability testing to devise notices that are understandable to consumers.

Finally, although the Commission understands the concerns of some industry commenters about the potential for civil liability, the Commission believes that these concerns are mitigated by the safe harbors afforded by the model forms in Appendix C to Part 698. The Commission notes that the affiliate sharing opt-out notice under section 603(d)(2)(A)(iii) of the FCRA, which may be enforced through private rights of action, must be included in the GLBA privacy notice. Therefore, the affiliate sharing opt-out notice generally is disclosed in a manner consistent with the clear and conspicuous standard set forth in the GLBA privacy regulations. Commenters did not identify any litigation that has resulted from the requirement to provide a clear and conspicuous affiliate sharing opt-out notice. The Commission believes that compliance with the examples and use of the model forms, although optional, should minimize the risk of litigation.

Concise

Proposed § 680.21(b) defined the term ''concise'' to mean a reasonably brief expression or statement. The proposal also provided that a notice required by this part may be concise even if it is combined with other disclosures required or authorized by federal or state law. Such disclosures include, but are not limited to, a GLBA privacy notice, an affiliate sharing notice under section 603(d)(2)(A)(iii) of the FCRA, and other consumer disclosures. Finally, the proposal clarified that the requirement for a concise notice would be satisfied by the appropriate use of one of the model forms contained in proposed Appendix A to the Commission's rule, although use of the model forms is not required. The Commission received no comments on the proposed definition of ''concise.'' The final rule renumbers the definition of ''concise'' as § 680.3(f). The reference to the model forms has been moved to Appendix C to Part 698, but otherwise the definition is adopted as proposed.

Consumer

Proposed paragraph (e) defined the term ''consumer'' to mean an individual. This definition is identical to the definition of ''consumer'' in section 603(c) of the FCRA.

Several commenters asked the Commission to narrow the proposed definition to apply only to individuals who obtain financial products or services primarily for personal, family, or household purposes, in part to achieve consistency with the definition of ''consumer'' in the GLBA. The FCRA's definition of ''consumer,'' however, differs from, and is broader than, the definition of that term in the GLBA. The Commission believes that the use of distinct definitions of ''consumer'' in the two statutes reflects differences in the scope and objectives of each statute. For purposes of this definition, an individual acting through a legal representative would qualify as a consumer. The final rule renumbers ''consumer'' as § 680.3(g) but otherwise adopts it without change.

Eligibility Information

Proposed § 680.3(g) defined the term ''eligibility information'' to mean any information the communication of which would be a consumer report if the exclusions from the definition of ''consumer report'' in section 603(d)(2)(A) of the FCRA did not apply. As proposed, eligibility information would include a person's own transaction or experience information, such as information about a consumer's account history with that person, and ''other'' information under section 603(d)(2)(A)(iii), such as information from consumer reports or applications.

Most commenters generally supported the proposed definition of ''eligibility information'' as an appropriate means of simplifying the statutory terminology without changing the scope of the information covered by the rule. A number of commenters requested that the Commission clarify that certain types of information do not constitute eligibility information, such as name,

address, telephone number, Social Security number, and other identifying information. One commenter requested the exclusion of publicly available information from the definition. Another commenter requested additional clarification regarding the term ''transaction or experience information.'' A few commenters suggested that the Commission include examples of what is and is not included within ''eligibility information.'' Finally, one commenter urged the Commission to revise the definition to restate much of the statutory definition of ''consumer report'' to eliminate the need for cross-references.

The final rule renumbers the definition of ''eligibility information'' as 680.3(h). The Commission has revised the definition to clarify that the term ''eligibility information'' does not include aggregate or blind data that does not contain personal identifiers. Examples of personal identifiers include account numbers, names, or addresses, as indicated in the definition, as well as Social Security numbers, driver's license numbers, telephone numbers, or other types of information that, depending on the circumstances or when used in combination, could identify the individual.

The Commission also believes that further clarification of, or exclusions from, the term ''eligibility information,'' such as the categorical exclusion of names, addresses, telephone numbers, other identifying information, or publicly available information, would directly implicate the definitions of ''consumer report'' and ''consumer reporting agency'' in sections 603(d) and (f), respectively, of the FCRA. The Commission decided not to define the terms ''consumer report'' and ''consumer reporting agency'' in this rulemaking and not to interpret the meaning of terms used in those definitions, such as ''transaction or experience'' information. The Commission also notes that financial institutions have relied on these statutory definitions for many years.

Person

Proposed paragraph (h) defined the term ''person'' to mean any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity. This definition is identical to the definition of ''person'' in section 603(b) of the FCRA.

One commenter requested clarification of how the proposed definition of ''person'' would affect other provisions of the affiliate marketing rule. Specifically, this commenter asked how the supplementary information's discussion of agents might affect the scope provisions of the rule.

The supplementary information to the proposal stated that a person may act through an agent, including but not limited to a licensed agent (in the case of an insurance company) or a trustee. The supplementary information also provided that actions taken by an agent on behalf of a person that are within the scope of the agency relationship would be treated as actions of that person. The Commission included these statements to address comprehensively the status of agents and to eliminate the need to refer specifically to licensed agents in the proposed definition of ''pre-existing business relationship.'' As discussed below, many commenters believed that licensed agents should be expressly included in the definition of ''pre-existing business relationship.'' The Commission has revised the final rule in response to those comments. By specifically addressing licensed agents, the final rule does not alter the general principles of principal-agent relationships that apply to all agents, not just licensed agents. The Commission will treat actions taken by an agent on behalf of a person that are within the scope of the agency relationship as actions of that person, regardless of whether the agent is a licensed agent or not. The final rule renumbers the definition of ''person'' as § 680.3(i).

Pre-Existing Business Relationship

Proposed § 680.3(i) defined the term ''pre-existing business relationship'' to mean a relationship between a person and a consumer based on the following: (1) a financial contract between the person and the consumer that is in force; (2) 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 a solicitation covered by this part is sent to the consumer; or (3) 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 a solicitation covered by this part is sent to the consumer.

The proposed definition generally tracked the statutory definition contained in section 624 of the FCRA, with certain revisions for clarity. Although the statute gave the Commission the authority to identify by regulation other circumstances that qualify as a pre-existing business relationship, the Commission did not propose to exercise this authority. In the final rule, the definition of ''pre-existing business relationship'' has been renumbered as §680.3(j).

Industry commenters suggested certain revisions to the proposed definition of ''pre-existing business relationship.'' Many industry commenters asked the Commission to include in the definition statutory language relating to ''a person's licensed agent.'' A number of these commenters noted that this concept was particularly important to the insurance industry where independent, licensed agents frequently act as the main point of contact between the consumer and the insurance company.

In the final rule, the phrase ''or a person's licensed agent'' has been added to the definition of ''pre-existing business relationship'' to track the statutory language. For example, assume that a person is a licensed agent for the affiliated ABC life, auto, and homeowners' insurance companies. A consumer purchases an ABC auto insurance policy through the licensed agent. The licensed agent may use eligibility information about the consumer obtained in connection with the ABC auto policy it sold to the consumer to market ABC life and homeowner's insurance policies to the consumer for the duration of the pre-existing business relationship without offering the consumer the opportunity to opt out of that use.

Regarding the first basis for a pre-existing business relationship (a financial contract in force), several industry commenters asked the Commission to clarify that a financial contract includes any in-force contract that relates to a financial product or service covered by title V of the GLBA. One commenter objected to the requirement that the contract be in force on the date of the solicitation. This commenter believed that the Commission should interpret the statute to permit the exception to apply if a contract is in force at the time the affiliate uses the information, rather than when the solicitation is sent, noting that there may be a delay between the use and the solicitation.

The Commission has adopted the first prong of the definition of ''pre-existing business relationship'' as proposed. Although a comprehensive definition of the term ''financial contract'' has not been included in the final rule, the Commission construes the statutory term ''financial contract'' at least to include a contract that relates to a

consumer's purchase or lease of a financial product or service that a financial holding company could offer under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)). In addition, a financial contract which is in force will, in virtually all instances, qualify as a ''financial transaction,'' as that term is used in the second prong of the definition of ''pre-existing business relationship.'' The Commission does not agree with the suggestion that the financial contract should be in force on the date of use rather than on the date the solicitation is sent. The approach taken in the proposed and final rule is consistent with the approach used in the other two prongs of the statutory definition.

Industry commenters also suggested certain clarifications to the second basis for a pre-existing business relationship—a purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction between the consumer and the person during the preceding 18 months. Several industry commenters noted that, notwithstanding the example in the proposal regarding a lapsed insurance policy, it was not clear from what point in time the 18-month period begins to run in the case of many purchase, rental, lease, or financial transactions. These commenters asked the Commission to clarify that the 18-month period begins to run at the time all contractual responsibilities of either party under the purchase, rental, lease, or financial transaction expire. In addition, some commenters indicated that the term ''active account'' should be clarified to mean any account with outstanding contractual responsibilities on either side of an account relationship, regardless of whether specific transactions do or do not occur on that account.

The Commission has adopted the second prong of the definition of ''pre-existing business relationship'' as proposed. The Commission declines to interpret the term ''active account'' as requested by some commenters. The Commission notes that section 603(r)(4) of the FCRA defines the term ''account'' to have the same meaning as in section 903 of the Electronic Fund Transfer Act (EFTA). Under the EFTA, the term ''account'' means a demand deposit, savings deposit, or other asset account established primarily for personal, family, or household purposes. Some commenters, however, apparently believed that the term ''active account'' included extensions of credit. Credit extensions presumably would qualify as ''another continuing relationship,'' as used in the definition of ''pre-existing business relationship.''

More generally, however, even though a ''financial transaction'' would include in virtually all cases a financial contract which is in force, as noted above, the Commission does not believe it is appropriate to state that the 18-month period begins to run when all outstanding contractual responsibilities of both parties expire, regardless of whether specific transactions occur. Such a clarification would not appropriately address circumstances such as charge-offs, bankruptcies, early terminations, or extended periods of credit inactivity that could trigger commencement of the 18-month period. In addition, some contract provisions, such as arbitration clauses and choice of law provisions, may continue to have legal effect after all contractual performance has ended. The Commission does not believe that the continued effectiveness of such provisions should delay commencement of the 18-month period.

Nevertheless, the Commission believes that a few examples may provide useful guidance to facilitate compliance. For example, in the case of a closed-end mortgage or auto loan, the 18-month period generally would begin to run when the consumer pays off the outstanding balance on the loan. In a lease or rental transaction, the 18-month period generally would begin to run when the lease or rental agreement expires or is terminated by mutual agreement. In the case of general purpose credit cards that are issued with an expiration date, the 18-month period generally would begin to run when the consumer pays off the outstanding balance on the card and the card is either cancelled or expires without being renewed.

Commenters also made certain suggestions regarding the third basis for a pre-existing business relationship—an inquiry or application by the consumer regarding a product or service offered by the person during the preceding three months. Consumer groups urged the Commission to clarify that an inquiry must be made of the specific affiliate, rather than a general inquiry about a product or service. Industry commenters expressed concern about certain statements in the supplementary information that explained the meaning of an inquiry.

The Commission does not agree that an inquiry must be made of a specific affiliate. Many affiliated institutions use a central call center to handle consumer inquiries. The clarification urged by consumer groups could preclude the establishment of a pre-existing business relationship based on a consumer's call to a central call center about a specific product or service offered by an affiliate.

In the supplementary information to the proposal, the Commission noted that certain elements of the definition of ''pre-existing business relationship'' were substantially similar to the definition of ''established business relationship'' under the amended Telemarketing Sales Rule (TSR) (16 CFR 310.2(n)). The TSR definition was informed by Congress' intent that the ''established business relationship'' exemption to the ''do not call'' provisions of the Telephone Consumer Protection Act (47 U.S.C. 227 *et seq.*) should be grounded on the reasonable expectations of the consumer.[8] The Commission observed that Congress' incorporation of similar language in the definition of ''pre-existing business relationship''[9] suggested that it would be appropriate to consider the reasonable expectations of the consumer in determining the scope of this exception. Thus, the Commission explained that, for purposes of this regulation, an inquiry would include any affirmative request by a consumer for information after which the consumer would reasonably expect to receive information from the affiliate about its products or services.[10] Moreover, a consumer would not reasonably expect to receive information from the affiliate if the consumer did not request information or did not provide contact information to the affiliate.

Industry commenters objected to the discussion in the supplementary information. Some of these commenters believed that looking to the reasonable expectations of the consumer would narrow the scope of the exception and impose on institutions a subjective standard that depended upon the consumer's state of mind. These commenters also maintained that the availability of the exception should not depend upon the consumer both requesting information and providing contact information to the affiliate. Some commenters noted that either requesting information or providing contact information should suffice to establish an expectation of receiving solicitations. Other commenters noted that consumers would not provide

[8] H.R. Rep. No. 102-317, at 14-15 (1991). *See also* 68 FR 4580, 4591-94 (Jan. 29, 2003).

[9] 149 Cong. Rec. S13,980 (daily ed. Nov. 5, 2003) (statement of Senator Feinstein) (noting that the ''pre-existing business relationship'' definition ''is the same definition developed by the Federal Trade Commission in creating a national 'Do Not Call' registry for telemarketers.'')

[10] *See* 68 FR at 4594.

contact information if they believed that the affiliate would already have the consumer's contact information or would obtain it from the consumer's financial institution. Some commenters believed that the consumer should not have to make an affirmative request for information in order to have an inquiry. Commenters also expressed concern that the discussion in the supplementary information would require consumers to use specific words to trigger the exception.

The Commission has adopted the third prong of the definition of ''pre-existing business relationship'' as proposed. The Commission continues to believe that it is appropriate to consider what the consumer says in determining whether the consumer has made an inquiry about a product or service. It may not be necessary, however, for the consumer to provide contact information in all cases. As discussed below, the Commission has revised the examples of inquiries to illustrate different circumstances.

Consumer groups and NAAG urged the Commission not to expand the definition of ''pre-existing business relationship'' to include any additional types of relationships. Industry commenters suggested a number of additional bases for establishing a pre-existing business relationship. Several industry commenters believed that the term ''pre-existing business relationship'' should be defined to include relationships arising out of the ownership of servicing rights, a participation interest in lending transactions, and similar relationships. These commenters provided no further explanation for why such an expansion was necessary. One commenter urged the Commission to expand the definition of ''pre-existing business relationship'' to apply to affiliates that share a common trade name, share the same employees or representatives, operate out of the same physical location or locations, and offer similar products.

In addition, a number of industry commenters requested clarification of the term ''pre-existing business relationship'' as applied to manufacturers that make sales through dealers. These commenters explained that automobile manufacturers do not sell vehicles directly to consumers, but through franchised dealers. Vehicle financing may be arranged through a manufacturer's captive finance company or independent sources of financing. These commenters noted that manufacturers often provide consumers with information about warranty coverage, recall notices, and other product information. According to these commenters, manufacturers also send solicitations to consumers about their products and services, drawing in part on transaction or experience information from the captive finance company. These commenters asked the Commission to clarify that the relationship between a manufacturer and a consumer qualifies as a pre-existing business relationship based on the purchase, rental, or lease of the manufacturer's goods, or, alternatively, to exercise its authority to add this relationship as an additional basis for a pre-existing business relationship. One commenter asked the Commission to clarify that a pre-existing business relationship could be established even if the person provides a product or service to the consumer without charging a fee.

The Commission does not believe it is necessary to add any additional bases for a pre-existing business relationship. The Commission acknowledges that a pre-existing business relationship exists where a person owns the servicing rights to a consumer's loan and such person collects payments from, or otherwise deals directly with, the consumer. In the Commission's view, however, that situation qualifies as a financial transaction and thus falls within the second prong of the definition of ''pre-existing business relationship.'' The Commission has included an example, discussed below, to illustrate how the ownership of servicing rights can create a pre-existing business relationship.

A pre-existing business relationship does not arise solely from a participation interest in a lending transaction because such an interest does not result in a financial contract or a financial transaction between the consumer and the participating party. The Commission declines to add a specific provision for franchised dealers. The statute contains no special provision addressing franchised dealers, as it does for licensed agents. Moreover, a franchised dealer and a manufacturer generally are not affiliates and thus are subject to the GLBA privacy rule relating to information sharing with non-affiliated third parties. The Commission also finds no basis for including within the meaning of ''pre-existing business relationship'' any affiliate that shares a common trade name or representatives, or that operates from the same location or offers similar products. Finally, the Commission declines to add a provision that would create a pre-existing business relationship when a consumer obtains a product or service without charge from a person. Such a provision would be overly broad, is not necessary given the breadth of the statutory definition of ''pre-existing business relationship,'' and could result in circumvention of the notice requirement.

Proposed § 680.20(d)(1) provided four examples of the pre-existing business relationship exception. In the final rule, these examples have been renumbered as § 680.3(j)(2)(i)-(iv), and revised to illustrate the definition of ''pre-existing business relationship,'' rather than the corresponding exception.

The two examples relating to the first and second prongs of the definition of ''pre-existing business relationship'' have been revised in § 680.3(j)(2)(i) and (ii) to focus on a loan account creditor as the person with the pre-existing business relationship, but are otherwise substantively similar to the proposal. One commenter recommended expanding the example now contained in § 680.3(j)(2)(i) to refer to the licensed agent that wrote the policy or services the relationship. The Commission believes that adding the term ''licensed agent'' to the definition is sufficient and sees no reason to further complicate this example to illustrate how the definition applies to licensed agents.

Section 680.3(j)(2)(iii) is new and illustrates when a pre-existing business relationship is created in the context of a mortgage loan. This example specifically addresses circumstances where either the loan or ownership of the servicing rights to the loan is sold to a third party. As this example illustrates, sale of the entire loan by the original lender terminates the financial transaction between the consumer and that lender and creates a new financial transaction between the consumer and the purchaser of the loan. However, the original lender's sale of a fractional interest in the loan to an investor does not create a new financial transaction between the consumer and the investor. When the original lender sells a fractional interest in the consumer's loan to an investor but also retains an ownership interest in the loan, however, the original lender continues to have a pre-existing business relationship with the consumer because the consumer obtained a loan from the lender and the lender continues to own an interest in the loan. In addition, the ownership of servicing rights coupled with direct dealings with the consumer results in a financial transaction between the consumer and the owner of the servicing rights, thereby creating a pre-existing business relationship between the consumer and the owner of the servicing rights. The Commission notes that a financial institution that owns servicing rights generally has a customer

relationship with the consumer and an obligation to provide a GLBA privacy notice to the consumer.

The example in proposed § 680.20(d)(1)(iii) regarding applications and inquiries elicited comment. Some industry commenters urged the Commission to revise this example so that it does not depend upon the consumer's expectations or the consumer providing contact information. These commenters noted, for example, that the contact information would be self-evident if the consumer makes an e-mail request or provides a return address on an envelope. These commenters also believed that in the case of a telephone call initiated by a consumer, a captured telephone number should be sufficient to create an inquiry if the consumer requests information about products or services.

In the final rule, the Commission has crafted three separate examples from proposed § 680.20(d)(1)(iii). Section 680.3(j)(2)(iv) provides an example where a consumer applies for a product or service, but does not obtain the product or service for which she applied. Contact information is not mentioned in this example because the consumer presumably would have supplied it on the application.

Section 680.3(j)(2)(v) provides an example where a consumer makes a telephone inquiry about a product or service offered by a depository institution and provides contact information to the institution, but does not obtain a product or service from or enter into a financial transaction with the institution. The Commission does not believe that an institution's capture of a consumer's telephone number during a telephone conversation with the consumer about the institution's products or services is sufficient to create an inquiry. In that circumstance, to ensure that an inquiry has been made, the institution should ask the consumer to provide his or her contact information, or confirm with the consumer that the consumer has a pre-existing business relationship with an affiliate.

Section 680.3(j)(2)(vi) provides an example where the consumer makes an e-mail inquiry about a product or service offered by a creditor, but does not separately provide contact information. In that case, the consumer provides the creditor with contact information in the form of the consumer's e-mail address. In addition, e-mail communications, unlike telephone communications, do not provide institutions with the same opportunity to ask for the consumer's contact information.

Industry commenters recommended deleting the example in proposed § 680.20(d)(1)(iv) illustrating a call center scenario where a consumer would not reasonably expect to receive information from an affiliate. In the final rule, the Commission has included a positive example of an inquiry made by a consumer through a call center in § 680.3(j)(2)(vii), while retaining the negative example from the proposal in § 680.3(j)(3)(i). In addition, the Commission has included in § 680.3(j)(3)(ii) an example of a consumer call to ask about retail locations and hours, which does not create a pre-existing business relationship. This example is substantively similar to the example from proposed § 680.20(d)(2)(iii).

A new example in § 680.3(j)(3)(iii) illustrates a case where a consumer responds to an advertisement that offers a free promotional item, but the advertisement does not indicate that an affiliate's products or services will be marketed to consumers who respond to the advertisement. The example illustrates that the consumer's response does not create a pre-existing business relationship because the consumer has not made an inquiry about a product or service, but has merely responded to an offer for a free promotional item. Similarly, if a consumer is directed by a company with which the consumer has a pre-existing business relationship to contact the company's affiliate to receive a promotional item but the company does not mention the affiliate's products or services, the consumer's contact with the affiliate about the promotional item does not create a pre-existing business relationship between the consumer and the affiliate.

Solicitation

Proposed § 680.3(j) defined the term ''solicitation'' to mean marketing initiated by a person to a particular consumer that is based on eligibility information communicated to that person by its affiliate and is intended to encourage the consumer to purchase a product or service. The proposed definition further clarified that a communication, such as a telemarketing solicitation, direct mail, or e-mail, would be a solicitation if it is directed to a specific consumer based on eligibility information. The proposed definition did not, however, include communications that were directed at the general public without regard to eligibility information, even if those communications were intended to encourage consumers to purchase products and services from the person initiating the communications.

Congress gave the Commission the authority to determine by regulation that other communications do not constitute a solicitation. The Commission does not propose to exercise this authority. The Commission solicited 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 was needed to address Internet marketing.

Most commenters believed that the proposed definition tracked the statutory definition contained in section 624 of the FCRA. A number of industry commenters, however, believed that the proposed definition misstated the types of marketing that would not qualify as a solicitation. Specifically, the first sentence of proposed § 680.3(j)(2) provided that ''[a] solicitation does not include communications that are directed at the general public and distributed without the use of eligibility information communicated by an affiliate.'' These commenters believed that a solicitation should not include *either* marketing directed at the general public *or* marketing distributed without the use of eligibility information communicated by an affiliate. Several industry commenters also requested that the Commission include the phrase ''of a product or service'' in the introductory language for consistency with the statutory definition. Some industry commenters sought clarification that certain types of communications would not constitute solicitations, for example, marketing announcements delivered via pre-recorded call center messages, automated teller machine screens, or Internet sites, or product information provided at or through educational seminars, customer appreciation events, or newsletters.

NAAG urged the Commission to clarify the portion of the definition that refers to ''a particular consumer.'' NAAG believed that mass mailings of the same or similar marketing materials to a large group of consumers could fall within the definition of ''solicitation,'' so long as the marketing is based on eligibility information received from an affiliate. NAAG expressed concern that some might construe the term ''particular'' to narrow the meaning of a ''solicitation.''

With regard to Internet marketing, industry commenters urged the Commission not to address such practices in this rulemaking. These

commenters believed that the definition of ''solicitation'' should provide specific guidance that ''pop-up'' ads and other forms of Internet marketing generally were directed to the general public and not based on eligibility information received from an affiliate, or that such marketing would fall within an exception. NAAG believed that such advertisements should be treated as solicitations if they were based on any eligibility information received from an affiliate. Consumer groups believed that if an affiliate's pop-up ads and other Internet marketing were the result of specific actions by the consumer or information collected based upon a consumer's experience on the Internet, then such marketing should be considered solicitations. These commenters also believed that pop-up ads and other Internet marketing targeted to all customers of a company should be treated as solicitations if based on the consumer's experience on the Internet.

Section 680.3(k) of the final rule contains the definition of ''solicitation.'' The definition has been revised to track the statutory language more closely. The phrase ''of a product or service'' has been added to the definition, as requested by some commenters. To ensure consistency with the definition of ''pre-existing business relationship,'' the phrase ''or obtain'' has been retained so that the definition of ''solicitation'' will include marketing for the rental or lease of goods or services, financial transactions, and financial contracts. The Commission has also deleted as unnecessary the reference to communications ''distributed without the use of eligibility information communicated by an affiliate.'' Marketing that is undertaken without the use of eligibility information received from an affiliate is not covered by the affiliate marketing rule. Moreover, there is no restriction on using eligibility information received from an affiliate in marketing directed at the general public, such as radio, television, or billboard advertisements. The phrase ''to a particular consumer'' has been retained because it is part of the statutory definition. The Commission does not believe that the phrase ''to a particular consumer'' excludes large-scale marketing campaigns from the definition of ''solicitation'' because, within such campaigns, eligibility information received from an affiliate may be used to target individual consumers.

The definition of ''solicitation'' does not distinguish between different mediums. A determination of whether a marketing communication constitutes a solicitation depends upon the facts and circumstances. The Commission has decided not to make those determinations in this rulemaking. Thus, the Commission is not adopting special rules or guidance regarding Internet-based marketing; whether Internet-based marketing is a solicitation in a particular case will be determined according to the same criteria that apply to other means of marketing. The Commission also declines to exclude categorically from the definition of ''solicitation'' marketing messages on voice response units, ATM screens, or other forms of media. Marketing delivered via such media may be solicitations if such marketing is targeted to a particular consumer based on eligibility information received from an affiliate. For example, a marketing message on an ATM screen would be a solicitation if it is targeted to a particular consumer based on eligibility information received from an affiliate, but would not be a solicitation if it is delivered to all consumers that use the ATM.

Similarly, the Commission declines to exclude educational seminars, customer appreciation events, focus group invitations, and similar forms of communication from the definition of ''solicitation.'' The Commission believes that such activities must be evaluated according to the facts and circumstances and some of those activities may be coupled with, or a prelude to, a solicitation. For example, an invitation to a financial educational seminar where the invitees are selected based on eligibility information received from an affiliate may be a solicitation if the seminar is used to solicit the consumer to purchase investment products or services.

You

The term ''you'' is defined as persons described in § 680.1(a) and the definition has been renumbered as § 680.3(l).

Section 680.21 Affiliate Marketing Opt-out and Exceptions

The Commission proposed to establish certain rules relating to the requirement to provide the consumer with notice and a reasonable opportunity and a simple method to opt out of a person's use of eligibility information that it obtained from an affiliate for the purpose of making or sending solicitations to the consumer. The Commission noted that the statute is ambiguous because it does not specify which affiliate must provide the opt-out notice to the consumer. The Commission addressed this ambiguity by proposing to place certain responsibilities on the ''communicating affiliate'' and other responsibilities on the ''receiving affiliate.''

Proposed § 680.20(a) set forth the duties of a communicating affiliate. That section required the communicating affiliate to provide a notice to the consumer before a receiving affiliate could use eligibility information to make or send solicitations to the consumer. Under the proposal, the opt-out notice would state that eligibility information may be communicated to and used by the receiving affiliate to make or send solicitations to the consumer regarding the affiliate's products and services, and would give the consumer a reasonable opportunity and a simple method to opt out.

Proposed § 680.20(a) also contained two rules of construction relating to the communicating affiliate's duty to provide the notice. The first rule of construction would have allowed the notice to be provided either in the name of a person with which the consumer currently does or previously has done business or in one or more common corporate names shared by members of an affiliated group of companies that includes the common corporate name used by that person. The rule of construction also would have provided alternatives regarding the manner in which the notice could be given, such as by allowing the communicating affiliate to provide the notice either directly to the consumer, through an agent, or through a joint notice with one or more of its affiliates. The second rule of construction would have clarified that, to avoid duplicate notices, it would not be necessary for each affiliate that communicates the same eligibility information to provide an opt-out notice to the consumer, so long as the notice provided by the affiliate that initially communicated the information was broad enough to cover use of that information by each affiliate that received and used it to make solicitations. The proposal included examples to illustrate how each of these rules of construction would work.

Proposed § 680.20(b) set forth the general duties of a receiving affiliate. That section would have prohibited the receiving affiliate from using eligibility information it received from an affiliate to make solicitations to the consumer unless, prior to such use, the consumer was provided an opt-out notice that applied to that affiliate's use of eligibility information to make solicitations and a reasonable opportunity and simple method to opt out, and the consumer did not opt out of that use.

Most industry commenters maintained that the final rule should not require any specific entity to provide the opt-out notice, but should only require that the consumer be provided an opt-out notice covering an affiliate's use of eligibility information before a solicitation is made to the consumer. These commenters believed the final rule should provide flexibility and allow either the receiving affiliate, the communicating affiliate, or any other affiliate to provide the opt-out notice. These commenters maintained that the statute is not ambiguous and does not impose any obligations on a specific entity, such as the communicating affiliate, to provide the opt-out notice. Some of these commenters acknowledged, however, that the communicating affiliate would, as a practical matter, most likely give the opt-out notice.

A number of industry commenters expressed concern that the proposed rule would create a basis for civil liability against the communicating affiliate under section 624 because that section is covered by the FCRA's private right of action provisions in sections 616 and 617. Some commenters noted that, to avoid exposure to civil liability, a communicating affiliate would have to require receiving affiliates to commit to not using the information to make solicitations, give an opt-out notice whenever they share eligibility information with affiliates, or never share eligibility information with affiliates. These commenters maintained that, in many cases, none of these solutions would be practical, for example, where a receiving affiliate negligently failed to comply with a commitment not to make solicitations unless notice has been given to the consumer.

Several industry commenters noted that the language in section 624(a)(1)(A) that ''information may be communicated'' could be included in an opt-out notice provided by the receiving affiliate. These commenters also believed that the statutory requirement that the Commission consider existing affiliate sharing notification practices and permit coordinated and consolidated notices did not imply that the communicating affiliate should be responsible for providing the opt-out notice.

Industry commenters made several suggestions for revising the language of the proposal. Some suggested revising proposed § 680.20(a) to omit any reference to the communicating affiliate and to incorporate the passive voice used in the statute. Others suggested various ways of merging proposed § 680.20(b) into proposed § 680.20(a) to focus exclusively on the responsibilities of the receiving affiliate. One commenter identified certain drafting problems it believed arose from the fact that the proposal focused alternately on the communicating affiliate and the receiving affiliate and that those two entities may be regulated by different regulatory agencies.

A few industry commenters acknowledged that the Commission had raised legitimate concerns in the supplementary information to the proposal about how meaningful a notice could be when provided by a receiving affiliate that the consumer may not recognize. These commenters believed that this concern could be addressed through other means. One commenter, for example, suggested the following introductory language in paragraph (a)(2): ''The notice required by this paragraph (a) may be provided either in the name of the bank receiving the information (provided that such bank also identifies the affiliate which provided such information), in the name of the affiliate which provided such information, or in one or more common corporate names shared by such bank and the affiliate which provided the information, and may be provided in the following manner . . .'' Another industry commenter expressed support for the rules of construction with revisions to allow the use of brand names and trade names, as well as the actual ''corporate'' name, and to allow an agent or affiliate to send a common notice that uses more than one common name in a non-deceptive manner.

Consumer group commenters supported making the communicating affiliate responsible for providing the notice and opportunity to opt out. These commenters believed that allowing the receiving affiliate to send the opt-out notice would invite consumer confusion as to whether or not the opt-out notice itself is a solicitation. These commenters also believed that the Commission should require the names of the receiving affiliates to be clearly disclosed to the consumer. Consumer groups also believed that the proposed rules of construction struck a reasonable balance by allowing commonly named affiliates to share a notice while making clear that a notice from an affiliate with whom the consumer is not familiar will not be effective. They also suggested that the company with the pre-existing business relationship should be clearly marked on the opt-out notice.

NAAG believed that a receiving affiliate should not be permitted to give the opt-out notice solely on its own behalf because a receiving affiliate is unlikely to be an entity from which the consumer would expect to receive important communications. NAAG also requested that the Commission revise certain portions of the proposed rules of construction, for example, by deleting from proposed § 680.20(a)(2)(i) the phrase ''or previously has done business'' based on concerns that it would render the notice partially ineffective because, even without this phrase, the notice would not be required for 18 months after a customer relationship ends. NAAG also requested that the Commission revise proposed §§ 680.20(a)(2)(B)(2) and (a)(2)(C) to clarify that the common name used must be one that includes the name used by the person providing the opt-out notice.

In the proposal, the Commission did not require the opt-out notice to be provided in writing. The Commission noted, however, that it contemplated that the opt-out notice would be provided to the consumer in writing or, if the consumer agrees, electronically. The proposal solicited comment on whether there were circumstances in which it would be necessary and appropriate to allow oral notice and opt out and how an oral notice could satisfy the clear and conspicuous standard in the statute.

Industry commenters believed that the final rule should permit oral notices. These commenters identified circumstances in which a relationship is established by telephone as an example of when oral notice would be appropriate. Some industry commenters also noted that an oral notice should be permitted because the affiliate sharing opt-out notice under section 603(d)(2)(A)(iii) may be given orally, as well as in writing or electronically. Several industry commenters noted that the Commission in the Telemarketing Sales Rule and the OCC in regulations relating to debt cancellation contracts and debt suspension agreements have permitted clear and conspicuous oral notices. These commenters did not believe that allowing oral notice in these circumstances had created any enforcement difficulties for the Commission or OCC. Other industry commenters noted that institutions could demonstrate compliance through the use of scripts or by monitoring or recording calls.

Consumer groups believed that a written opt-out notice should be required in all cases. These commenters believed that, with an oral notice, it is impossible to ensure that a consumer receives the appropriate notice or information on the right to opt out. They believed that allowing oral notices

would create enforcement barriers for regulators. Consumer groups also believed that institutions have strong economic incentives to prevent consumers from opting out and would engage in misrepresentations or otherwise use language in their scripts that is designed to discourage consumers from opting out. NAAG believed that oral notices would not meet the statutory requirement for a clear, conspicuous, and concise notice, that consumers would be less likely to comprehend oral notices, and enforcement would be more difficult if oral opt-out notices were allowed.

Section 680.21(a) of the final rule contains the revised provisions regarding the initial notice and opt-out requirement. Although the language of this section has been revised and simplified, the substance of this provision is substantially similar to the proposal.

Section 680.21(a)(1) sets forth the general rule. This section contains the three conditions that must be met before a person may use eligibility information about a consumer that it receives from an affiliate to make a solicitation for marketing purposes to the consumer. First, it must be clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that the person may use shared eligibility information to make solicitations to the consumer. Second, the consumer must be provided a reasonable opportunity and a reasonable and simple method to opt out of the use of that eligibility information to make solicitations to the consumer. Third, the consumer must not have opted out. Section 680.21(a)(2) of the final rule provides an example of the general rule.

The Commission has concluded that the opt-out notice may not be provided orally, but must be provided in writing or, if the consumer agrees, electronically. The statute requires the Commission to consider the affiliate sharing notification practices employed on the date of enactment and to ensure that notices and disclosures may be coordinated and consolidated in promulgating regulations. The affiliate sharing notice under section 603(d)(2)(A)(iii) of the FCRA generally must be included in the GLBA privacy notice, which must be provided in writing, or if the consumer agrees, electronically. Requiring the affiliate marketing opt-out notice to be provided in writing, or if the consumer agrees, electronically, is thus consistent with existing affiliate sharing notification practices and promotes coordination and consolidation of the three privacy-related opt-out notices. The Commission is not persuaded that there are any circumstances where it would be necessary to provide an oral opt-out notice. A number of key exceptions to the initial notice and opt-out requirement, such as the pre-existing business relationship exception, consumer-initiated communication exception, and consumer authorization or request exception, may be triggered by an oral communication with the consumer. It also could be more difficult for the Commission to monitor and enforce compliance with the final rule if oral opt-out notices were allowed. Accordingly, the final rule requires the opt-out notice to be provided in writing or, if the consumer agrees, electronically.

Section 680.21(a)(3) identifies those affiliates who may provide the initial opt-out notice. This section provides that the initial opt-out notice must be provided either by an affiliate that has or has previously had a pre-existing business relationship with the consumer, or 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 has previously had a pre-existing business relationship with the consumer. The final rule follows the general approach taken in the proposal to ensure that the notice is provided by an entity known to the consumer, while eliminating potentially ambiguous and confusing terms like ''communicating affiliate'' and ''receiving affiliate.''

The Commission also has eliminated as unnecessary the rules of construction. Joint notices are now addressed directly in § 680.21(a)(3). The Commission also has concluded that the provisions from the proposal relating to notice provided by an agent are unnecessary. General agency principles, however, continue to apply. An affiliate that has or has previously had a pre-existing business relationship with the consumer may direct its agent to provide the opt-out notice on its behalf.

The Commission has concluded that the statute's silence with regard to which affiliates may provide the opt-out notice makes the statute ambiguous on this point, despite industry comments to the contrary. The Commission also continues to believe that consumers are more likely to pay attention to a notice provided by a person known to the consumer. The Commission remains concerned that a notice provided by an entity unknown to the consumer may not provide meaningful or effective notice, and that consumers may ignore or discard notices provided by unknown entities. Industry comments on the proposal did little to address those concerns. For practical reasons, the Commission believes that affiliate marketing opt-out notices typically would be provided by an affiliate that has or has previously had a pre-existing business relationship with the consumer, or as part of a joint notice, whether or not required by the rule.

The Commission appreciates industry concerns about civil liability and has revised the final rule to address those concerns. Specifically, in contrast to the proposal, the final rule does not impose duties on any affiliate other than the affiliate that intends to use shared eligibility information to make solicitations to the consumer. Although an opt-out notice must be provided by an affiliate that has or has previously had a pre-existing business relationship with the consumer (or as part of a joint notice), that affiliate has no duty to provide such a notice. Instead, the final rule provides that absent such a notice, an affiliate must not use shared eligibility information to make solicitations to the consumer. Industry concerns about civil liability also may be mitigated to some extent by the Supreme Court's recent decision in *Safeco Ins. Co. of America v. Burr*, 127 S. Ct. 2201 (June 4, 2007).

Finally, many institutions currently require consumers to provide their Social Security numbers when exercising their existing GLBA and FCRA opt-out rights. The Commission believes that institutions likely would follow their existing practice with regard to affiliate marketing opt-outs. To combat identity theft and prevent ''phishing,'' however, the Commission, along with many institutions, has been educating consumers *not* to provide their Social Security numbers to unknown entities. Furthermore, as co-Chair of the President's Identity Theft Task Force, the Commission has made a commitment to examine and recommend ways to limit the private sector's use of Social Security numbers.

The approach recommended by industry commenters would allow an unknown entity not only to provide an affiliate marketing opt-out notice to the consumer, but also to require the consumer to reveal his or her Social Security number to that unknown entity in order to exercise the opt-out right. Such an approach would send conflicting messages to consumers about providing Social Security numbers to unknown entities. This approach also would be inconsistent with the Commission's current efforts to develop a comprehensive record on the uses of the Social Security number in the private sector and evaluate their

necessity, as recommended by the President's Identity Theft Task Force.[11]

Making Solicitations

The proposal repeatedly referred to ''making or sending'' solicitations. Several commenters suggested revising the regulation to eliminate all references to ''sending'' solicitations. These commenters believed that the statute only concerns the use of eligibility information to ''make'' solicitations and does not address ''sending'' solicitations. Commenters expressed concern that by referring to ''sending'' solicitations, the proposal would apply the notice and opt-out requirements to servicers that send solicitations on behalf of another entity.

The Commission has revised the final rule to eliminate all combined references to ''making or sending'' solicitations. The general rule in section 624(a)(1), along with the duration provisions in section 624(a)(3) and the pre-existing business relationship exception in section 624(a)(4)(A), refer to ''making'' or ''to make'' a solicitation. Other provisions of the statute, such as the consumer choice provision in section 624(a)(2)(A), the service provider exception in section 624(a)(4)(C), the non-retroactivity provision in section 624(a)(5), and the definition of ''pre-existing business relationship'' in section 624(d)(1), refer to ''sending'' or ''to send'' a solicitation. The verb ''to send,'' as used in the statute, refers to a ministerial act that a service provider, such as a mail house, performs for the person making the solicitation, (*see* 15 U.S.C. 1681s-3(a)(4)(C)), or indicates the point in time after which solicitations are no longer permitted. *See* 15 U.S.C. 1681s-3(d)(1)(B) and (C).

The Commission concludes that ''making'' and ''sending'' solicitations are different activities and that the focus of the statute is primarily on the ''making'' of solicitations. For example, a service provider may send a solicitation on behalf of another entity, but it is the entity on whose behalf the solicitation is sent that is making the solicitation and thus is subject to the general prohibition on making a solicitation, unless the consumer is given notice and an opportunity to opt out. Accordingly, the Commission has revised the final rule to refer to ''making'' a solicitation, except where the statute specifically refers to ''sending'' solicitations.

The statute, however, does not describe what a person must do in order ''to make'' a solicitation. Similarly, the legislative history does not contain guidance as to the meaning of ''making'' a solicitation. Nevertheless, the Commission believes it is important to provide clear guidance regarding what activities result in making a solicitation.

One commenter suggested that the test for making a solicitation should turn on whether an affiliate having a pre-existing business relationship with the consumer retains the discretion to determine whether or not to send the solicitation. This commenter provided an example where a financial institution obtains a list of an affiliate's customers from a common shared database, applies its own criteria to this list, and then requests the affiliate with an existing business relationship to solicit the affiliate's own customers to purchase the financial institution's products or services. (Thus, the financial institution would be using eligibility information to select a list of its affiliate's customers to receive the financial institution's marketing materials.) This commenter believed that section 624 should not apply so long as the affiliate with the existing business relationship has discretion to determine whether or not to send the solicitations. This commenter also maintained that the applicability of section 624's notice and opt-out requirement should depend on who markets the product and not on what the product is or whose product it is.

Nothing in the statute indicates that the discretion of the affiliate providing the eligibility information to determine whether or not to send a solicitation on behalf of a person who has received eligibility information from that affiliate is the test for what constitutes making a solicitation. Rather, the statute focuses on whether the person receiving eligibility information from an affiliate uses that information to market its products or services to consumers. A ''discretion to send'' test would also inappropriately link the terms ''making'' and ''sending'' in a manner that would promote confusion and undercut arguments made by commenters urging the Commission to disassociate the two terms. Finally, a ''discretion to send'' test could foster circumvention of the notice and opt-out requirement, restrict the ability of consumers to prohibit solicitations in a manner not contemplated by the statute, and make it difficult for the Commission to administer and enforce the statute.

Section 680.21(b) of the final rule clarifies what constitutes ''making'' a solicitation for purposes of this part. Section 680.21(b)(1) provides that a person makes a solicitation for marketing purposes to a consumer if: (a) the person receives eligibility information from an affiliate; (b) the person uses that eligibility information to do one of the following—identify the consumer or type of consumer to receive a solicitation, establish the criteria used to select the consumer to receive a solicitation, or decide which of its products or services to market to the consumer or tailor its solicitation to that consumer; and (c) as a result of the person's use of the eligibility information, the consumer is provided a solicitation about the person's products or services.

The Commission recognizes that several common industry practices may complicate application of the rule outlined in § 680.21(b)(1). First, affiliated groups often use a common database as the repository for eligibility information obtained by various affiliates, and information in that database may be accessible to multiple affiliates. Second, affiliated companies often use service providers to perform marketing activities, and some of those service providers may provide services for a number of different affiliates. Third, an affiliate may use its own eligibility information to market the products or services of another affiliate. Sections 680.21(b)(2)-(5) address these issues.

Section 680.21(b)(2) clarifies that a person may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that the person may access. Of course, receipt of eligibility information from an affiliate is only one element of the rule outlined in § 680.21(b)(1). In the case of a common database, *use* of the eligibility information will be the key element in determining whether a person has made a solicitation.

Section 680.21(b)(3) provides that a person receives or uses an affiliate's eligibility information if a service provider acting on behalf of the person receives or uses that information in the manner described in §§ 680.21(b)(1)(i) or (b)(1)(ii), except as provided in § 680.21(b)(5), which is discussed below. Section 680.21(b)(3) also provides that all relevant facts and circumstances will determine whether a service provider is acting on behalf of a person when it receives or uses an affiliate's eligibility information in connection with marketing that person's products or services.

Section 680.21(b)(4) addresses constructive sharing. In the supplementary information to the proposal, the Commission solicited comment on whether the notice and

[11] *See Combatting Identity Theft: A Strategic Plan*, at 26–27 (April 2007) (available at *www.idtheft.gov*).

opt-out requirements of this rule should apply to circumstances that involve a ''constructive sharing'' of eligibility information to conduct marketing, given the policy objectives of section 214 of the FACT Act. By way of example, in a ''constructive sharing'' scenario, a consumer has a relationship with a financial institution, and the financial institution is affiliated with an insurance company. The insurance company develops specific eligibility criteria, such as consumers having combined deposit balances in excess of $50,000 or average monthly demand account deposits in excess of $10,000, without the use of eligibility information received from the financial institution. The insurance company provides its criteria to the financial institution and asks the institution to identify financial institution consumers that meet the eligibility criteria and send insurance company marketing materials to those consumers. The financial institution sends the marketing materials to those consumers who meet the insurance company's eligibility criteria. A consumer who meets the eligibility criteria contacts the insurance company after receiving the insurance company marketing materials in the manner specified in those materials. The consumer's response provides the insurance company with discernible eligibility information, such as through a response form that is coded to identify the consumer as an individual who meets the specific eligibility criteria.[12]

Industry commenters urged the Commission not to apply the notice and opt-out requirement to ''constructive sharing'' situations. The principal arguments made by these commenters in support of their position were as follows. First, in a constructive sharing scenario, there is no sharing of eligibility information among affiliates. Rather, the consumer provides information to an affiliate when responding. Second, section 624 applies when a person *uses* eligibility information furnished by its affiliate to make a solicitation for its own products or services to the consumer. In constructive sharing, however, the person does not use eligibility information and does not make a solicitation as defined in the statute. Third, the affiliate that sends the marketing material has a pre-existing business relationship with the consumer and is thus exempt from the notice and opt-out requirements. Fourth, if the consumer responds to the marketing materials, for example, by returning a response card to an affiliate, one or more of the exceptions to the notice and opt-out requirement would apply, such as the consumer-initiated communication exception, the pre-existing business relationship exception, or both.

Consumer groups believed that constructive sharing contravenes the intent of Congress and amounts to a loophole that should be fixed. Similarly, NAAG believed that the letter and spirit of section 624 required subjecting constructive sharing to the notice and opt-out requirements and that to find otherwise would create a significant and unwarranted exception.

After considering the constructive sharing issue, the Commission concludes that the statute only covers situations where a person *uses* eligibility information that it received from an affiliate to make a solicitation to the consumer about its products or services. In a ''constructive sharing'' scenario like that described above, a pre-existing business relationship is established between the consumer and the insurance company when the consumer contacts the insurance company to inquire about or apply for insurance products as a result of the consumer's receipt of the insurance marketing materials. This pre-existing business relationship is established before the insurance company uses any shared eligibility information to make solicitations to the consumer. Because the insurance company does not use shared eligibility information to make solicitations to the consumer before it establishes a pre-existing business relationship with the consumer, the statute does not apply.

The Commission acknowledges the concerns expressed by consumer groups and NAAG regarding the decision not to apply the notice and opt-out requirements to constructive sharing situations. The statute's affiliate marketing provisions, however, only limit the use of eligibility information received from an affiliate to make solicitations to a consumer. A separate provision of the FCRA, section 603(d)(2)(A)(iii), regulates the sharing of eligibility information among affiliates and prohibits the sharing of non-transaction or experience information, such as credit scores from a consumer report or income from an application, among affiliates, unless the consumer is given notice and an opportunity to opt out of such sharing. The FCRA does not restrict the sharing of transaction or experience information among affiliates unless that information is medical information. Section 603(d)(2)(A)(iii) operates independent of the affiliate marketing rule. Thus, the existence of a pre-existing business relationship between a consumer and an affiliate that seeks to use shared eligibility information, such as credit scores or income, to market to that consumer (or the applicability of another exception to this affiliate marketing rule) does not relieve the entity sharing the credit score or income information of the requirement to comply with the affiliate sharing notice and opt-out provisions of section 603(d)(2)(A)(iii) of the FCRA before it shares that non-transaction or experience information with its affiliate.[13]

Section 680.21(b)(4) describes two situations where a person is deemed *not* to have made a solicitation subject to this part. Both situations assume that the person has not used eligibility information received from an affiliate in the manner described in § 680.21(b)(1)(ii). First, a person does not make a solicitation subject to this part if that person's 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 person's products or services to the consumer. Second, if, in the situation just described, the person's affiliate directs its service provider to use the affiliate's own eligibility information to market the person's products or services to the consumer, and the person does not communicate directly with the service provider regarding that use of the eligibility information, then the person has not made a solicitation subject to this part.

The core concept underlying the second prong of this provision is that the affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer controls the actions of the service provider using that information. Therefore, the service provider's use of the eligibility information should not be attributed to the person whose products or services will be marketed to consumers. In such circumstances, the service provider is acting on behalf of the affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer, and not on behalf of the

[12] The supplementary information to the proposal noted that the notice and opt-out requirement would not apply if, for example, an insurance company asked its affiliated financial institution to include insurance company marketing material in periodic statements sent to consumers by the financial institution without regard to eligibility information.

[13] A sharing of information occurs if a reference code included in marketing materials reveals one affiliate's information about a consumer to another affiliate upon receipt of a consumer's response.

person whose products or services will be marketed to that affiliate's consumers.

The Commission also recognizes that there may be situations where the person whose products or services are being marketed *does* communicate with the affiliate's service provider. This may be the case, for example, where the service provider performs services for various affiliates relying on information maintained in and accessed from a common database. In certain circumstances, the person whose products or services are being marketed may communicate with the affiliate's service provider, yet the service provider is still acting on behalf of the affiliate when it uses the affiliate's eligibility information in connection with marketing the person's products or services. Section 680.21(b)(5) describes the conditions under which a service provider would be deemed to be acting on behalf of the affiliate with the pre-existing business relationship, rather than the person whose products or services are being marketed, notwithstanding direct communications between the person and the service provider.

Section 680.21(b)(5) builds upon the concept of control of a service provider and thus is a natural outgrowth of § 680.21(b)(4). Under the conditions set out in § 680.21(b)(5), the service provider is acting on behalf of an affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer because, among other things, the affiliate controls the actions of the service provider in connection with the service provider's receipt and use of the eligibility information. This provision is designed to minimize uncertainty that may arise from application of the facts and circumstances test in § 680.21(b)(3) to cases that involve direct communications between a service provider and a person whose products and services will be marketed to consumers.

Section 680.21(b)(5) provides that a person does not make a solicitation subject to this part if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that the person may access) receives eligibility information from the person's affiliate that the person's affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market the person's products or services to the consumer, so long as the following five conditions are met.

First, the person's affiliate controls 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 person's products or services). This requirement must be set forth in a written agreement between the person's affiliate and the service provider. The person's affiliate may demonstrate control by, for example, establishing and implementing reasonable policies and procedures applicable to the service provider's access to and use of its eligibility information.

Second, the person's affiliate establishes specific terms and conditions under which the service provider may access and use that eligibility information to market the person's products or services (or those of affiliates generally) to the consumer, and periodically evaluates 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 consumer by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials. The specific terms and conditions established by the person's affiliate must be set forth in writing, but need not be set forth in a written agreement between the person's affiliate and the service provider. If a periodic evaluation by the person's affiliate reveals that the service provider is not complying with those terms and conditions, the Commission expects the person's affiliate to take appropriate corrective action.

Third, the person'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 person's products or services. This requirement must be set forth in a written agreement between the person's affiliate and the service provider.

Fourth, the person's affiliate is identified on or with the marketing materials provided to the consumer. This requirement will be construed flexibly. For example, the person'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 which contains the marketing materials.

Fifth, the person does not directly use the affiliate's eligibility information in the manner described in § 680.21(b)(1)(ii).

These five conditions together ensure that the service provider is acting on behalf of the affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer because that affiliate controls the service provider's receipt and use of that affiliate's eligibility information.

Section 680.21(b)(6) provides six illustrative examples of the rule relating to making solicitations as set forth in §§ 680.21(b)(1)-(5).

Exceptions

Proposed § 680.20(c) contained exceptions to the requirements of this part and incorporated each of the statutory exceptions to the affiliate marketing notice and opt-out requirements that are set forth in section 624(a)(4) of the FCRA. The Commission has revised the preface to the exceptions for clarity to provide that the provisions of this part do not apply to ''you'' if a person uses eligibility information that it receives from an affiliate in certain circumstances. In addition, each of the exceptions has been moved to § 680.21(c) in the final rule and is discussed below.

Pre-existing Business Relationship Exception

Proposed § 680.20(c)(1) provided that the provisions of this part would not apply to an affiliate using eligibility information to make a solicitation to a consumer with whom the affiliate has a pre-existing business relationship. As noted above, a pre-existing business relationship exists when: (1) there is a financial contract in force between the affiliate and the consumer; (2) the consumer and the affiliate have engaged in a financial transaction (including holding an active account or a policy in force or having another continuing relationship) during the 18 months immediately preceding the date of the solicitation; (3) the consumer has purchased, rented, or leased the affiliate's goods or services during the 18 months immediately preceding the date of the solicitation; or (4) the consumer has inquired about or applied for a product or service offered by the affiliate during the 3-month period immediately preceding the date of the solicitation. Proposed § 680.20(d)(1) provided examples of the pre-existing business relationship exception. As explained above, the Commission has

revised the examples from proposed § 680.20(d)(1) in the final rule and included them as examples of the definition of ''pre-existing business relationship'' rather than as examples of the pre-existing business relationship exception.

Section 680.21(c)(1) of the final rule revises the pre-existing business relationship exception to delete the word ''send'' and to eliminate as unnecessary the cross-reference to the location of the definition of ''pre-existing business relationship.'' As discussed above, commenters made a number of suggestions regarding the definition of ''pre-existing business relationship.'' The Commission has addressed those comments elsewhere. Most commenters supported the proposed text of the pre-existing business relationship exception, which generally tracks the statutory language.

Some commenters, however, apparently believed that the pre-existing business relationship exception is broader than it actually is. For example, assume that an insurance company has a pre-existing business relationship with a consumer and shares eligibility information about the consumer with its affiliates by putting that information into a common database that is accessible by all affiliates. The insurance company's lending affiliate accesses the database, reviews the data on the insurance company's consumers and, based on its review, decides to market to some of the insurance company's consumers. Rather than sending the solicitations itself, the lender asks the insurance company with the pre-existing business relationship to send solicitations on its behalf to the insurance company's consumers. As noted above, one commenter believed that in this circumstance the pre-existing business relationship exception would apply so long as the insurance company retained the discretion to decide whether or not to send the solicitations on behalf of the lender. However, the Commission concludes that this situation does not fall within the pre-existing business relationship exception. Instead, the lender makes the solicitation because it used eligibility information received from an affiliate to select the consumer to receive a solicitation about its products or services and, as a result, the consumer is provided a solicitation. To eliminate any confusion and clarify the scope of the exception, the Commission has added an example in § 680.21(d)(1) of the final rule to illustrate a situation where the pre-existing business relationship exception would apply.

Employee Benefit Plan Exception

Proposed §680.20(c)(2) provided that the provisions of this part would not apply to an affiliate using the information to facilitate communications to an individual for whose benefit the affiliate provides employee benefit or other services under a contract with an employer related to and arising out of a current employment relationship or an individual's status as a participant or beneficiary of an employee benefit plan. One commenter believed that the exception should be revised to permit communications ''to an affiliate about an individual for whose benefit an entity 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.'' This commenter also suggested deleting the phrase ''you receive from an affiliate'' in the introduction to proposed § 680.20(c). This commenter believed that this exception should permit an employer or plan sponsor to share information with its affiliates in order to offer other financial services, such as brokerage accounts or IRAs, to its employees. This commenter further requested clarification on whether the exception applies only if related to products offered as an employee benefit.

Section 680.21(c)(2) of the final rule adopts the employee benefit exception as proposed. The Commission declined to adopt the changes suggested by the one commenter. First, the suggestion to make the exception applicable to communications ''to an affiliate about an individual for whose benefit an entity provides employee benefit or other services'' differs from the language of the statute. The language of the proposed and final rule focuses on facilitating communications ''to an individual for whose benefit the person provides employee benefit or other services,'' which tracks the statutory language better than the alternative language proposed by the commenter.

Second, the only person to whom section 624 might apply is a person that receives eligibility information from an affiliate. Specifically, the statutory preface to the exceptions provides that ''[t]his section shall not apply to a person'' using information to do certain things. The language of the statute thus makes clear that the exceptions in section 624(a)(4) of the FCRA were meant to apply to persons that otherwise would be subject to section 624. In the case of the employee benefit exception, the person using the information is also ''the person provid[ing] employee benefit or other services pursuant to a contract with an employer.'' Therefore, the Commission concludes that this exception, like the other provisions of this part, should apply only to a person that uses eligibility information it receives from an affiliate to make solicitations to consumers about its products or services.

Service Provider Exception

Proposed § 680.20(c)(3) provided that the provisions of this part would not apply to an affiliate using the information to perform services for another affiliate, unless the services involve making or sending solicitations on its own behalf or on behalf of an affiliate and the service provider or such affiliate is not permitted to make or send such solicitations as a result of the consumer's election to opt out. Thus, under the proposal, when the notice has been provided to a consumer and the consumer has opted out, an affiliate subject to the consumer's opt-out election may not circumvent the opt-out by instructing the person with the consumer relationship or another affiliate to send solicitations to the consumer on its behalf.

Several industry commenters urged the Commission to revise the proposed exception to conform to the statutory language. Specifically, with respect to the exclusion from the service provider exception, these commenters recommended that the Commission delete the references to solicitations on behalf of the service provider. Some of these commenters maintained that the references to solicitations on behalf of the service provider itself would impose additional burdens and costs on companies that use a single affiliate to provide various administrative services to other affiliates and would make it more difficult to provide general educational materials to consumers. Some of these commenters also asked the Commission to clarify that the limitation in the service provider exception has no applicability to any other exception.

Section 680.21(c)(3) of the final rule revises the service provider exception to delete as surplusage the references to solicitations by a service provider on its own behalf. The Commission notes that the general rule in § 680.21(a)(1) prohibits a service provider from using eligibility information it received from an affiliate to make solicitations to the consumer about its own products or services unless the consumer is given notice and an opportunity to opt out or

unless one of the other exceptions applies. The service provider exception simply allows a service provider to do what the affiliate on whose behalf it is acting may do, such as using shared eligibility information to make solicitations to consumers to whom the affiliate is permitted to make such solicitations. The final rule also deletes the word ''make'' from the exception to the service provider exception because, as discussed above, ''making'' and ''sending'' solicitations are distinct activities and this provision of the statute uses the verb ''to send.'' The Commission notes that, although the statute contains separate service provider and pre-existing business relationship exceptions, nothing in those exceptions prevents an affiliate that has a pre-existing business relationship with the consumer from relying upon the service provider exception, where appropriate. Section 680.21(d)(2) of the final rule provides examples of the service provider exception.

Consumer-Initiated Communication Exception

Proposed § 680.20(c)(4) provided that the provisions of this part would not apply to an affiliate using the information to make solicitations in response to a communication initiated by the consumer. The proposed rule further clarified that this exception may be triggered by an oral, electronic, or written communication initiated by the consumer.

The supplementary information noted that to be covered by the proposed exception, the use of eligibility information must be responsive to the communication initiated by the consumer. The supplementary information also explained that the time period during which solicitations remain responsive to the consumer's communication would depend on the facts and circumstances. As illustrated in the example in proposed § 680.20(d)(2)(iii), if a consumer were to call an affiliate to ask about retail locations and hours, the affiliate could not use eligibility information to make solicitations to the consumer about specific products because those solicitations would not be responsive to the consumer's communication. Conversely, the example in proposed § 680.20(d)(2)(i) illustrated that if the consumer calls an affiliate to ask about its products or services and provides contact information, solicitations related to those products or services would be responsive to the communication and thus permitted under the exception. Finally, as illustrated by the example in proposed § 680.20(d)(2)(ii), the Commission also contemplated that a consumer would not initiate a communication if an affiliate made the initial call and left a message for the consumer to call back, and the consumer responded.

Commenters generally supported the text of the proposed consumer-initiated communication exception. Several commenters, however, urged the Commission to either delete the phrase ''orally, electronically, or in writing'' from the regulation or modify the language to read ''whether orally, electronically, or in writing.'' These commenters maintained that other means of communication may be used by consumers in the future and should not be precluded by the regulations. Another commenter welcomed the reference to oral communications and requested that the Commission clarify that electronic communications refers to both e-mail and facsimile transmissions.

Many industry commenters objected to the statement in the supplementary information that to qualify for this exception, the use of eligibility information ''must be responsive'' to the communication initiated by the consumer. These commenters believed that the concept of ''responsiveness'' creates a vague, subjective, and narrow standard that could subject institutions to compliance risk. These commenters noted that the Commission did not and could not provide a clear definition of what would be ''responsive.'' Some of these commenters noted that consumers may not be familiar with the various types of products or services available to them and the different affiliates that offer those products or services and may rely on the institution to inform them about available options. For this reason, most of these commenters maintained that the exception should not limit an affiliate from responding with solicitations about any product or service. Some of these commenters believed that it would be difficult to monitor compliance with or to develop scripts for a ''responsiveness'' standard by customer service representatives. One commenter noted that the Senate bill used more restrictive language in this exception than the final bill passed by Congress. Some commenters also objected to the statement that the time period during which solicitations remain responsive would depend on the facts and circumstances.

NAAG supported the statement in the supplementary information that, to qualify for this exception, the use of eligibility information ''must be responsive'' to the communication initiated by the consumer. NAAG believed this clarification was so important that it should be incorporated into the rule itself. NAAG also suggested imposing a specific time limit to allow solicitations to be made for no more than 30 days after the consumer-initiated communication under this exception.

Industry commenters also objected to some of the examples. In particular, industry commenters objected to the example in proposed § 680.20(d)(2)(i) on two grounds. First, these commenters believed that the consumer should not have to supply contact information in order to trigger the exception. These commenters noted that such a requirement would seem to preclude solicitations over the phone during the same call by presuming that a solicitation would be made by mail or e-mail. Some of these commenters also believed that consumers would expect an affiliated company, especially a company with a common brand, to have their contact information already and would not want to provide it again. Second, as noted above, some commenters maintained that the affiliate should be able to respond by making solicitations about any product or service, not just those mentioned by the consumer.

Many industry commenters objected to the example in proposed § 680.20(d)(2)(ii) about the consumer responding to a call back message. These commenters believed that such a call back should qualify as a consumer-initiated communication, noting that the consumer has the option of not returning the call. Moreover, these commenters noted that the customer service representative receiving the call would not know what prompted the consumer's call. Several commenters acknowledged that there may be concerns about calls made under false pretenses to prompt consumers to return the call, but suggested that those concerns should be addressed by other means, such as enforcement of the laws dealing with unfair or deceptive acts or practices.

Finally, some industry commenters expressed concerns about the example in proposed § 680.20(d)(2)(iii) regarding the consumer who calls to ask for retail locations and hours. These commenters noted that it is impossible to know what will transpire on a particular telephone call. One commenter noted, for example, that if a consumer called to ask for directions to an office, the customer service representative might ask why the consumer needed to go to that office. This, in turn, could prompt the consumer to mention a product or service that the consumer hoped to

obtain and lead to a discussion of specific products or services that might be appropriate for the consumer.

Section 680.21(c)(4) of the final rule revises the consumer-initiated communications exception to delete the reference to oral, electronic, or written communications. The Commission believes that any form of communication may come within the exception as long as the consumer initiates the communication, whether in-person or by mail, e-mail, telephone, facsimile, or through other means. New forms of communication that may develop in the future could also come within the exception.

Section 680.21(c)(4) of the final rule also provides that the communications covered by the exception are consumer-initiated communications about a person's products or services. For the exception to apply, the statute requires that a person use eligibility information ''in response to'' a communication initiated by a consumer. The Commission believes this statutory language contemplates that the consumer-initiated communications will relate to a person's products or services and that the solicitations covered by the exception will be those made in response to that communication.

The Commission also believes the exceptions should be construed narrowly to avoid undermining the general rule requiring notice and opt-out. Thus, consistent with the purposes of the statute, the Commission does not believe that a consumer-initiated communication that is unrelated to a product or service should trigger the exception. A rule that allowed any consumer-initiated communication, no matter how unrelated to a product or service, to trigger the exception would not to give meaning to the phrase ''in response to'' and could produce incongruous results. For example, if a consumer calls an affiliate solely to obtain retail hours and directions or solely to opt out, the exception is not triggered because the communication does not relate to the affiliate's products or services and making a solicitation about products or services to the consumer in those circumstances would not be a reasonable response to that communication.

The Commission recognizes, however, that if the conversation shifts to a discussion of products or services that the consumer may need, solicitations may be responsive depending upon the facts and circumstances. Likewise, if a consumer who has opted out of an affiliate's use of eligibility information to make solicitations calls the affiliate for information about a particular product or service, for example, life insurance, solicitations regarding life insurance could be made in response to that call, but solicitations regarding other products or services would not be responsive. Finally, the Commission does not believe it is appropriate to adopt a specific time limit for making solicitations following a consumer-initiated communication about products or services because solicitations will likely be made quickly and any time limit would be arbitrary.

In the final rule, the Commission has renumbered the example in proposed § 680.20(d)(2)(i) as § 680.21(d)(3)(i), and revised it to delete the references to a telephone call as the specific form of communication and the reference to providing contact information. As discussed above and illustrated in the examples in §§ 680.20(j)(2)(ii)(E) and (F), the need to provide contact information may vary depending on the form of communication used by the consumer. The new example in § 680.21(d)(3)(ii) responds to commenters' concerns by illustrating a circumstance involving a consumer-initiated communication in which a consumer does not know exactly what products or services he or she wants, but initiates a communication to obtain information about investing for a child's college education.

The Commission has renumbered the call-back example in proposed § 680.20(d)(2)(iii) as § 680.21(d)(3)(iii) and revised it. The revised example provides that where the financial institution makes an initial marketing call without using eligibility information received from an affiliate and leaves a message that invites the consumer to apply for the credit by calling a toll-free number, the consumer's response qualifies as a consumer-initiated communication about a product or service. The revised example balances commenters' concerns about tracking which calls are call backs and the Commission's concern that consumers may be induced into triggering the consumer-initiated communication exception as a result of inaccurate, incomplete, or deceptive telephone messages.

For the reasons discussed above, the Commission has renumbered the retail hours example in proposed § 680.20(d)(2)(iii) as § 680.21(d)(3)(iv), but otherwise adopted it as proposed. In addition, the new example in § 680.21(d)(3)(v) responds to commenters' concerns by illustrating a case where a consumer calls to ask about retail locations and hours and the call center representative, after eliciting information about the reason why the consumer wants to visit a retail location, offers to provide information about products of interest to the consumer by telephone and mail, thus demonstrating how the conversation may develop to the point where making solicitations would be responsive to the consumer's call.

Consumer Authorization or Request Exception

Proposed § 680.20(c)(5) clarified that the provisions of this part would not apply to an affiliate using the information to make solicitations affirmatively authorized or requested by the consumer. The proposal further provided that this exception may be triggered by an oral, electronic, or written authorization or request by the consumer. However, a pre-selected check box or boilerplate language in a disclosure or contract would not constitute an affirmative authorization or request under the proposal.

The proposal noted that the consumer authorization or request exception could be triggered, for example, if a consumer obtains a mortgage from a mortgage lender and authorizes or requests to receive solicitations about homeowner's insurance from an insurance affiliate of the mortgage lender. The consumer could provide the authorization or make the request either through the person with whom the consumer has a business relationship or directly to the affiliate that will make the solicitation. Proposed § 680.20(d)(3) provided an example of the affirmative authorization or request exception.

Most industry commenters argued that the proposed exception did not track the language of the statute because the Commission included the word ''affirmative'' in the proposed exception. These commenters believed that including the word ''affirmative'' in the proposed rule narrowed the exception in a manner not intended by Congress. Several of these commenters noted that the Commission has declined to specify what constitutes consumer consent under the GLBA privacy rule and indicated that they were not aware of any policy considerations or compliance issues that would warrant a departure from the Commission's prior position.

Some industry commenters believed that a pre-selected check box should be sufficient to evidence a consumer's authorization or request for solicitations. In other words, a consumer's decision not to deselect a pre-selected check box should constitute a knowing act of the consumer to authorize or request solicitations. Other industry

commenters believed that preprinted language in a disclosure or contract should be sufficient to evidence a consumer's authorization or request for solicitations. One commenter cited case law and Commission informal staff opinion letters relating to a consumer's written instructions to obtain a consumer report pursuant to section 604(a)(2) of the FCRA as support for allowing boilerplate language to constitute authorization or request.

A few industry commenters requested that the Commission clarify that a consumer's authorization or request does not have to refer to a specific product or service or to a specific provider of products or services in order for the exception to apply. As discussed above, industry commenters had differing views regarding the reference to oral, written, or electronic means of triggering the exception.

NAAG suggested imposing a specific time limit to allow solicitations to be made for no more than 30 days after the consumer's authorization or request under this exception.

Section 680.21(c)(5) of the final rule revises the consumer authorization or request exception to delete the word ''affirmative'' as surplusage. The deletion of the word ''affirmative'' does not change the meaning of the exception however. The consumer still must take affirmative steps to ''authorize'' or ''request'' solicitations.

The Commission construes this exception, like the other exceptions, narrowly and in a manner that does not undermine the general notice and opt-out requirement. For that reason, the Commission believes that affiliated companies cannot avoid use of the statute's notice and opt-out provisions by including preprinted boilerplate language in the disclosures or contracts they provide to consumers, such as language stating that by applying to open an account, the consumer authorizes or requests to receive solicitations from affiliates. Such an interpretation would permit the exception to swallow the rule, a result that cannot be squared with the intent of Congress to give consumers notice and an opportunity to opt out of solicitations.

The comparison made by some commenters to the GLBA privacy rule is misplaced. The GLBA and the privacy rule create an exception to permit the disclosure of nonpublic personal information ''with the consent or at the direction of the consumer.'' Section 624 of the FCRA creates an exception to permit the use of shared eligibility information ''in response to solicitations authorized or requested by the consumer.'' The Commission interprets the ''authorized or requested'' language in the FCRA exception to require the consumer to take affirmative steps in order to trigger the exception.

The Commission has made conforming changes to the example in proposed § 680.20(d)(3), which has been renumbered as § 680.21(d)(4)(i) in the final rule. In addition, the Commission has added three additional examples. The example in § 680.21(d)(4)(ii) illustrates how a consumer can authorize or request solicitations by checking a blank check box. The examples in §§ 680.21(d)(4)(iii) and (iv) illustrate that preprinted boilerplate language and a pre-selected check box would not meet the authorization or request exception.

The Commission does not believe it is appropriate to set a fixed time period for an authorization or request. As noted in the proposal, the duration of the authorization or request depends on what is reasonable under the facts and circumstances. In addition, an authorization to make solicitations to the consumer terminates if the consumer revokes the authorization.

For the same reasons discussed above, the Commission has deleted the reference to oral, electronic, or written communications from this exception to track the language of the statute. Further, the Commission does not believe it is necessary to clarify the elements of an authorization or request. The statute clearly refers to ''solicitations authorized or requested by the consumer.'' The facts and circumstances will determine what solicitations have been authorized or requested by the consumer.

Compliance with Applicable Laws Exception

Proposed § 680.20(c)(6) clarified that the provisions of this part would not apply to an affiliate if compliance with the requirements of section 624 by the affiliate would prevent that affiliate from complying with any provision of state insurance laws pertaining to unfair discrimination in a state where the affiliate is lawfully doing business. *See* FCRA, section 624(a)(4). The Commission received no comments on this provision. Section 680.21(c)(6) of the final rule adopts the state insurance law compliance exception as proposed.

One commenter requested the creation of an additional exception to permit the sharing of eligibility information among affiliates that are aligned under one line of business within an organization and that share common management, branding, and regulatory oversight (*i.e.*, banking, securities, and insurance companies). This commenter was focused on private banking enterprises. As discussed above, the Commission finds no statutory basis for creating such an exception to the notice and opt-out requirement.

Relation to Affiliate-Sharing Notice and Opt-out

Proposed § 680.20(f) clarified the relationship between the affiliate sharing notice and opt-out under section 603(d)(2)(A)(iii) of the FCRA and the affiliate marketing notice and opt-out in new section 624 of the FCRA. Specifically, the proposal provided that nothing in the affiliate marketing rule 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 among affiliates to avoid becoming a consumer reporting agency.

One commenter urged the Commission to delete this provision as unnecessary. In the alternative, this commenter requested that the Commission clarify that section 603(d)(2)(A)(iii) applies to the sharing of information that would otherwise meet the definition of a ''consumer report,'' and that the sharing affiliate does not automatically become a consumer reporting agency, but risks becoming a consumer reporting agency.

This provision has been renumbered as § 680.21(e) in the final rule. Section 680.21(e) has been revised to delete the clause that referred to becoming a consumer reporting agency and to substitute in its place the neutral phrase ''where applicable.''

Section 680.22 Scope and Duration of Opt-Out

Scope of the Opt-out

The Commission addressed issues relating to the scope of the opt-out in various sections of the proposal. In the supplementary information to the proposal, the Commission stated that the opt-out would be tied to the consumer, rather than to the information. Some industry commenters supported the approach of tying the opt-out to the consumer, rather than to the information. Other industry commenters, however, believed it was inappropriate to tie the opt-out to the consumer and requested that institutions have the flexibility to implement the consumer's opt-out at the account level, rather than at the consumer level. These commenters believed that an account-by-account approach would be consistent with the

menu of opt-out choices provided in this rule and the GLBA privacy rule. These commenters also noted that an account-based approach would provide the consumer with a new notice and opportunity to opt out when a former customer decides to re-establish a new relationship with the institution.

Proposed § 680.21(c) provided that the notice could be designed to allow a consumer to choose from a menu of alternatives when opting out, such as by selecting certain types of affiliates, certain types of information, or certain modes of delivery from which to opt out, so long as one of the alternatives gave the consumer the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivering solicitations. Several industry commenters objected to the requirement that the institution provide a single universal opt-out option that would allow consumers to opt out completely of all solicitations. In addition, one commenter found the reference to all types of eligibility information confusing, while another commenter noted that some institutions may want to implement the opt-out on an account-by-account basis.

Section 680.25(d) of the proposal provided that if a consumer's relationship with an institution terminated for any reason when a consumer's opt-out election was in force, the opt-out would continue to apply indefinitely, unless revoked by the consumer. Most industry commenters objected to having the opt-out period continue to apply indefinitely upon termination of the consumer's relationship with the institution. These commenters believed that this approach was not supported by the statute, would prove costly and difficult to administer, and would require the indefinite tracking of opt-outs. These commenters also believed that the five-year opt-out period would provide sufficient protection to consumers that terminate their relationship. One commenter noted that the proposed rule would impose particular hardships on mortgage lenders because those lenders often have consumer relationships of very short duration on account of selling the loans they originate into the secondary market. Consumer groups supported the proposed treatment of opt-outs for terminated consumer relationships.

Upon further examination, the Commission believes that the scope of the opt-out should be addressed comprehensively in a single section of the final rule. The Commission also concludes that tying the opt-out to the consumer could have had unintended consequences. For example, if the opt-out were tied to the consumer, an institution would have to track the consumer indefinitely, even if the consumer's relationship with the institution terminated and a new relationship were subsequently established with that institution years later. The Commission does not believe that institutions should be required to track consumers indefinitely following termination. In addition, an opt-out tied to the consumer could apply to the use of all eligibility information, not just to eligibility information about the consumer, received from an affiliate and used to make solicitations to the consumer. It is not clear from the statute or the legislative history that Congress intended the opt-out provisions of section 624 to apply to eligibility information about consumers other than the consumer to whom a solicitation is made. Finally, the Commission does not believe it is necessary to make the opt-out effective in perpetuity upon termination of the relationship.

Section 680.22(a) of the final rule brings together these different scope considerations to address comprehensively the scope of the opt-out. Under the revised approach, the scope of the opt-out is derived from language of section 624(a)(2)(A) of the FCRA and generally depends upon the content of the opt-out notice. Section 680.22(a)(1) provides that, except as otherwise provided in that section, a consumer's election to opt out prohibits any affiliate covered by the opt-out notice from using the eligibility information received from another affiliate as described in the notice to make solicitations for marketing purposes to the consumer.

Section 680.22(a)(2)(i) clarifies that, in the context of a continuing relationship, an opt-out notice may apply to eligibility information obtained in connection with a single continuing relationship, multiple continuing relationships, continuing relationships established subsequent to delivery of the opt-out notice, or any other transaction with the consumer. Section 680.22(a)(2)(ii) provides examples of continuing relationships. These examples are substantially similar to the examples used in the GLBA privacy rule with added references to relationships between the consumer and an affiliate.

Section 680.22(a)(3)(i) limits the scope of an opt-out notice that is not connected with a continuing relationship. This section provides that if there is no continuing relationship between the consumer and a person or its affiliate, and if the person or its affiliate provides an opt-out notice to a consumer that relates to eligibility information obtained in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, the opt-out notice only applies to eligibility information obtained in connection with that transaction. The notice cannot apply to eligibility information that may be obtained in connection with subsequent transactions or a continuing relationship that may be subsequently established by the consumer with the person or its affiliate. Section 680.22(a)(3)(ii) provides examples of isolated transactions.

Section 680.22(a)(4) provides that a consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations. An opt-out notice may give the consumer the opportunity to elect to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice, solicitations based on certain types of eligibility information but not other types of eligibility information, or solicitations by certain methods of delivery but not other methods of delivery, so long as one of the alternatives is the opportunity to prohibit all solicitations from all of the affiliates that are covered by the notice. The Commission continues to believe that the language of section 624(a)(2)(A) of the FCRA requires the opt-out notice to contain a single opt-out option for all solicitations within the scope of the notice.

The Commission recognizes that consumers could receive a number of different opt-out notices, even from the same affiliate. The Commission will monitor industry notice practices and evaluate whether further action is needed.

Section 680.22(a)(5) contains a special rule for notice following termination of a continuing relationship. This rule provides that a consumer must be given a new opt-out notice if, after all continuing relationships with a person or its affiliate have been terminated, the consumer subsequently establishes a new continuing relationship with that person or the same or a different affiliate and the consumer's eligibility information is to be used to make a solicitation. This special rule affords the consumer and the company a fresh start following termination of all continuing relationships by requiring a new opt-out notice if a new continuing relationship is subsequently established.

The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. The new opt-

out notice may apply more broadly to information obtained in connection with a terminated relationship and give the consumer the opportunity to opt out with respect to eligibility information obtained in connection with both the terminated and the new continuing relationships. Further, the consumer's failure to opt out does not override a prior opt-out election by the consumer applicable to eligibility information obtained in connection with a terminated relationship that is still in effect, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship. The final rule also contains an example of this special rule. The Commission notes, however, that where a consumer was not given an opt-out notice in connection with the initial continuing relationship because eligibility information obtained in connection with that continuing relationship was not shared with affiliates for use in making solicitations, an opt-out notice provided in connection with a new continuing relationship would have to apply to any eligibility information obtained in connection with the terminated relationship that is to be shared with affiliates for use in making future solicitations.

Duration and Timing of Opt-Out

Proposed § 680.25 addressed the duration and effect of the consumer's opt-out election. Proposed § 680.25(a) provided that the consumer's election to opt out would be effective for the opt-out period, which is a period of at least five years beginning as soon as reasonably practicable after the consumer's opt-out election is received. The supplementary information noted that if a consumer elected to opt out every year, a new opt-out period of at least five years would begin upon receipt of each successive opt-out election.

Some industry commenters believed that the proposal was inconsistent with the statute because it provided that the opt-out period would begin as soon as reasonably practicable after the consumer's opt-out election is received. These commenters believed that the opt-out period should begin on the date the consumer's opt-out is received and that the final rule also should allow institutions a reasonable period of time to implement a consumer's initial or renewal opt-out election before it becomes effective. Consumer groups believed that the requirement to honor an opt-out ''beginning as soon as reasonably practicable'' was too vague. These commenters believed that a consumer's opt-out should be honored within a specific length of time not to exceed 30 days after the consumer responds to the opt-out notice.

A few industry commenters urged the Commission to allow consumers to revoke an opt-out election orally. Other industry commenters requested that the final rule include a clear statement that an opt-out period may be shortened to a period of less than five years by the consumer's revocation of an opt-out election. Consumer groups approved of the Commission's statement that if a consumer opts out again during the five-year opt-out period, then a new five-year period begins. Consumer groups also supported allowing institutions to make the opt-out period effective in perpetuity so long as this is clearly disclosed to the consumer in the original notice.

The general provision regarding the duration of the opt-out has been renumbered as § 680.22(b) in the final rule, consistent with the Commission's decision to address all scope issues in the same section. The Commission has revised the duration provision to clarify that the opt-out period expires if the consumer revokes the opt-out in writing or, if the consumer agrees, electronically. The requirement for a written or electronic revocation is retained and is consistent with the approach taken in the GLBA privacy rule. The Commission does not believe it is necessary or appropriate to permit oral revocation. The Commission notes that many of the exceptions to the notice and opt-out requirements may be triggered by oral communications, as discussed above, which would enable the use of shared eligibility information to make solicitations pending receipt of a written or electronic revocation. Also, as noted in the proposal, nothing prohibits setting an opt-out period longer than five years, including an opt-out period that does not expire unless revoked by the consumer.

The Commission does not agree that the opt-out period should begin on the date the consumer's election to opt out is received. Commenters generally recognized that institutions cannot instantaneously implement a consumer's opt-out election but need time to do so. The Commission interprets the statutory language to mean that the consumer's opt-out election must be honored for a period of at least five years from the date such election is implemented. The Commission believes that Congress did not intend for the opt-out period to be shortened to a period of less than the five years specified in the statute to reflect the time between the date the consumer's opt-out election is received and the date the consumer's opt-out election is implemented.

The Commission also believes it is neither necessary nor desirable to set a mandatory deadline for implementing the consumer's opt-out election. A general standard is preferable because the time it will reasonably take to implement a consumer's opt-out election may vary.

Consistent with the special rule for a notice following termination of a continuing relationship, the duration of the opt-out is not affected by the termination of a continuing relationship. When a consumer opts out in the course of a continuing relationship and that relationship is terminated during the opt-out period, the opt-out remains in effect for the rest of the opt-out period. If the consumer subsequently establishes a new continuing relationship while the opt-out period remains in effect, the opt-out period may not be shortened with respect to information obtained in connection with the terminated relationship by sending a new opt-out notice to the consumer when the new continuing relationship is established, even if the consumer does not opt out upon receipt of the new opt-out notice. A person may track the eligibility information obtained in connection with the terminated relationship and provide a renewal notice to the consumer, or may choose not to use eligibility information obtained in connection with the terminated relationship to make solicitations to the consumer.

Proposed § 680.25(c) clarified that a consumer may opt out at any time. As explained in the supplementary information to the proposal, even if the consumer did not opt out in response to the initial opt-out notice or if the consumer's election to opt out was not prompted by an opt-out notice, a consumer may still opt out. Regardless of when the consumer opts out, the opt-out must be effective for a period of at least five years.

The Commission received few comments on this provision. Consumer groups urged the Commission to reinforce the continuing nature of the right to opt out by requiring institutions to give the opt-out notice annually along with the annual GLBA privacy notice. These commenters acknowledged that the FCRA does not specifically state that the notice is required annually, but noted that the statute also does not say that the consumer has only one opportunity to opt out.

The Commission has renumbered the provision giving the consumer the right

to opt out at any time as § 680.22(c) in the final rule, but otherwise adopted the provision as proposed. The Commission finds no statutory basis for requiring the provision of an annual opt-out notice to consumers along with the GLBA privacy notice.

Section 680.23 Contents of Opt-out Notice; Consolidated and Equivalent Notices

Contents in General

Section 680.21 of the proposal addressed the contents of the opt-out notice. Proposed § 680.21(a) would have required that the opt-out notice be clear, conspicuous, and concise, and accurately disclose: (1) that the consumer may elect to limit a person's affiliate from using eligibility information about the consumer that it obtains from that person to make or send solicitations to the consumer; (2) if applicable, that the consumer's election will apply for a specified period of time and that the consumer will be allowed to extend the election once that period expires; and (3) a reasonable and simple method for the consumer to opt out.

Some commenters expressed concern about requiring the notice to specify the applicable time period and the consumer's right to extend the election once the opt-out expires. One commenter believed this would require institutions to determine in advance the length of the opt-out period. Another commenter urged the Commission to clarify that institutions could subsequently increase the duration of the opt-out or make it permanent without providing another notice to the consumer.

The Commission has renumbered the provisions addressing the contents of the opt-out notice as § 680.23(a) in the final rule and revised them. Section 680.23(a)(1) of the final rule requires additional information in opt-out notices. Section 680.23(a)(1)(i) provides that all opt-out notices must identify, by name, the affiliate(s) that is providing the notice. A group of affiliates may jointly provide the notice. 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. Acceptable ways of identifying the multiple affiliates providing the notice include 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. A representation that the notice is provided by ''the ABC banking, credit card, insurance, and securities companies'' applies to all companies in those categories, not just some of those companies. But if the affiliates providing the 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, if the affiliates providing the notice do business under both the ABC name and the XYZ name, then the notice could list each affiliate by name or indicate that the notice is being provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and credit card companies and the XYZ insurance companies.''

Section 680.23(a)(1)(ii) provides that an opt-out notice must contain a list of the affiliates or types of affiliates covered by the notice. The notice may apply to multiple affiliates and to companies that become affiliates after the notice is provided to the consumer. The rule for identifying the affiliates covered by the notice is substantially similar to the rule for identifying the affiliates providing the notice in § 680.23(a)(1)(i), as described in the previous paragraph.

Sections 680.23(a)(1)(iii)-(vii) respectively require the opt-out notice to include the following: a general description of the types of eligibility information that may be used to make solicitations to the consumer; a statement that the consumer may elect to limit the use of eligibility information to make solicitations to the consumer; a statement 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; if the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, a statement that the consumer who has chosen to limit marketing offers does not need to act again until the consumer receives a renewal notice; and a reasonable and simple method for the consumer to opt out. The statement described in § 680.23(a)(1)(vi) regarding consumers who may have previously opted out does not apply to the model privacy form that the Commission is developing in a separate rulemaking. Appropriate use of the model forms in Appendix C will satisfy these content requirements.

The Commission continues to believe that the opt-out notice must specify the length of the opt-out period, if one is provided. However, an institution that subsequently chooses to increase the duration of the opt-out period that it previously disclosed or honor the opt-out in perpetuity has no obligation to provide a revised notice to the consumer. In that case, the result is the same as if the institution established a five-year opt-out period and then did not send a renewal notice at the end of that period. A person receiving eligibility information from an affiliate would be prohibited from using that information to make solicitations to a consumer unless a renewal notice is first provided to the consumer and the consumer does not renew the opt-out. So long as no solicitations are made using eligibility information received from an affiliate, there would be no violation of the statute or regulation for failing to send a renewal notice in this situation.

Joint Notice

Proposed § 680.24(c) permitted a person subject to this rule to provide a joint opt-out notice with one or more of its affiliates that are identified in the notice, so long as the notice was accurate with respect to each affiliate jointly issuing the notice. Under the proposal, a joint notice would not have to list each affiliate participating in the joint notice by its name, but could state that it applies to ''all institutions with the ABC name'' or ''all affiliates in the ABC family of companies.''

One commenter believed that individually listing each company could result in long and confusing notices. This commenter suggested revising the rule to permit the generic identification of the types of affiliates by whom eligibility information may be used to make solicitations and to allow the notice to apply to entities that become affiliates after the notice is sent.

In the final rule, the separate joint notice provision has been eliminated. Instead, the final rule incorporates the joint notice option into the provisions that address which affiliates may provide the opt-out notice and the contents of the notice.

Joint relationships

The proposal addressed joint relationships in the section dealing with delivery of opt-out notices. Proposed § 680.24(d) set out a rule that would apply when two or more consumers jointly obtain a product or service from a person subject to the rule (referred to in the proposed regulation as ''joint consumers''), such as a joint credit card account. It also provided several examples. Under the proposal, a person subject to this rule could provide a single opt-out notice to joint accountholders. The notice would have

had to indicate whether the person would consider an opt-out by a joint accountholder as an opt-out by all of the associated accountholders, or whether each accountholder would have to opt out separately. The person could not require all accountholders to opt out before honoring an opt-out direction by one of the joint accountholders. Because section 624 of the FCRA deals with the use of information for marketing by affiliates, rather than the sharing of information among affiliates, comment was requested on whether information about a joint account should be allowed to be used for making solicitations to a joint consumer who has not opted out.

Some commenters supported the flexible approach proposed by the Commission for dealing with joint accounts and notice to joint accountholders. One commenter suggested providing additional flexibility to enable consumers to opt out in certain circumstances, such as when eligibility information from a joint account is involved, but not in others, such as when eligibility information from an individual account is involved. Another commenter, however, believed that the provisions regarding joint relationships may not be appropriate for the affiliate marketing rule because section 624 relates to the use of information for marketing to a particular consumer, not to the sharing of information among affiliates. Consumer groups urged the Commission to prohibit the use of eligibility information about a joint account for making solicitations to a consumer who has not opted out if the other joint consumer on the account has opted out.

The Commission has renumbered the provision addressing joint relationships as § 680.23(a)(2) in the final rule. The Commission has deleted the example of joint relationships from the final rule because it addressed, in part, the sharing of information, rather than the use of information. The Commission has made other revisions to enhance the readability of this provision. The revised provision is substantively similar to the joint relationships provision of the GLBA privacy rule, except to the extent that rule refers to the sharing of information among affiliates.

The Commission believes that different issues may arise with regard to providing a single opt-out notice to joint consumers in the context of this rule, which focuses on the *use* of information, compared to issues that may arise with regard to providing such a notice in the context of other privacy rules that focus on the *sharing* of information. For example, a consumer may opt out with respect to affiliate marketing in connection with an individually-held account, but not opt out with respect to affiliate marketing in connection with a joint relationship. In that case, it could be challenging to identify which consumer information may and may not be used by affiliates to make solicitations to the consumer. Nevertheless, the final rule permits persons providing opt-out notices to consumers to provide a single opt-out notice to joint consumers.

Alternative Contents

Proposed § 680.21(d) provided that, where an institution elects to give consumers a broader right to opt out of marketing than is required by this part, the institution would have the ability to modify the contents of the opt-out notice to reflect accurately the scope of the opt-out right it provides to consumers. This section also noted that proposed Appendix A provided a model form that may be helpful for institutions that wish to allow consumers to opt out of all marketing from the institution and its affiliates, but use of the model form is not required. Commenters generally favored the flexibility afforded by this provision. The Commission has renumbered the provision addressing alternative contents as § 680.23(a)(3) in the final rule, but otherwise adopted it as proposed.

Model Notices

Section 680.23(a)(4) in the final rule states that model notices are provided in Appendix C of Part 698, renumbered from Appendix A of Part 680. The Commission has provided these model notices to facilitate compliance with the rule. However, the final rule does not require use of the model notices.

Consolidated and Equivalent Notices

Proposed § 680.27 provided that an opt-out notice required by this part could be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the FCRA and the notice required by title V of the GLBA. In addition, a notice or other disclosure that was equivalent to the notice required by this part, and that was provided to a consumer together with disclosures required by any other provision of law, would satisfy the requirements of this part. The proposal specifically requested comment on the consolidation of the affiliate marketing notice with the GLBA privacy notice and the affiliate sharing opt-out notice under section 603(d)(2)(A)(iii) of the FCRA.

Commenters generally supported the proposed provision. Several commenters believed it was probable that most institutions would want to provide the affiliate marketing opt-out notice with their existing GLBA privacy notice to reduce compliance costs and minimize consumer confusion. One commenter believed that institutions would be less likely to include the opt-out notice as part of their annual GLBA privacy notice because section 214 does not have an annual notice requirement.

The Commission has moved the provisions addressing consolidated and equivalent notices to the section addressing the contents of the notice and renumbered those provisions as §§ 680.23(b) and (c) respectively in the final rule. Otherwise, those provisions have been adopted as proposed with one exception. The provision on equivalent notices clarifies that an equivalent notice satisfies the requirements of § 680.23—not the entire part—because the part addresses many issues besides the content of the notice, such as delivery and renewal of opt-outs. The Commission believes that these provisions are related to the contents of the notice and should therefore be included in this section.

The Commission encourages consolidation of the affiliate marketing opt-out notice with the GLBA privacy notice, including the affiliate sharing opt-out notice under section 603(d)(2)(A)(iii) of the FCRA, so that consumers receive a single notice they can use to review and exercise all privacy opt-outs. Consolidation of these notices, however, presents special issues. For example, the affiliate marketing opt-out may be limited to a period of at least five years, subject to renewal, whereas the GLBA privacy and FCRA section 603(d)(2)(A)(iii) opt-out notices are not time-limited. This difference, if applicable, must be made clear to the consumer. Thus, if a consolidated notice is used and the affiliate marketing opt-out is limited in duration, the notice must inform consumers that if they previously opted out, they do not need to opt out again until they receive a renewal notice when the opt-out expires or is about to expire. In addition, as discussed more fully below, the Commission has developed a model privacy form that includes the affiliate marketing opt-out. The Commission expects that once published in final form, use of the model privacy form will satisfy the requirement to provide an affiliate marketing opt-out notice.

Section 680.24 Reasonable Opportunity to Opt Out

Section 680.22(a) of the proposal provided that before a receiving affiliate could use eligibility information to make or send solicitations to the consumer, the communicating affiliate would have to provide the consumer with a reasonable opportunity to opt out following delivery of the opt-out notice. Given the variety of circumstances in which institutions must provide a reasonable opportunity to opt out, the proposal construed the requirement for a reasonable opportunity to opt out as a general test that would avoid setting a mandatory waiting period in all cases.

The proposed rule would not have required institutions subject to the rule to disclose how long a consumer would have to respond to the opt-out notice before eligibility information communicated to affiliates could be used to make or send solicitations to the consumer, although institutions would have the flexibility to include such disclosures in their notices. In this respect, the proposed rule was consistent with the GLBA privacy rule.

Industry commenters generally supported the Commission's approach of treating the requirement for a reasonable opportunity to opt out as a general test that would avoid setting a mandatory waiting period. NAAG, on the other hand, believed that the Commission should set a mandatory waiting period of at least 45 days from the date of mailing or other transmission of the notice because consumers may be ill, away from home, or otherwise unable to respond to correspondence promptly.

Industry commenters generally supported the Commission's decision not to require the disclosure of how long a consumer would have to respond to the opt-out notice before eligibility information could be used to make or send solicitations to the consumer. Consumer groups believed that consumers should be told how long they have to respond to the notice before eligibility information could be used by affiliates to make or send solicitations and that they may exercise their right to opt out at any time.

The Commission has renumbered the section addressing a reasonable opportunity to opt out as § 680.24 in the final rule and revised it. Section 680.24(a) of the final rule retains the approach of construing the requirement for a reasonable opportunity to opt out as a general test that avoids setting a mandatory waiting period in all cases. Given the variety of circumstances in which a reasonable opportunity to opt out must be provided, the Commission believes that the appropriate time to permit solicitations may vary depending upon the circumstances. A general standard provides flexibility to allow a person to use eligibility information it receives from an affiliate to make solicitations at an appropriate point in time that may vary depending upon the circumstances, while assuring that the consumer is given a realistic opportunity to prevent such use of this information. In the final rule, the Commission has retained the approach of not requiring affiliate marketing opt-out notices to disclose how long a consumer has to respond before eligibility information may be used to make solicitations to the consumer or that consumers may exercise their right to opt out at any time. However, an institution may, at its option, add this information to its opt-out notice.

Section 680.22(b) of the proposal provided examples to illustrate what would constitute a reasonable opportunity to opt out. The proposed examples would have provided a generally applicable safe harbor for opt-out periods of 30 days. As explained in the supplementary information to the proposal, although 30 days would be a safe harbor, a person subject to this requirement could decide, at its option, to give consumers more than 30 days in which to decide whether or not to opt out. A shorter waiting period could be adequate in certain situations depending on the circumstances.

Proposed §680.22(b)(1) contained an example of a reasonable opportunity to opt out when the notice was provided by mail. Proposed § 680.22(b)(2) contained an example of a reasonable opportunity to opt out when the notice was provided by electronic means. The proposed examples were consistent with examples used in the GLBA privacy rule.

Proposed § 680.22(b)(3) contained an example of a reasonable opportunity to opt out where, in a transaction conducted electronically, the consumer was required to decide, as a necessary part of proceeding with the transaction, whether or not to opt out before completing the transaction, so long as the institution provided a simple process at the Internet Web site that the consumer could use at that time to opt out. In this example, the opt-out notice would automatically be provided to the consumer, such as through a non-bypassable link to an intermediate Web page, or ''speedbump.'' The consumer would be given a choice of either opting out or not opting out at that time through a simple process conducted at the Web site. For example, the consumer could be required to check a box right at the Internet Web site in order to opt out or decline to opt out before continuing with the transaction. However, this example would not cover a situation where the consumer was required to send a separate e-mail or visit a different Internet Web site in order to opt out.

Proposed § 680.22(b)(4) illustrated that including the affiliate marketing opt-out notice in a notice under the GLBA would satisfy the reasonable opportunity standard. In such cases, the consumer would be allowed to exercise the opt-out in the same manner and would be given the same amount of time to exercise the opt-out as is provided for any other opt-out provided in the GLBA privacy notice.

Proposed § 680.22(b)(5) illustrated how an ''opt-in'' could meet the requirement to provide a reasonable opportunity to opt out. Specifically, if an institution has a policy of not allowing its affiliates to use eligibility information to market to consumers without the consumer's affirmative consent, providing the consumer with an opportunity to ''opt in'' or affirmatively consent to such use would constitute a reasonable opportunity to opt out. The supplementary information clarified that the consumer's affirmative consent must be documented and that a pre-selected check box would not evidence the consumer's affirmative consent.

Some industry commenters supported the proposed 30-day safe harbor and the examples illustrating the safe harbor. Other industry commenters, however, expressed concern that the 30-day safe harbor would become the mandatory minimum waiting period in virtually all cases, particularly because of the risk of civil liability. For this reason, some industry commenters objected to the use of examples altogether and urged that the Commission delete the proposed examples. Other industry commenters asked the Commission to include only the examples from the GLBA.

Consumer groups believed that the safe harbor should be 45 days, rather than 30 days. These commenters believed that 45 days was necessary in part to account for the time consumed in mail deliveries and in part to avoid penalizing consumers who are away from home for vacation or illness.

Regarding the specific examples, a few commenters objected to the example in proposed § 680.22(b)(2), stating that the acknowledgment of receipt requirement would be inconsistent with the Electronic Signatures in Global and National Commerce Act (E-Sign Act). One of

these commenters believed this requirement amounted to an opt-in for electronic notices. Several commenters believed that the example in proposed § 680.22(b)(3) for requesting the consumer to opt out as a necessary step in proceeding with an electronic transaction should not be limited to electronic transactions, but should be expanded to apply to all transaction methods. A number of commenters believed that the example in proposed § 680.22(b)(5) should either be deleted or, alternatively, should not refer to ''affirmative'' consent. These commenters noted that the example in proposed § 680.22(b)(4) allowed a person to satisfy the reasonable opportunity standard by permitting the consumer to exercise the opt-out in the same manner and giving the consumer the same amount of time to exercise the opt-out as provided in the GLBA privacy notice and that the GLBA rule did not require ''affirmative'' consent.

The Commission has renumbered the examples of a reasonable opportunity to opt out as § 680.24(b) in the final rule, and revised them as discussed below. The Commission believes the examples are helpful in illustrating what constitutes a reasonable opportunity to opt out.

The generally applicable 30-day safe harbor is retained in the final rule. The Commission believes that providing a generally applicable safe harbor of 30 days is helpful because it affords certainty to entities that choose to follow the 30-day waiting period. Although 30 days is a safe harbor in all cases, a person providing an opt-out notice may decide, at its option, to give consumers more than 30 days in which to decide whether or not to opt out. A shorter waiting period could be adequate in certain situations, depending on the circumstances, in accordance with the general test for a reasonable opportunity to opt out. The use of examples and a 30-day safe harbor is consistent with the approach followed in the GLBA privacy rule. However, the Commission believes that the examples in this rule should differ to some extent from the examples in the GLBA privacy rule because the affiliate marketing opt-out requires a one-time, not an annual, notice. Further, the affiliate marketing notice may, but need not, be included in the GLBA privacy notice.

In the final rule, the Commission has retained the example of a reasonable opportunity to opt out by mail with revisions for clarity. Commenters had no specific objections to this example.

The Commission has revised the example of a reasonable opportunity to opt out by electronic means and divided it into two subparts in the final rule to illustrate the different means of delivering an electronic notice. The example illustrates that for notices provided electronically, such as by posting the notice at an Internet Web site at which the consumer has obtained a product or service, a reasonable opportunity to opt out would include giving the consumer 30 days after the consumer acknowledges receipt of the electronic notice to opt out by any reasonable means. The acknowledgment of receipt aspect of this example is consistent with an example in the GLBA privacy regulation. The example also illustrates that for notices provided by e-mail to a consumer who had agreed to receive disclosures by e-mail from the person sending the notice, a reasonable opportunity to opt out would include giving the consumer 30 days after the e-mail is sent to elect to opt out by any reasonable means. The Commission does not believe that consumer acknowledgment is necessary where the consumer has agreed to receive disclosures by e-mail.

The Commission has determined that the electronic delivery of affiliate marketing opt-out notices does not require consumer consent in accordance with the E-Sign Act because neither section 624 of the FCRA nor this final rule requires that the notice be provided in writing. Thus, the Commission does not believe that the acknowledgment of receipt trigger is beyond the scope of their interpretive authority. Persons that provide affiliate marketing opt-out notices under this part electronically may do so pursuant to the agreement of the consumer, as specified in this rule, or in accordance with the requirements of the E-Sign Act.

The Commission believes that the example of a consumer who is required to opt out as a necessary part of proceeding with the transaction should not be limited to electronic transactions. However, rather than revising the electronic transactions example, the Commission has retained the electronic transactions example in § 680.24(b)(3) and added a new example for in-person transactions in § 680.24(b)(4). Together, these examples illustrate that an abbreviated opt-out period is appropriate when the consumer is given a ''yes'' or ''no'' choice and is not permitted to proceed with the transaction unless the consumer makes a choice. For in-person transactions, consumers could be provided a form with a question that requires the consumer to write a ''yes'' or ''no'' to indicate their opt-out preference or a form that contains two blank check boxes: one that allows consumers to indicate that they want to opt out and one that allows consumers to indicate that they do not want to opt out.

In the final rule, the Commission has retained the example of including the opt-out notice in a privacy notice in § 680.24(b)(5) as consistent with the statutory requirement that the Commission consider methods for coordinating and combining notices. The Commission has deleted the example of providing an opt-in as a form of opting out as unnecessary and confusing.

Section 680.25 Reasonable and Simple Methods of Opting Out

Section 680.23 of the proposal set forth reasonable and simple methods of opting out. This section generally tracked the examples of reasonable opt-out means from § 313.7(a)(2)(ii) of the GLBA privacy regulation with certain revisions to give effect to Congress' mandate that methods of opting out be simple. For instance, proposed § 680.23(a)(2) referred to including a self-addressed envelope with the reply form and opt-out notice. The Commission also contemplated that a toll-free telephone number would be adequately designed and staffed to enable consumers to opt out in a single phone call.

Proposed § 680.23(b) set forth methods of opting out that are not reasonable and simple, such as requiring the consumer to write a letter to the institution or to call or write to obtain an opt-out form rather than including it with the notice. This section generally tracked the examples of unreasonable opt-out means from § 313.7(a)(2)(iii) of the GLBA privacy rule. In addition, the proposal contained an example of a consumer who agrees to receive the opt-out notice in electronic form only, such as by electronic mail or by using a process at a Web site. Such a consumer should not be required to opt out solely by telephone or paper mail.

Many industry commenters asked the Commission to clarify that the examples are not the only ways to comply with the rule. These commenters believed that, as drafted, the proposal could be interpreted as an exclusive rule, rather than as examples. These commenters asked the Commission to make clear in the final rule that the methods set out in the rule are examples and do not exclude other reasonable and simple methods of opting out. A few industry commenters believed that the final rule should not include any examples of methods of opting out because of the potential for civil liability.

Many industry commenters also urged the Commission to use the same examples used in the GLBA privacy rule. These commenters did not believe that Congress would allow coordinated and consolidated notices, but require different methods of opting out. For instance, these commenters recommended deleting the reference to a self-addressed envelope because there is no such reference in the GLBA privacy rule. One commenter noted that its experience with self-addressed envelopes was negative because consumers often used the envelopes for other purposes resulting in misdirected communications. Industry commenters also objected to requiring institutions to provide an electronic opt-out mechanism to a consumer who agrees to receive an opt-out notice in electronic form. These commenters believed this example was unjustified and inconsistent with the GLBA privacy rule. Commenters also indicated that some institutions may not have the technical capabilities to accept electronic opt-outs. Several commenters recommended that the Commission clarify that an institution is not obligated to honor opt-outs submitted through means other than those designated by the institution.

Consumer groups generally believed that the proposal appropriately tracked the examples in the GLBA privacy regulation with revisions to give effect to Congress' mandate that methods of opting out be simple. These commenters believed, however, that the proposal was inadequate because it provided examples instead of requiring the use of certain methods. These commenters believed that the final rule should require self-addressed envelopes and require that toll-free numbers be adequately designed and staffed to enable consumers to opt out in a single phone call. According to these commenters, inadequate and poorly trained staff has been a shortcoming of the GLBA opt-out procedures. These commenters also recommended that consumers be given the opportunity to opt out by a simple check box on payment coupons. Finally, these commenters asked the Commission to clarify that the federal standard is a floor and that if the notice is combined with other choices made available under other federal and state laws, the most consumer-friendly means for opting out should apply.

The Commission has renumbered the section addressing reasonable and simple methods of opting out as § 680.25 in the final rule, and revised it as discussed below. The Commission has restructured this section to include a general rule and examples in separate paragraphs (a) and (b) respectively. This revision clarifies that the specific methods identified in the rule are examples, not an exhaustive list of permissible methods.

The Commission believes that including examples in § 680.25(b) is helpful. However, the Commission declines to adopt the GLBA examples without change. Section 624 of the FCRA requires the Commission to ensure that the consumer is given reasonable and *simple* methods of opting out. The GLBA did not require simple methods of opting out. The Commission believes that the methods of opting out can, in some instances, be simpler than some of the reasonable methods illustrated in the GLBA privacy rule. To effectuate the statutory mandate that consumers have simple methods of opting out, the Commission has modified, for purposes of this rulemaking, some of the examples of reasonable methods of opting out that were used in the GLBA privacy regulation.

Most of the examples in the final rule are substantially similar to those in § 680.23(a) and (b) of the proposal with revisions for clarity. The example in § 680.25(b)(1)(ii) has been revised to reflect the Commission's understanding that the reply form and self-addressed envelope would be included together with the opt-out notice. As in the proposal, the Commission contemplates that a toll-free telephone number that consumers may call to opt out, as illustrated by the example in § 680.25(b)(1)(iv), would be adequately designed and staffed to enable consumers to opt out in a single phone call. In setting up a toll-free telephone number that consumers may use to exercise their opt-out rights, institutions should minimize extraneous messages directed to consumers who are in the process of opting out.

One new example in § 680.25(b)(1)(v) illustrates that reasonable and simple methods include allowing consumers to exercise all of their opt-out rights described in a consolidated opt-out notice that includes the GLBA privacy, FCRA affiliate sharing, and FCRA affiliate marketing opt-outs, by a single method, such as by calling a single toll-free telephone number. This example furthers the statutory directive to the Commission to ensure that notices and disclosures may be coordinated and consolidated. The final rule also clarifies the example renumbered as § 680.25(b)(2)(iii) to illustrate that it is not reasonable or simple to require a consumer who receives the opt-out notice in electronic form, such as through posting at an Internet Web site, to opt out solely by paper mail or by visiting a different Web site without providing a link to that site.

Section 680.25(c) has been added to clarify that each consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for that consumer. This new section corresponds to a provision in the GLBA privacy rule, 16 CFR § 313.7(a)(2)(iv).

Section 680.26 Delivery of Opt-out Notices

General rule and examples

Section 680.24 of the proposal addressed the delivery of opt-out notices. Proposed § 680.24(a) provided that an institution would have to deliver an opt-out notice so that each consumer could reasonably be expected to receive actual notice. This standard would not have required actual notice. The supplementary information to the proposal also clarified that, for opt-out notices delivered electronically, the notices could be delivered either in accordance with the electronic disclosure provisions in this part or in accordance with the E-Sign Act. For example, the institution could e-mail its notice to a consumer who agreed to the electronic delivery of information or provide the notice on its Internet Web site for a consumer who obtained a product or service electronically from that Web site. Commenters generally supported the reasonable expectation of actual notice standard.

Proposed § 680.24(b) provided examples to illustrate what would constitute delivery of an opt-out notice. Commenters expressed concern about the electronic notice example in proposed paragraph (b)(1)(iii). Consumer groups objected to this example by pointing to a growing trend in which companies require consumers to agree to electronic notices if they conduct business on an Internet Web site. These commenters believed that there was nothing to ensure that the notice would be clearly accessible to consumers on the Web site. These commenters believed that, at a minimum, the Commission should require the notice to be sent to the consumer's e-mail address, rather than posted to an Internet Web site, where the consumer has expressly opted in to the electronic delivery of notices. Some industry commenters objected to the acknowledgment of receipt requirement in this example as inconsistent with the E-Sign Act. One of these commenters urged the Commission to explicitly incorporate the E-Sign Act into the

requirements for delivering opt-out notices.

The Commission has renumbered the general rule regarding delivery of opt-out notices as § 680.26(a) in the final rule and divided the examples into positive and negative examples in §§ 680.26(b) and (c) respectively. In the final rule, the Commission has retained the reasonable expectation of actual notice standard, which does not require the institution to determine if the consumer actually received the opt-out notice. For example, mailing a printed copy of the opt-out notice to the last known mailing address of a consumer satisfies the requirement to deliver the opt-out notice so that there is a reasonable expectation that the consumer has received actual notice.

The Commission has revised some of the examples of a reasonable expectation of actual notice for electronic notices. The new example in § 680.26(b)(3) illustrates that the reasonable expectation of actual notice standard would be satisfied by providing notice by e-mail to a consumer who has agreed to receive disclosures by e-mail from the person providing the notice. The Commission reiterates that an acknowledgment of receipt is not necessary for a notice provided by e-mail to such a consumer. Conversely, the example in § 680.26(c)(2) illustrates that the reasonable expectation of actual notice standard would not be satisfied by providing notice by e-mail to a consumer who has not agreed to receive disclosures by e-mail from the person providing the notice.

The revised example in § 680.26(b)(4) illustrates that for a consumer who obtains a product or service electronically, the reasonable expectation standard would be satisfied by posting the notice on the Internet Web site at which the consumer obtains such product or services and requiring the consumer to acknowledge receipt of the notice. Conversely, the new example in § 680.26(c)(3) illustrates that the reasonable expectation standard would not be satisfied by posting the notice on the Internet Web site without requiring the consumer to acknowledge receipt of the notice. As discussed above, the Commission has determined that the electronic delivery of opt-out notices does not require consumer consent in accordance with the E-Sign Act because neither section 624 of the FCRA nor the final rule require that the notice be provided in writing. Thus, requiring an acknowledgment of receipt is within the scope of the Commission's interpretive authority. This example is also consistent with an example in the GLBA privacy rule and seems appropriate where the notice is posted at an Internet Web site.

The Commission declines to require the delivery of electronic notices by e-mail. Concerns about the security of e-mail, especially phishing, make it inappropriate to require e-mail as the only permissible form of electronic delivery for opt-out notices.

Section 680 .27 Renewal of Opt-out

Proposed § 680.26 described the procedures for extension of an opt-out. Proposed § 680.26(a) provided that a receiving affiliate could not make or send solicitations to the consumer after the expiration of the opt-out period based on eligibility information it receives or has received from an affiliate, unless the person responsible for providing the initial opt-out notice, or its successor, has given the consumer an extension notice and a reasonable opportunity to extend the opt-out, and the consumer does not extend the opt-out. Thus, if an extension notice was not provided to the consumer, the opt-out period would continue indefinitely. Proposed § 680.26(b) provided that each opt-out extension would have to be effective for a period of at least five years.

Proposed § 680.26(c) addressed the contents of a clear, conspicuous, and concise extension notice and provided flexibility to comply in either of two ways. Under one approach, the notice would disclose the same items required to be disclosed in the initial opt-out notice, along with a statement explaining that the consumer's prior opt-out has expired or is about to expire, as applicable, and that if the consumer wishes to keep the consumer's opt-out election in force, the consumer must opt out again. Under a second approach, the extension notice would provide: (1) that the consumer previously elected to limit an affiliate from using eligibility information about the consumer that it obtains from the communicating affiliate to make or send solicitations to the consumer; (2) that the consumer's election has expired or is about to expire, as applicable; (3) that the consumer may elect to extend the consumer's previous election; and (4) a reasonable and simple method for the consumer to opt out. The supplementary information to the proposal clarified that institutions would not need to provide extension notices if they treated the consumer's opt-out election as valid in perpetuity, unless revoked by the consumer.

Proposed § 680.26(d) addressed the timing of the extension notice and provided that an extension notice could be given to the consumer either a reasonable period of time before the expiration of the opt-out period, 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. The Commission did not propose to set a fixed time for what would constitute a reasonable period of time before the expiration of the opt-out period to send an extension notice because a reasonable period of time may depend upon the amount of time afforded to the consumer for a reasonable opportunity to opt out, the amount of time necessary to process opt-outs, and other factors. Proposed § 680.26(e) made clear that sending an extension notice to the consumer before the expiration of the opt-out period does not shorten the five-year opt-out period.

A few industry commenters objected to the fact that the contents of the extension notice would differ from the contents of the initial notice by requiring that the extension notice inform the consumer that the consumer's prior opt-out has expired or is about to expire, as applicable, and that the consumer must opt out again to keep the opt-out election in force. These commenters argued that the added disclosure requirement would be costly and provide little benefit to consumers. One commenter maintained that the added disclosure requirement would make it difficult, if not impossible, to combine the extension notice with the GLBA privacy notice. Commenters also maintained that the language of the statute, particularly section 624(a)(1), contemplates that the same notice would satisfy the requirements for the initial and extension notices. Consumer groups and NAAG recommended that the Commission define a ''reasonable opportunity'' to extend the opt-out as a period of at least 45 days before shared eligibility information is used to make solicitations to the consumer.

The Commission has renumbered the provisions addressing the extension or renewal of opt-outs as § 680.27 in the final rule and revised them. For purposes of clarity, the final rule refers to a ''renewal'' notice, rather than an ''extension'' notice.

Section 680.27(a) contains the general rule, which provides that after the opt-out period expires, a person may not make solicitations based on eligibility information received from an affiliate to a consumer who previously opted out unless the consumer has been given a compliant renewal notice and a reasonable opportunity to opt out, and the consumer does not renew the opt-out. This section also clarifies that a

person can make solicitations to a consumer after expiration of the opt-out period if one of the exceptions in § 680.21(c) applies.

The Commission declines to set a fixed minimum time period for a reasonable opportunity to renew the opt-out as unnecessary and inconsistent with the approach taken elsewhere in this rule and in the GLBA privacy rule. The provision regarding the duration of the renewed opt-out elicited no comment, and it has been retained in § 680.27(a)(2) of the final rule.

Section 680.27(a)(3) identifies the affiliates who may provide the renewal notice. A renewal notice must be provided either 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. This rule balances the Commission's goal of ensuring that the notice is provided by an entity known to the consumer with a recognition that flexibility is required to account for changes in the corporate structure that may result from mergers and acquisitions, corporate name changes, and other events.

The Commission recognizes that the content of the extension or renewal notice differs from the content of the initial notice. Nothing in the statute, however, requires identical content in the initial and renewal notices. Moreover, the statute requires the Commission to provide specific guidance to ensure that opt-out notices are clear, conspicuous, and concise. It is unreasonable to expect consumers, upon receipt of a renewal notice, to remember that they previously opted out five years ago (or longer) or, even if they do remember, to know that they must opt out again in order to renew their opt-out decision. Therefore, to ensure that the renewal notice is meaningful, the Commission concludes that the renewal notice must remind the consumer that he or she previously opted out, inform the consumer that the opt-out has expired or is about to expire, and advise the consumer that he or she must opt out again to renew the opt-out and continue to limit solicitations from affiliates. Under the final rule, the renewal notice can state that ''the consumer's election has expired or is about to expire.'' The Commission has deleted the words ''as applicable'' so that the notice does not have to be tailored to differentiate consumers for whom the election ''has expired'' from those for whom the election ''is about to expire.''

The Commission is not persuaded that the additional content of the renewal notice will have any impact on the ability to combine the opt-out notice with the GLBA privacy notice. Even if the language of the renewal notice were identical to the initial notice, it still could be difficult to avoid honoring a consumer's opt-out in perpetuity if the affiliate marketing opt-out notice is incorporated into the GLBA privacy notice. Privacy notices typically state that if a consumer has previously opted out, it is not necessary for the consumer to opt out again. This statement would be accurate with respect to the affiliate marketing opt-out only if the consumer's opt-out is honored in perpetuity. It would not be accurate, however, if the affiliate marketing opt-out is effective only for a limited period of time, subject to renewal by the consumer at intervals of five years or longer. Thus, if the affiliate marketing opt-out notice was consolidated with GLBA privacy notices and was effective for a limited period of time, the privacy notices would have to be modified to make clear that statements that the consumer does not have to opt out again do not apply to the affiliate marketing renewal notice. Therefore, the Commission does not believe that requiring a renewal notice to contain information not included in an initial notice will significantly affect the ability to incorporate the affiliate marketing opt-out notice into GLBA privacy notices because consolidation of the notices is most likely to occur when the affiliate marketing opt-out will be honored in perpetuity. Entities that prefer not to provide renewal notices may do so by honoring the consumer's opt-out in perpetuity. The contents of the renewal notice are adopted in § 680.27(b) with revisions that incorporate the changes to § 680.23, as discussed above. Section 680.27(b) of the final rule also omits the alternative contents set forth in the proposal, which the Commission now believes would be unnecessarily duplicative.

Proposed § 680.26(d) addressed the timing of the extension or renewal notice and elicited no comment. The Commission has renumbered this provision as § 680.27(c) in the final rule and adopted it with technical revisions. As explained in the supplementary information to the proposal, providing the renewal notice a reasonable period of time before the expiration of the opt-out period would enable institutions to begin marketing to consumers who do not renew their opt-out upon expiration of the opt-out period. But giving a renewal notice too far in advance of the expiration of the opt-out period may confuse consumers. The Commission will deem a renewal notice provided on or with the last annual privacy notice required by the GLBA privacy provisions sent to the consumer before the expiration of the opt-out period to be reasonable in all cases.

Proposed § 680.26(e) regarding the effect of an extension or renewal notice on the existing opt-out period elicited no comment. The Commission has renumbered this provision as § 680.27(d) in the final rule, and adopted it with technical changes.

Section 680.28 Effective Date, Compliance Date, and Prospective Application

Effective Date and Compliance Date

Consistent with the requirements of section 624 of the FCRA, the proposal indicated that the final rule would become effective six months after the date on which it would be issued in final form. The Commission requested comment on whether there was any need to delay the mandatory compliance date beyond the effective date specifically to permit institutions to incorporate the affiliate marketing opt-out notice into their next annual GLBA privacy notice.

Most industry commenters believed that the Commission should delay the mandatory compliance date until some time after the effective date of the final rule. These commenters suggested various periods for delaying the mandatory compliance date ranging from three months to more than 24 months. Common recommendations were for a delayed mandatory compliance date of six, 12, or 18 months.

Some of these commenters suggested a two-part mandatory compliance date consisting of a delayed mandatory compliance date of either three or six months for new accounts or for general application and a special mandatory compliance date for institutions that intend to consolidate their affiliate marketing opt-out notice with their GLBA privacy notice. Under this special mandatory compliance date, institutions would have to comply at the time they provide their next GLBA privacy notice following the effective date of the final rule or a date certain, whichever is earlier.

Industry commenters believed that a delayed mandatory compliance date was necessary in order to make significant changes to business practices and procedures, to implement necessary operational and systems changes, and to design and provide opt-out notices.

Industry commenters also noted that many institutions would like to send the affiliate marketing opt-out notice with their initial or annual GLBA privacy notices, both to minimize costs and to avoid consumer confusion. These commenters noted that many large institutions provide GLBA privacy notices on a rolling basis and that a delayed mandatory compliance date was necessary to enable institutions to introduce the affiliate marketing opt-out notice into this cycle. One large institution estimated that its first-year compliance costs would increase by a minimum of $660,000 if it was not able to consolidate the affiliate marketing opt-out notice with its GLBA privacy notice. A few industry commenters believed that Congress knew that an effective date is not necessarily the same as a mandatory compliance date because banking regulations commonly have effective dates and mandatory compliance dates that differ.

Consumer groups and NAAG believed that the effective date of the final rule should be the mandatory compliance date. These commenters believed that institutions have had time to prepare for compliance since the FACT Act became law in December 2003. Consumer groups believed that if institutions need more time to comply, affiliates should cease using eligibility information to make solicitations until the notice and opportunity to opt out is provided.

The final rule will become effective January 1, 2008. Consistent with the statute's directive that the Commission ensure that notices may be consolidated and coordinated, the mandatory compliance date is delayed to give institutions a reasonable amount of time to include the affiliate marketing opt-out notice with their initial and annual privacy notices. Accordingly, compliance with this part is required not later than October 1, 2008. The Commission believes that delaying the mandatory compliance date for approximately one year will give all institutions adequate time to develop and distribute opt-out notices and give most institutions sufficient time to develop and distribute consolidated notices if they choose to do so.

Prospective Application

Proposed § 680.20(e) provided that the provisions of this part would not apply to eligibility information that was received by a receiving affiliate prior to the date on which compliance with these regulations would be required. Some industry commenters supported this provision. Other industry commenters, however, believed that the proposed rule did not track the statutory language or reflect the intent of Congress. These commenters believed that the final rule should grandfather all information received by any financial institution or affiliate in a holding company prior to the mandatory compliance date, and not grandfather only that information received prior to the mandatory compliance date by a person that intends to use the information to make solicitations to the consumer. Some of these commenters recommended, in the alternative, that the Commission clarify that any information placed into a common database by an affiliate should be deemed to have been provided to an affiliated person if the Commission opts to retain the prospective application provision as proposed. These commenters argued that without such a clarification, affiliated companies would have to undertake the costly deconstruction of existing databases to ensure compliance.

In the final rule, the provision addressing prospective application has been renumbered as § 680.28(c), and revised. The Commission continues to believe that the better interpretation of the non-retroactivity provision is that it is tied to receipt of eligibility information by a person that intends to use the information to make solicitations to the consumer. The final rule clarifies, however, that a person is deemed to receive eligibility information from its affiliate when the affiliate places that information in a common database where it is accessible by the person, even if the person has not accessed or used that information as of the compliance date. For example, assume that an affiliate obtains eligibility information about a consumer as a result of having a pre-existing business relationship with that consumer. The affiliate places that information into a common database that is accessible to other affiliates before the mandatory compliance date. The final rule does not apply to that information, and other affiliates may use that information for marketing to the consumer. On the other hand, if the affiliate obtains eligibility information about the consumer before the mandatory compliance date, but does not either place that information into a common database that is accessible to other affiliates or otherwise provide that information to another affiliate before the mandatory compliance date, the final rule will apply to that eligibility information. Further, if the database is updated with new eligibility information after the mandatory compliance date, the final rule will apply to the new or updated eligibility information.

Appendix C

Appendix A of the proposal contained model forms to illustrate by way of example how institutions could comply with the notice and opt-out requirements of section 624 and the proposed regulations. Appendix A included three proposed model forms. Model Form A-1 was a proposed form of an initial opt-out notice. Model Form A-2 was a proposed form of an extension notice. Model Form A-3 was a proposed form that institutions may use if they offer consumers a broader right to opt out of marketing than is required by law.

The proposed model forms were designed to convey the necessary information to consumers as simply as possible. The Commission tested the proposed model forms using two widely available readability tests, the Flesch reading ease test and the Flesch-Kincaid grade level test, each of which generates a readability score.[14] Proposed Model Form A-1 had a Flesch reading ease score of 53.7 and a Flesch-Kincaid grade level score of 9.9. Proposed Model Form A-2 had a Flesch reading ease score of 57.5 and a Flesch-Kincaid grade level score of 9.6. Proposed Model Form A-3 had a Flesch reading ease score of 69.9 and a Flesch-Kincaid grade level score of 6.7.

Commenters generally supported the proposed model forms. As noted above, some commenters had concerns about the content of the initial and renewal notices. Some industry commenters expressed concern about requiring the notice to specify the applicable time period and the consumer's right to renew the election once the opt-out expires. Industry commenters also suggested revising the language of the notice to refer either to ''financial'' information or ''credit eligibility'' information for clarity. One commenter suggested deleting the examples of the types of information shared with affiliates. Another commenter suggested rephrasing the model forms in the passive voice. One commenter encouraged the Commission to clarify that use of the model forms provides a safe harbor. Another commenter believed that the optional third paragraph of Model Form A-1 should be revised, or an alternate paragraph added, to provide guidance on how to

[14] The Flesch reading ease test generates a score between zero and 100, where the higher score correlates with improved readability. The Flesch-Kincaid grade level test generates a numerical assessment of the grade-level at which the text is written.

clearly disclose to consumers that the opt-out may not limit the sharing of contact information and other information that does not meet the definition of ''consumer report.''

Consumer groups and NAAG commended the Commission for reporting the Flesch reading ease score and Flesch-Kincaid grade-level score for each of the model forms. These commenters urged the Commission to modify the proposed rule to require that any person that does not use the model forms must provide a notice that achieves readability scores at least as good as the scores for the model forms. Consumer groups also suggested adding a sentence about providing the form annually to mitigate consumer confusion. These commenters also urged the Commission to adopt a short-form notice.

The Commission has revised and expanded the number of model forms to reflect changes made to the final rule. In addition, the model forms have been renumbered as Appendix C to Part 698. The Commission believes that model forms are helpful for entities that give notices and beneficial for consumers. The model forms are provided as stand-alone documents. However, some persons may choose to combine the opt-out notice with other consumer disclosures, such as the GLBA privacy notice. Creating a consolidated model form is beyond the scope of this rulemaking, but, as discussed above, institutions can combine the affiliate marketing opt-out notice with other disclosures, including the GLBA privacy notice.

On March 31, 2006, the FTC, Board, FDIC, NCUA, OCC, and SEC released a report entitled *Evolution of a Prototype Financial Privacy Notice*, prepared by Kleimann Communication Group, Inc., summarizing research that led to the development of a prototype short-form GLBA privacy notice. That prototype included an affiliate marketing opt-out notice. The prototype assumed that the notice would be provided by the affiliate that is sharing eligibility information. The Commission believes that providing model forms in this rule for stand-alone opt-out notices that may be used in a more diverse set of circumstances than a model privacy form is appropriate and consistent with efforts to develop a model privacy form. On March 29, 2007, the FTC, Board, FDIC, NCUA, OCC, OTS, SEC, and the Commodity Futures Trading Commission published for public comment in the **Federal Register** (72 FR 14940) a model privacy form that includes the affiliate marketing opt-out. Once such a notice is published in final form, use of the model privacy form will satisfy the requirement to provide an initial affiliate marketing opt-out notice.

The final rule includes five model forms. Model Form C-1 is the model for an initial notice provided by a single affiliate. Model Form C-2 is the model for an initial notice provided as a joint notice from two or more affiliates. Model Form C-3 is the model for a renewal notice provided by a single affiliate. Model Form C-4 is the model for a renewal notice provided as a joint notice from two or more affiliates. Model Form C-5 is a model for a voluntary ''no marketing'' opt-out.

The Commission tested each of the model forms using two widely-available readability tests, the Flesch reading ease test and the Flesch-Kincaid grade level test. In conducting these tests, the Commission eliminated parenthetical text wherever possible, included the optional clauses, and substituted the names of fictional entities, for example, ABC Lender or the ABC group of companies, as the names of the relevant entities to ensure that the test results were not skewed by the inclusion of descriptive text that would not be included in actual opt-out notices. The results of these tests are summarized for each of the model forms in Table 1 below.

Although the Commission encourages the use of these tests as well as other types of consumer testing in designing opt-out notices, the Commission declines to adopt a prescriptive approach that requires notices to achieve certain scores under the Flesch reading ease or Flesch-Kincaid grade level tests. Some variation in readability scores is inevitable and may be caused by minor differences in the language of the notice, such as the name of the entity providing the notice or the types of information that may be used for marketing.

TABLE 1

	Flesch reading ease score	Flesch-Kincaid grade level score
Model Form C-1	50.2	11.5
Model Form C-2	51.7	11.5
Model Form C-3	54.6	9.7
Model Form C-4	54.2	9.8
Model Form C-5	81.3	3.8

As noted in the proposal, use of the model forms is not mandatory. However, appropriate use of the model forms provides a safe harbor. There is flexibility to use or not use the model forms, or to modify the forms, so long as the requirements of the regulation are met. For example, although several of the model forms use five years as the duration of the opt-out period, an opt-out period of longer than five years may be used and the longer time period substituted in the opt-out notices. Alternatively, the consumer's opt-out may be treated as effective in perpetuity and, if so, the opt-out notice should omit any reference to the limited duration of the opt-out period or the right to renew the opt-out.

The Commission has revised the model forms so that the disclosure regarding the duration of the opt-out may state that the opt-out applies either for a fixed number of years or ''at least 5 years.'' This revision permits institutions that use a longer opt-out period or that subsequently extend their opt-out period to rely on the model language. The model form also contains a reference to the consumer's right to revoke an opt-out. In addition, language has been added to the model forms to clarify that, with an opt-out of limited duration, a consumer does not have to opt out again until a renewal notice is sent.

V. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA), as amended, 44 U.S.C. 3501-3521, the Commission staff has submitted the final rule and a PRA Supporting Statement to the Office of Management and Budget (OMB) for review. As required by the PRA, the staff's annual burden estimates take into account the burden associated with the rule's reporting, recordkeeping, and third-party disclosure requirements.[15]

As set forth in the notice of proposed rulemaking (NPRM), the final rule likewise imposes disclosure requirements on certain affiliated companies subject to the Commission's jurisdiction. The final rule provides that if a company communicates certain information about a consumer (''eligibility information'') to an affiliate, the affiliate may not use that information to send solicitations to the consumer unless the consumer is given notice and an opportunity and a simple method to opt out of such use of the information and the consumer does not opt out. The final rule also contains model disclosures that companies may use to comply with the final rule's requirements.

The staff's estimates reflect the average amount of burden incurred by entities subject to the final rule, taking into account that some entities may not share eligibility information with

[15] 44 U.S.C. 3502(2); 5 CFR 1320.3(b)

affiliates for the purpose of making solicitations and other entities may choose to rely on the exceptions to the final rule's notice and opt-out requirements. In either of these cases, the notice would not be required, and the resulting burden would be zero. Moreover, the burden estimates take into account that a number of non-GLBA companies currently provide notices and opt-out choices voluntarily as a service to their customers. Since these entities already have systems and processes in place for providing the notice and implementing the opt-out, the resulting PRA burden under the final rule for such entities would be *de minimis*.

The staff's estimates assume a higher burden will be incurred during the first year of the OMB clearance period with a lesser burden incurred during the subsequent two years, since the notice is only required to be given once for a minimum period of at least five (5) years. The staff did not estimate the burden for preparing and distributing extension notices by persons that limit the duration of the opt-out time period because the minimum effective time period for the opt-out is five years while the relevant PRA clearance period is no more than three years. Moreover, entities providing the notice and opt-out may elect to have a longer opt-out period, for example, ten years, or to make the opt-out election effective in perpetuity.

The staff's labor cost estimates take into account: managerial and professional time for reviewing internal policies and determining compliance obligations; technical time for creating the notice and opt-out, in either paper or electronic form; incremental training; and clerical time for disseminating the notice and opt-out.[16] In addition, the staff's cost estimates presume that the availability of model disclosures and opt-out notices will simplify the compliance review and implementation processes, thereby significantly reducing the cost of compliance. Further, the final rule gives entities flexibility to provide a single joint notice on behalf of some or all of its affiliates, which should further reduce the cost of compliance.

The Commission staff previously estimated in the NPRM that the total paperwork burden for the proposed rule over a standard three-year OMB grant of clearance would be 2,715,000 hours and $63,144,000 in labor costs for both GLBA and non-GLBA entities, cumulatively.[17] In preparation for this publication, staff has revisited those estimates, refining its analysis. There are no program changes from the NPRM that impact staff's prior PRA analysis. Rather, staff has adjusted its previously stated estimate of burden hours and the number of non-GLBA entities that may send the proposed affiliate marketing notice based on: (1) a refined numerical estimate of non-GLBA entities with affiliates under the Commission's jurisdiction and thus subject to the final rule; and (2) recognition that an entity need only give a notice once during the three-year clearance period. Thus, staff now estimates the total average annual burden hours and labor costs over the three-year clearance period to be 1,105,000 and $31,302,000, respectively, as further explained below.

The staff estimates that approximately 1.17 million (rounded) non-GLBA entities under the jurisdiction of the Commission have affiliates and would be affected by the final rule.[18] As in the NPRM, staff further estimates that there are an average of 5 businesses per family or affiliated relationship, and that the affiliated entities will choose to send a joint notice, as permitted by the final rule. Thus an estimated 233,400 (rounded) non-GLBA entities may send the new affiliate marketing notice. The staff estimates that the cumulative burden per non-GLBA entity will total 14 hours[19] over a three-year PRA clearance cycle, not *per* year, as previously set forth in the NPRM. Based on updated population data, the Commission staff estimates that the total burden for non-GLBA entities during the prospective three-year clearance period would be approximately 3,268,000 hours and associated labor costs would be approximately $92,247,000.[20] However, non-GLBA entities will give notice only once during a three-year clearance period. Thus, averaged annually over that span, estimated burden for non-GLBA entities is 1,089,000 hours and $30,749,000 in labor costs, rounded.[21]

As stated in the NPRM, the number of GLBA entities under the Commission's jurisdiction is 3,350.[22] As before, staff estimates that GLBA entities would incur 6 hours of paperwork burden during the first year of the clearance period,[23] given that the final rule provides model notices. This would thus approximate 20,000 hours, cumulatively, during the first year of a three-year OMB clearance period. Labor costs, as adjusted, would approximate $716,000.[24] Allowing for increased familiarity with procedure, the paperwork burden in ensuing years would decline, with GLBA entities each incurring 4 hours of annual burden[25] during the remaining two years of the clearance period. At an estimated 3,350 GLBA entities under the Commission's jurisdiction, this amounts to 13,400 hours and $472,000 in labor costs[26] in each of the ensuing two years. Thus, averaged over the three-year clearance period, the estimated annual burden for GLBA entities is 15,600 hours and $533,000 in labor costs.

Combining estimates for GLBA and non-GLBA entities, total average annual burden over a prospective three-year clearance period, is approximately 1,105,000 hours and $31,302,000 in labor costs, rounded. As noted in the NPRM, GLBA entities are already providing notices to their customers so there are no new capital or other non-labor costs, as this notice may be consolidated into their current notices. For non-GLBA entities, the final rule provides for simple and concise model forms that institutions may use to

[16] No clerical time was included in staff's burden analysis for GLBA entities as the notice would likely be combined with existing GLBA notices.

[17] 69 FR at 33335.

[18] This estimate is derived from an analysis of a database of U.S. businesses based on SIC codes for businesses that market goods or services to consumers, which included the following industries: transportation services; communication; electric, gas, and sanitary services; retail trade; finance, insurance, and real estate; and services (excluding business services and engineering, management services). This estimate excludes businesses not subject to the Commission's jurisdiction as well as businesses that do not use data or information subject to the rule.

[19] This estimate, as in the NPRM, is based on a projected apportionment of 7 hours managerial time, 2 hours technical time, and 5 hours of clerical assistance.

[20] The hourly rates are based on average annual Bureau of Labor Statistics National Compensation Survey data, June 2005 (with 2005 as the most recent whole year information available at the BLS Web site). *http://www.bls.gov/ncs/ocs/sp/ncbl0832.pdf* (Table 1.1), and further adjusted by a multiplier of 1.06426, a compounding for approximate wage inflation for 2005 and 2006, based on the BLS Employment Cost Index. The dollar total above is derived from the estimated 7 hours of managerial labor at $34.21 per hour; 2 hours of technical labor at $29.80 per hour; and 5 hours of clerical labor at $14.44 per hour—a combined $371.27—multiplied by 1.06426 (a combined $395.13)—for the estimated 233,400+ non-GLBA business families subject to the Rule.

[21] 3,268,000 hours ÷ 3 = 1,089,000; $92,247,000 ÷ 3 = $30,749,000.

[22] *See* 69 FR at 33334.

[23] This estimate is based on 5 hours of managerial time and 1 hour of technical time to execute the notice. As in the NPRM, staff excludes clerical time from the estimate because the notice likely would be combined with existing GLBA notices.

[24] 3,350 GLBA entities x ($34.21 x 5 hours) + ($29.80 x 1 hour)] x 1.06426 wage inflation multiplier. *See* note 20.

[25] This estimate, carried over from the NPRM, is based on 3 hours of managerial time and 1 hour of technical time.

[26] 3,350 GLBA entities x [($34.21 x 3 hours) + ($29.80 x 1 hour)] x 1.06426 wage inflation multiplier. *See* note 20.

comply. Thus, any capital or non-labor costs associated with compliance for these entities are negligible.

The Commission staff recognized that the amount of time needed for any particular entity subject to the proposed requirements may be higher or lower, but believes that the above stated averages are reasonable estimates. In arriving at these estimates, staff determined that many entities do not have affiliates and are not covered by section 214 of the FACT Act or the rule. Entities that have affiliates may choose not to engage in the sharing of certain information or marketing to consumers covered by section 214 of the FACT Act or the rule. Moreover, to minimize the compliance costs and burdens for entities, particularly small businesses, the final rule contains model disclosures and opt-out notices that may be used to satisfy the statutory requirements. Finally, the final rule gives covered entities flexibility to satisfy the notice and opt-out requirement by sending the consumer a free-standing opt-out notice or by adding the opt-out notice to the privacy notices already provided to consumers, such as those provided in accordance with the provisions of Title V of the GLBA. For covered persons that choose to prepare a free-standing opt-out notice, the time necessary to prepare it would be minimal because those persons could simply copy the model disclosure, making minor adjustments as indicated by it. Similarly, for covered persons that choose to incorporate the opt-out notice into their GLBA privacy notices, the time necessary to integrate them would be minimal.

In response to the PRA section of the NPRM, the Commission received one comment, from the Mortgage Bankers Association (''MBA''). The MBA expressed concern that the NPRM's burden estimates convey a misleading impression of the cost of compliance with the final rule.[27] The MBA's principal objection was that the cost estimates assume that the major cost is sending the disclosures, rather than processing any opt-out requests and ensuring that solicitations are not sent to consumers who have opted out or have not yet had a reasonable opportunity to do so. The MBA added that the NPRM's cost estimates did not reflect the costs associated with building compliance systems, such as costs attributed to significant database programming, coordination across business entities, legal and managerial review, employee training, and business process changes. As an example, the MBA stated that one of its members, a medium-sized mortgage banker, estimated that it would cost at least $5 million in direct costs to modify its data warehouse computer system to accommodate the opt-outs and to send disclosures to all of its customers, plus hundreds of thousands of dollars for indirect costs. The MBA stated that the NPRM did not consider the significant clerical effort needed to comply with the then-proposed rule. The MBA also stated that companies that currently provide GLBA privacy and FCRA affiliate sharing opt-out notices would still incur significant costs because: (1) in contrast to the GLBA, the new opt-out right applies to the sharing of information with affiliates; and (2) in contrast to the FCRA, the new opt-out right applies to transaction and experience information. Finally, the MBA stated that compliance with the then-proposed rule would be particularly difficult because software modifications and employee training will be required to ensure that both bank and mortgage company employees have access to consumers' transaction and experience information in order to service their accounts, but they are prevented from using such information to solicit business from consumers who have exercised their opt-out rights.

The Commission staff continues to believe that its estimate of the average amount of time to prepare and distribute an initial notice to consumers is reasonable. As a preliminary matter, the Commission staff notes that the PRA does not require an estimate all of the costs that may be associated with implementing the opt-out, but only the information collection costs. The annual burden estimates take into account the requisite burden associated with the reporting, recordkeeping, and third-party disclosure requirements, including any incremental training costs that may be associated with implementing the final rule's requirements. Further, the Commission's staff estimates are over-inclusive with respect to the number of entities that must comply with the rule. As stated earlier, many entities voluntarily provide consumers with the right to opt out of advertising by affiliates, and thus will not be subject to the final rule's requirements and attendant costs. The Commission continues to believe that institutions should be able to modify existing database systems and employee training programs, used to comply with the GLBA and FCRA notice and opt-out requirements, to meet the requirements of this final rule. The Commission also believes that use of an average amount of time is appropriate because some persons may not share eligibility information with affiliates for the purpose of making solicitations or may choose to rely on the exceptions to the notice and opt-out requirement. In either of these cases, the notice would not be required, and the resulting burden would be zero.

The Commission also believes that the availability of model disclosures and opt-out notices may significantly reduce the cost of compliance. In addition, as stated earlier the final rule gives persons considerable flexibility to provide a joint opt-out notice on behalf of multiple affiliates and to define the scope and the duration of the opt-out. This flexibility may reduce the cost of compliance by allowing covered persons to make choices that are most appropriate for their business. Moreover, because the notice is only required to be given once for a minimum period of at least five years, the Commission's estimates assume a higher burden will be incurred during the first year of the OMB clearance period with a lesser burden incurred during the subsequent two years.

VI. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601-612, requires that the Commission provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule and a Final Regulatory Flexibility Analysis (''FRFA''), with the final rule, unless the Commission certifies that the rule will not have a significant economic impact on a substantial number of small business entities. *See* 5 U.S.C. 603-605. For the majority of entities subject to the final rule, a small business entity is defined by the Small Business Administration as one whose average annual receipts do not exceed $6 million or that has fewer than 500 employees. *See http://www.sba.gov/size/indextableofsize.html.*

1. Statement of the need for, and objectives of, the final rule.

The FACT Act amends the FCRA and was enacted, in part, for the purpose of allowing consumers to limit the use of eligibility information received from an affiliate to make solicitations to the consumer. Section 214 of the FACT Act generally prohibits a person from using certain information received from an affiliate to make a solicitation for marketing purposes to a consumer,

[27] The MBA's comment is available at *http://www.ftc.gov/os/comments/affiliate_marketing/04-13481-0033.pdf.* No other comments relating to paperwork burden were received.

unless the consumer is given notice and an opportunity and simple method to opt out of the making of such solicitations. Section 214 requires the Commission, together with the other agencies, to issue regulations implementing the section in consultation and coordination with each other. The Commission received no comments on the reasons for the proposed rule. The Commission is adopting the final rule to implement § 214 of the FACT Act. The **SUPPLEMENTARY INFORMATION** above contains information on the objectives of the final rule.

2. Summary of issues raised by comments in response to the initial regulatory flexibility analysis.

In accordance with Section 3(a) of the RFA, the Commission conducted an initial regulatory flexibility analysis in connection with the proposed rule. One commenter, the Mortgage Bankers Association (MBA), believed that the Commission and the other agencies had underestimated the costs of compliance. The issues raised by the MBA are described in the **Paperwork Reduction Act** section above. The MBA's concerns applied equally to small entities and larger entities. The MBA did not raise any issues unique to small entities.

3. Description and estimate of small entities affected by the final rule.

The affiliate marketing rule, which closely tracks the language of section 214 of the FACT ACT, would apply to ''[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 clauses (i), (ii), and (iii) of section 603(d)(2)(A).'' In short, section 214 applies to any entity that (1) is under the Commission's jurisdiction pursuant to the FCRA and (2) receives consumer report information from an affiliate and uses that information to make a marketing solicitation to the consumer. The entities covered by the Commission's rule would include non-bank lenders, insurers, retailers, landlords, mortgage brokers, automobile dealers, telecommunication firms, and any other business that shares eligibility information with its affiliates. It is not readily feasible to determine a precise number of small entities that will be subject to the rule, but it is not likely that many of the entities covered by this new rule are small as defined by the Small Business Administration since most of the entities with affiliates are likely to be above the $6 million level. *See http://www.sba.gov/size/indextableofsize.html.*

Although all small entities covered by the Commission's rule potentially could be subject to the final rule, small entities that do not have affiliates would not be subject to the final rule. In addition, small entities that have affiliates may choose not to engage in activities that would require compliance with the final rule. For example, small entities may choose not to share eligibility information with their affiliates for the purpose of making solicitations. Alternatively, small entities and their affiliates may structure their marketing activities in a way that does not trigger the requirement to comply with the final rule, such as by relying upon the exceptions to the notice requirement contained in the final rule.

4. Recordkeeping, reporting, and other compliance requirements.

The final rule requires small entities to provide opt-out notices and renewal notices to consumers in certain circumstances, as discussed in the **SUPPLEMENTARY INFORMATION** above. The final rule also requires small entities to implement consumers' opt-out elections. The final rule contains no requirement to report information to the Commission.

Small entities that have affiliates and that share eligibility information with those affiliates for purposes of making solicitations may be subject to the rule. Small entities that do not have affiliates, do not share eligibility information with their affiliates for marketing purposes, use shared eligibility information for purposes of making solicitations only in accordance with one of the exceptions set forth in the final rule, or structure their marketing activities to eliminate the need to provide an opt-out notice would not be subject to the final rule. The professional skills necessary for preparation of the opt-out notice include compliance and/or privacy specialists and computer programmers.

5. Steps taken to minimize the economic impact on small entities.

The Commission has attempted to minimize the economic impact on small entities by adopting a rule that is consistent with the other federal agencies and choosing alternatives that provide for joint notices and model forms small institutions may, but are not required to, use to minimize the cost of compliance.

Some commenters suggested an alternative that would allow any affiliate to provide the opt-out notice to consumers instead of requiring the affiliate the consumer has a relationship with to provide the notice. The Commission chose the alternative that requires the affiliate with the relationship with the consumer to provide the notice. *See* section IV, *supra*. This alternative is not expected to have a significant impact on small businesses since, as stated earlier, many small businesses are not likely to be subject to the rule or they may opt not to engage in practices that would subject them to the rule's requirements.

List of Subjects

16 CFR Part 680

Consumer reports, Consumer reporting agencies, Credit, Fair Credit Reporting Act, Trade practices.

16 CFR Part 698

Consumer reports, Consumer reporting agencies, Credit, Fair Credit Reporting Act, Trade practices.

■ The Federal Trade Commission amends chapter I, title 16, Code of Federal Regulations, as follows:

■ 1. Add new part 680 as follows:

PART 680—AFFILIATE MARKETING

Sec.

Authority: Sec. 214(b), Pub. L. 108-159; 15 U.S.C. 1681s-3

§ 680.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to implement section 214 of the Fair and Accu-rate Credit Transactions Act of 2003, which (by adding section 624 to Fair Credit Reporting Act) regulates the use, for marketing solicitation purposes, of consumer information provided by persons affiliated with the person making the solicitation.

(b) *Scope.* This part applies to any person over which the Federal Trade Commission has jurisdiction that uses information from its affiliates for the purpose of marketing solicitations, or provides information to its affiliates for that purpose.

§ 680.2 Examples.

The examples in this part are not exclusive. Compliance with an example,

to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 680.3 Definitions.

As used in this part:

(a) *Act.* The term ''Act'' means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate.* The term ''affiliate'' means any company that is related by common ownership or common corporate control with another company.

(c) *Clear and conspicuous.* The term ''clear and conspicuous'' means reasonably under-standable and designed to call attention to the nature and significance of the information presented.

(d) *Common ownership or common corporate control.* The term ''common ownership or common corporate control'' means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(i) 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;

(ii) 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

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the Commission determines; or

(2) Any person has, with respect to both companies, a relationship described in paragraphs (d)(1)(i) through (d)(1)(iii) of this section.

(e) *Company.* The term ''company'' means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(f) *Concise*—(1) *In general.* The term ''concise'' means a reasonably brief expression or statement.

(2) *Combination with other required disclosures.* A notice required by this part may be concise even if it is combined with other disclosures required or authorized by federal or state law.

(g) *Consumer.* The term ''consumer'' means an individual.

(h) *Eligibility information.* The term ''eligibility information'' means 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 Act 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.

(i) *Person.* The term ''person'' means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(j) *Pre-existing business relationship*—(1) *In general.* The term ''pre-existing business relationship'' means a relationship between a person, or a person's licensed agent, and a consumer based on—

(i) 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 this part;

(ii) The purchase, rental, or lease by the consumer of the persons' 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 this part; or

(iii) 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 this part.

(2) *Examples of pre-existing business relationships.* (i) If a consumer has an existing loan account with a creditor, the creditor has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(ii) If a consumer obtained a mortgage from a mortgage lender, but refinanced the mortgage loan with a different lender when the mortgage loan came due, the first mortgage lender has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date the outstanding balance of the loan is paid and the loan is closed.

(iii) If a consumer obtains a mortgage, the mortgage lender has a pre-existing business relationship with the consumer. If the mortgage lender sells the consumer's entire loan to an investor, the mortgage lender has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date it sells the loan, and the investor has a pre-existing business relationship with the consumer upon purchasing the loan. If, however, the mortgage lender sells a fractional interest in the consumer's loan to an investor but also retains an ownership interest in the loan, the mortgage lender continues to have a pre-existing business relationship with the consumer, but the investor does not have a pre-existing business relationship with the consumer. If the mortgage lender retains ownership of the loan, but sells ownership of the servicing rights to the consumer's loan, the mortgage lender continues to have a pre-existing business relationship with the consumer. The purchaser of the servicing rights also has a pre-existing business relationship with the consumer as of the date it purchases ownership of the servicing rights, but only if it collects payments from or otherwise deals directly with the consumer on a continuing basis.

(iv) If a consumer applies to a creditor for a product or service that it offers, but does not obtain a product or service from or enter into a financial contract or transaction with the creditor, the creditor has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the application.

(v) If a consumer makes a telephone inquiry to a creditor about its products or services and provides contact information to the creditor, but does not obtain a product or service from or enter into a financial contract or transaction with the creditor, the creditor has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(vi) If a consumer makes an inquiry to a creditor by e-mail about its products or services, but does not obtain a product or service from or enter into a financial contract or transaction with the creditor, the creditor has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services

for three months after the date of the inquiry.

(vii) If a consumer has an existing relationship with a creditor that is part of a group of affiliated companies, makes a telephone call to the centralized call center for the group of affiliated companies to inquire about products or services offered by the insurance affiliate, and provides contact information to the call center, the call constitutes an inquiry to the insurance affiliate that offers those products or services. The insurance affiliate has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliated creditor to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(3) *Examples where no pre-existing business relationship is created.* (i) If a consumer makes a telephone call to a centralized call center for a group of affiliated companies to inquire about the consumer's existing account with a creditor, the call does not constitute an inquiry to any affiliate other than the creditor that holds the consumer's account and does not establish a pre-existing business relationship between the consumer and any affiliate of the account-holding creditor.

(ii) If a consumer who has a loan account with a creditor makes a telephone call to an af-filiate of the creditor to ask about the affiliate's retail locations and hours, but does not make an inquiry about the affiliate's products or services, the call does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate. Also, the affiliate's capture of the consumer's telephone number does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate.

(iii) If a consumer makes a telephone call to a creditor in response to an advertisement that offers a free promotional item to consumers who call a toll-free number, but the advertisement does not indicate that creditor's products or services will be marketed to consumers who call in response, the call does not create a pre-existing business relationship between the consumer and the creditor because the consumer has not made an inquiry about a product or service offered by the creditor, but has merely responded to an offer for a free promotional item.

(k) *Solicitation*—(1) *In general.* The term ''solicitation'' means the marketing of a product or service initiated by a person to a particular consumer that is—

(i) Based on eligibility information communicated to that person by its affiliate as described in this part; and

(ii) Intended to encourage the consumer to purchase or obtain such product or service.

(2) *Exclusion of marketing directed at the general public.* A solicitation does not include marketing communications that are directed at the general public. For example, television, general circulation magazine, and billboard advertisements do not constitute solicitations, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications.

(3) *Examples of solicitations.* A solicitation would include, for example, 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.

(l) *You* means a person described in § 680.1(b).

§§ 680.4–680.20 [Reserved]

§ 680.21 Affiliate marketing opt-out and exceptions.

(a) *Initial notice and opt-out requirement*—(1) *In general.* You may not use eligibility information about a consumer that you receive from an affiliate 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 you may use eligibility information about that consumer received from an affiliate 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 you from using eligibility information to make solicitations for marketing purposes to the consumer; and

(iii) The consumer has not opted out.

(2) *Example.* A consumer has a homeowner's insurance policy with an insurance company. The insurance company furnishes eligibility information about the consumer to its affiliated creditor. Based on that eligibility information, the creditor wants to make a solicitation to the consumer about its home equity loan products. The creditor does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The creditor is prohibited from using eligibility information received from its insurance affiliate to make solicitations to the consumer about its home equity loan products unless the consumer is given a notice and opportunity to opt out and the consumer does not opt out.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph (a) must be provided:

(i) By an affiliate that has or has previously had a pre-existing business relationship with the consumer; or

(ii) 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 has previously had a pre-existing business relationship with the consumer.

(b) *Making solicitations*—(1) *In general.* For purposes of this part, you make a solicitation for marketing purposes if—

(i) You receive eligibility information from an affiliate;

(ii) You use 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 your products or services to market to the consumer or tailor your solicitation to that consumer; and

(iii) As a result of your use of the eligibility information, the consumer is provided a solicitation.

(2) *Receiving eligibility information from an affiliate, including through a common database.* You may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that you may access.

(3) *Receipt or use of eligibility information by your service provider.* Except as provided in paragraph (b)(5) of this section, you receive or use an affiliate's eligibility information if a service provider acting on your behalf (whether an affiliate or a nonaffiliated third party) receives or uses that information in the manner described in paragraphs (b)(1)(i) or (b)(1)(ii) of this section. All relevant facts and circumstances will determine whether a person is acting as your service provider when it receives or uses an affiliate's eligibility information in connection with marketing your products and services.

(4) *Use by an affiliate of its own eligibility information.* Unless you have used eligibility information that you receive from an affiliate in the manner described in paragraph (b)(1)(ii) of this

section, you do not make a solicitation subject to this part if your affiliate:

(i) 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 your products or services to the consumer; or

(ii) Directs its service provider to use the affiliate's own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the consumer, and you do not communicate directly with the service provider regarding that use.

(5) *Use of eligibility information by a service provider.* (i) *In general.* You do not make a solicitation subject to this part if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that you may access) receives eligibility information from your affiliate that your affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market your products or services to the consumer, so long as—

(A) Your affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market your products or services);

(B) Your affiliate establishes specific terms and conditions under which the service provider may access and use the affiliate's eligibility information to market your products and services (or those of affiliates generally) to the consumer, such as the identity of the affiliated companies whose products or services may be marketed to the consumer by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) Your 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 your products or services;

(D) Your affiliate is identified on or with the marketing materials provided to the consumer; and

(E) You do not directly use your affiliate's eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) *Writing requirements.* (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between your affiliate and the service provider; and

(B) The specific terms and conditions established by your affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(6) *Examples of making solicitations.* (i) A consumer has a loan account with a creditor, which is affiliated with an insurance company. The insurance company receives eligibility information about the consumer from the creditor. The insurance company uses that eligibility information to identify the consumer to receive a solicitation about insurance products, and, as a result, the insurance company provides a solicitation to the consumer about its insurance products. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer.

(ii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that after using the eligibility information to identify the consumer to receive a solicitation about insurance products, the insurance company asks the creditor to send the solicitation to the consumer and the creditor does so. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer because it used eligibility information about the consumer that it received from an affiliate to identify the consumer to receive a solicitation about its products or services, and, as a result, a solicitation was provided to the consumer about the insurance company's products.

(iii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that eligibility information about consumers that have loan accounts with the creditor is placed into a common database that all members of the affiliated group of companies may independently access and use. Without using the creditor's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the creditor. The creditor reviews eligibility information about its own consumers using the selection criteria provided by the insurance company to determine which consumers should receive the insurance company's marketing materials and sends marketing materials about the insurance company's products to those consumers. Even though the insurance company has received eligibility information through the common database as provided in paragraph (b)(2) of this section, it did not use that information to identify consumers or establish selection criteria; instead, the creditor used its own eligibility information. Therefore, pursuant to paragraph (b)(4)(i) of this section, the insurance company has not made a solicitation to the consumer.

(iv) The same facts as in the example in paragraph (b)(6)(iii) of this section, except that the creditor provides the insurance company's criteria to the creditor's service provider and directs the service provider to use the creditor's eligibility information to identify creditor consumers who meet the criteria and to send the insurance company's marketing materials to those consumers. The insurance company does not communicate directly with the service provider regarding the use of the creditor's information to market its products to the creditor's consumers. Pursuant to paragraph (b)(4)(ii) of this section, the insurance company has not made a solicitation to the consumer.

(v) An affiliated group of companies includes a creditor, an insurance company, and a service provider. Each affiliate in the group places information about its consumers into a common database. The service provider has access to all information in the common database. The creditor controls access to and use of its eligibility information by the service provider. This control is set forth in a written agreement between the creditor and the service provider. The written agreement also requires the service provider to establish reasonable policies and procedures designed to ensure that the service provider uses the creditor's eligibility information in accordance with specific terms and conditions established by the creditor relating to the marketing of the products and services of all affiliates, including the insurance company. In a separate written communication, the creditor specifies the terms and conditions under which the service provider may use the creditor's eligibility information to market the insurance company's products and services to the creditor's consumers. The specific terms and conditions are: a list of affiliated companies (including the insurance company) whose products or services may be marketed to the creditor's consumers by the service provider; the specific products or types of products that may be marketed to the creditor's consumers by the service provider; the categories of eligibility information that may be used by the service provider in marketing products or services to the creditor's consumers; the types or

categories of the creditor's consumers to whom the service provider may market products or services of creditor affiliates; the number and/or types of marketing communications that the service provider may send to the creditor's consumers; and the length of time during which the service provider may market the prod-ucts or services of the creditor's affiliates to its consumers. The creditor periodically evaluates the service provider's compliance with these terms and conditions. The insurance company asks the service provider to market insurance products to certain consumers who have loan accounts with the creditor. Without using the creditor's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the service provider. The service provider uses the creditor's eligibility information from the common database to identify the creditor's consumers to whom insurance products will be marketed. When the insurance company's marketing materials are provided to the identified consumers, the name of the creditor is displayed on the insurance marketing materials, an introductory letter that accompanies the marketing materials, an account statement that accompanies the marketing materials, or the envelope containing the marketing materials. The re-quirements of paragraph (b)(5) of this section have been satisfied, and the insurance company has not made a solicitation to the consumer.

(vi) The same facts as in the example in paragraph (b)(6)(v) of this section, except that the terms and conditions permit the service provider to use the creditor's eligibility information to market the products and services of other affiliates to the creditor's consumers whenever the service provider deems it appropriate to do so. The service provider uses the creditor's eligibility information in accordance with the discretion af-forded to it by the terms and conditions. Because the terms and conditions are not specific, the requirements of paragraph (b)(5) of this section have not been satisfied.

(c) *Exceptions.* The provisions of this part do not apply to you if you use eligibility information that you receive from an affiliate:

(1) To make a solicitation for marketing purposes to a consumer with whom you have a pre-existing business relationship;

(2) To facilitate communications to an individual for whose benefit you provide 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;

(3) To perform services on behalf of an affiliate, except that this paragraph shall not be construed as permitting you to send solicitations on behalf of an affiliate if the affiliate would not be permitted to send the solicitation as a result of the election of the consumer to opt out under this part;

(4) In response to a communication about your products or services initiated by the consumer;

(5) In response to an authorization or request by the consumer to receive solicitations; or

(6) If your compliance with this part would prevent you from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which you are lawfully doing business.

(d) *Examples of exceptions*—(1) *Example of the pre-existing business relationship exception.* A consumer has a loan account with a creditor. The consumer also has a relationship with the creditor's securities affiliate for management of the consumer's securities portfolio. The creditor receives eligibility information about the consumer from its securities affiliate and uses that information to make a solicitation to the consumer about the creditor's wealth management services. The creditor may make this solicitation even if the consumer has not been given a notice and opportunity to opt out because the creditor has a pre-existing business relationship with the consumer.

(2) *Examples of service provider exception.* (i) A consumer has an insurance policy issued by an insurance company. The insurance company furnishes eligibility information about the consumer to an affiliated creditor. Based on that eligibility information, the creditor wants to make a solicitation to the consumer about its credit products. The creditor does not have a pre-existing business relationship with the consumer and none of the other exceptions in para-graph (c) of this section apply. The consumer has been given an opt-out notice and has elected to opt out of receiving such solicitations. The creditor asks a service provider to send the solicitation to the consumer on its behalf. The service provider may not send the solicitation on behalf of the creditor because, as a result of the consumer's opt-out election, the creditor is not permitted to make the solicitation.

(ii) The same facts as in paragraph (d)(2)(i) of this section, except the consumer has been given an opt-out notice, but has not elected to opt out. The creditor asks a service provider to send the solicitation to the consumer on its behalf. The service provider may send the solicitation on behalf of the creditor because, as a result of the consumer's not opting out, the creditor is permitted to make the solicitation.

(3) *Examples of consumer-initiated communications.* (i) A consumer who has a consumer loan account with a finance company initiates a communication with the creditor's mortgage lending affiliate to request information about a mortgage. The mortgage lender affiliate may use eligibility information about the consumer it obtains from the finance company or any other affiliate to make solicitations regarding mortgage products in response to the consumer-initiated communication.

(ii) A consumer who has a loan account with a creditor contacts the creditor to request information about how to save and invest for a child's college education without specifying the type of product in which the consumer may be interested. Information about a range of different products or services offered by the creditor and one or more affiliates of the creditor may be responsive to that communication. Such products or services may include the following: mutual funds offered by the creditor's mutual fund affil-iate; section 529 plans offered by the creditor, its mutual fund affiliate, or another securities affiliate; or trust services offered by a different creditor in the affiliated group. Any affiliate offering investment products or services that would be responsive to the consumer's request for information about saving and investing for a child's college education may use eligibility information to make solicitations to the consumer in response to this communication.

(iii) A credit card issuer makes a marketing call to the consumer without using eligibility information received from an affiliate. The issuer leaves a voice-mail message that invites the consumer to call a toll-free number to apply for the issuer's credit card. If the consumer calls the toll-free number to inquire about the credit card, the call is a consumer-initiated communication about a product or service and the credit card issuer may now use eligibility information it receives from its affiliates to make solicitations to the consumer.

(iv) A consumer calls a creditor to ask about retail locations and hours, but does not request information about products or services. The creditor may not use eligibility information it receives from an affiliate to make

solicitations to the consumer about its products or services because the consumer-initiated communication does not relate to the creditor's products or services. Thus, the use of eligibility information received from an affiliate would not be responsive to the communication and the exception does not apply.

(v) A consumer calls a creditor to ask about office locations and hours. The customer service representative asks the consumer if there is a particular product or service about which the consumer is seeking information. The consumer responds that the consumer wants to stop in and find out about second mortgage loans. The customer service representative offers to provide that information by telephone and mail additional information and application materials to the consumer. The consumer agrees and provides or confirms contact information for receipt of the materials to be mailed. The creditor may use eligibility information it receives from an affiliate to make solicitations to the consumer about mortgage loan products because such solicitations respond to the consumer-initiated communication about products or services.

(4) *Examples of consumer authorization or request for solicitations.* (i) A consumer who obtains a mortgage from a mortgage lender authorizes or requests information about homeowner's insurance offered by the mortgage lender's insurance affiliate. Such authorization or request, whether given to the mortgage lender or to the insurance affiliate, would permit the insurance affiliate to use eligibility information about the consumer it obtains from the mortgage lender or any other affiliate to make solicitations to the consumer about homeowner's insurance.

(ii) A consumer completes an online application to apply for a credit card from a department store. The store's online application contains a blank check box that the consumer may check to authorize or request information from the store's affiliates. The consumer checks the box. The consumer has authorized or requested solicitations from store's affiliates.

(iii) A consumer completes an online application to apply for a credit card from a department store. The store's online application contains a pre-selected check box indicating that the consumer authorizes or requests information from the store's affiliates. The consumer does not deselect the check box. The consumer has not authorized or requested solicitations from the store's affiliates.

(iv) The terms and conditions of a credit account agreement contain preprinted boilerplate language stating that by applying to open an account the consumer authorizes or requests to receive solicitations from the creditor's affiliates. The consumer has not authorized or requested solicitations from the creditor's affiliates.

(e) *Relation to affiliate-sharing notice and opt-out.* Nothing in this part limits the responsibility of a person to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the Act where applicable.

§ 680.22 Scope and duration of opt-out.

(a) *Scope of opt-out*—(1) *In general.* Except as otherwise provided in this section, the consumer's election 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*—(i) *In general.* If the consumer establishes a continuing relationship with you or your 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 you or your affiliates, including continuing relationships established subsequent to 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 you or your affiliates as described in the notice.

(ii) *Examples of continuing relationships.* A consumer has a continuing relationship with you or your affiliate if the consumer—

(A) Opens a credit account with you or your affiliate;

(B) Obtains a loan for which you or your affiliate owns the servicing rights;

(C) Purchases an insurance product from you or your affiliate;

(D) Holds an investment product through you or your affiliate, such as when you act or your affiliate acts as a custodian for securities or for assets in an individual retirement arrangement;

(E) Enters into an agreement or understanding with you or your affiliate whereby you or your affiliate undertakes to arrange or broker a home mortgage loan for the consumer;

(F) Enters into a lease of personal property with you or your affiliate; or

(G) Obtains financial, investment, or economic advisory services from you or your affiliate for a fee.

(3) *No continuing relationship*—(i) *In general.* If there is no continuing relationship between a consumer and you or your affiliate, and you or your affiliate obtain eligibility information about a consumer in connection with a transaction with the consumer, such as an isolated transaction 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.

(ii) *Examples of isolated transactions.* An isolated transaction occurs if—

(A) The consumer uses your or your affiliate's ATM to withdraw cash from an account at a financial institution; or

(B) You or your affiliate sells the consumer a money order, airline tickets, travel insurance, or traveler's checks in isolated transactions.

(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 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, electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information, or 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 for a notice following termination of all continuing relationships*—(i) *In general.* A consumer must be given a new opt-out notice if, after all continuing relationships with you or your affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with you or your affiliate(s) and the consumer's eligibility information is to be used to make a solicitation. The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent with paragraph (b) of this section, the consumer's decision not to opt out after receiving the new opt-out notice would 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.

(ii) *Example.* A consumer has an automobile loan account with a creditor

that is part of an affiliated group. The consumer pays off the loan. After paying off the loan, the consumer subsequently obtains a second mortgage loan from the creditor. The consumer must be given a new notice and opportunity to opt out before the creditor's affiliates may make solicitations to the consumer using eligibility information obtained by the creditor in connection with the new mortgage relationship, regardless of whether the consumer opted out in connection with the automobile loan account.

(b) *Duration of opt-out.* The election of a consumer to opt out must be effective for a period of at least five years (the ''opt-out period'') beginning when the consumer's opt-out election is received and implemented, unless the consumer subsequently revokes the opt-out in writing or, if the consumer agrees, electronically. 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.

(c) *Time of opt-out.* A consumer may opt out at any time.

§ 680.23 Contents of opt-out notice; consolidated and equivalent notices.

(a) *Contents of opt-out notice*—(1) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(i) The name of the affiliate(s) providing the notice. 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. But 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;''

(ii) 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. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to 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. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and credit card companies and the XYZ insurance companies;''

(iii) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(iv) That the consumer may elect to limit the use of eligibility information to make solicitations to the consumer;

(v) 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;

(vi) 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

(vii) A reasonable and simple method for the consumer to opt out.

(2) *Joint relationships.* (i) 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.

(ii) 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 associated joint consumers, or each joint consumer may be permitted to opt out separately. 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 joint consumers and the joint consumers must be permitted to exercise their separate rights to opt out in a single response.

(iii) It is impermissible to require all joint consumers to opt out before implementing any opt-out direction.

(3) *Alternative contents.* If the consumer is afforded a broader right to opt out of receiving marketing than is required by this part, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights.

(4) *Model notices.* Model notices are provided in Appendix C of Part 698 of this chapter.

(b) *Coordinated and consolidated notices.* A notice required by this part may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law by the entity providing the notice, including but not limited to the notice de-scribed in section 603(d)(2)(A)(iii) of the Act and the Gramm-Leach-Bliley Act privacy notice.

(c) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this part, and that is provided to a consumer together with disclosures required by any other provision of law, satisfies the requirements of this section.

§ 680.24 Reasonable opportunity to opt out.

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a solicitation to the consumer about your products or services, unless the consumer is provided a reasonable opportunity to opt out, as required by § 680.21(a)(1)(ii) of this part.

(b) *Examples of a reasonable opportunity to opt out.* The consumer is given a reasonable opportunity to opt out if:

(1) *By mail.* The opt-out notice is mailed to the consumer. The consumer is given 30 days from the date the notice is mailed to elect to opt out by any reasonable means.

(2) *By electronic means.* (i) The opt-out notice is provided electronically to the consumer, such as by posting the notice at an Internet Web site at which the consumer has obtained a product or service. The consumer acknowledges receipt of the electronic notice. The consumer is given 30 days after the date the consumer acknowledges receipt to elect to opt out by any reasonable means.

(ii) The opt-out notice is provided to the consumer by e-mail where the consumer has agreed to receive disclosures by e-mail from the person sending the notice. The consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* The opt-out notice is provided to the consumer at the time of

an electronic transaction, 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. There is a simple process that the consumer may use to opt out at that time using the same mechanism through which the transaction is conducted.

(4) *At the time of an in-person transaction.* The 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—one that allows consumers to indicate that they want to opt out and one that allows consumers to indicate that they do not want to opt out.

(5) *By including in a privacy notice.* The opt-out notice is included in a Gramm-Leach-Bliley Act privacy notice. 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.

§ 680.25 Reasonable and simple methods of opting out.

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a solicitation to the consumer about your products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by § 680.21(a)(1)(ii) of this part.

(b) *Examples*—(1) *Reasonable and simple opt-out methods.* Reasonable and simple methods for exercising the opt-out right include—

(i) Designating a check-off box in a prominent position on the opt-out form;

(ii) Including a reply form and a self-addressed envelope together with the opt-out notice;

(iii) 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;

(iv) Providing a toll-free telephone number that consumers may call to opt out; or

(v) Allowing consumers to exercise all of their opt-out rights described in a consolidated opt-out notice that includes the privacy opt-out under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, the affiliate sharing opt-out under the Act, and the affiliate marketing opt-out under the Act, by a single method, such as by calling a single toll-free telephone number.

(2) *Opt-out methods that are not reasonable and simple.* Reasonable and simple methods for exercising an opt-out right *do not* include—

(i) Requiring the consumer to write his or her own letter;

(ii) Requiring the consumer to call or write to obtain a form for opting out, rather than including the form with the opt-out notice;

(iii) Requiring the consumer who receives the opt-out notice in electronic form only, such as through posting at an Internet Web site, to opt out solely by paper mail or by visiting a different Web site without providing a link to that site.

(c) *Specific opt-out means.* Each consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for that consumer.

§ 680.26 Delivery of opt-out notices.

(a) *In general.* 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 this part or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.*

(b) *Examples of reasonable expectation of actual notice.* A consumer may reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Hand-delivers a printed copy of the notice to the consumer;

(2) Mails a printed copy of the notice to the last known mailing address of the consumer;

(3) Provides a notice by e-mail to a consumer who has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(4) Posts the 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.

(c) *Examples of no reasonable expectation of actual notice.* A consumer may *not* reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Only posts the notice on a sign in a branch or office or generally publishes the notice in a newspaper;

(2) 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; or

(3) Posts the notice on an Internet Web site without requiring the consumer to acknowledge receipt of the notice.

§ 680.27 Renewal of opt-out.

(a) *Renewal notice and opt-out requirement*—(1) *In general.* After the opt-out period expires, you may not make solicitations based on eligibility information you receive from an affiliate to a consumer who previously opted out, unless:

(i) The consumer has been given a renewal notice that complies with the requirements of this section and §§ 680.24 through 680.26 of this part, and a reasonable opportunity and a reasonable and simple method to renew the opt-out, and the consumer does not renew the opt-out; or

(ii) An exception in § 680.21(c) of this part applies.

(2) *Renewal period.* Each opt-out renewal must be effective for a period of at least five years as provided in § 680.22(b) of this part.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By the affiliate that provided the previous opt-out notice, or its successor; or

(ii) 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.

(b) *Contents of renewal notice.* The renewal notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) The name of the affiliate(s) providing the notice. 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. But 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;''

(2) 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. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to 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. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and credit card companies and the XYZ insurance companies;''

(3) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(4) That the consumer previously elected to limit the use of certain information to make solicitations to the consumer;

(5) That the consumer's election has expired or is about to expire;

(6) That the consumer may elect to renew the consumer's previous election;

(7) 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

(8) A reasonable and simple method for the consumer to opt out.

(c) *Timing of the renewal notice*—(1) *In 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.

(2) *Combination with annual privacy notice.* If you provide an annual privacy notice under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, 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.

(d) *No effect on opt-out period.* 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.

§ 680.28 Effective date, compliance date, and prospective application.

(a) *Effective date.* This part is effective January 1, 2008.

(b) *Mandatory compliance date.* Compliance with this part is required not later than October 1, 2008.

(c) *Prospective application.* The provisions of this part shall not prohibit you from using eligibility information that you receive from an affiliate to make solicitations to a consumer if you receive such information prior to October 1, 2008. For purposes of this section, you are deemed to receive eligibility information when such information is placed into a common database and is accessible by you.

PART 698—AMENDED

■ 2. Revise the authority citation for Part 698 to read as follows:

Authority: 15 U.S.C. 1681e, 1681g, 1681j, 1681m, 1681s, and 1681s-3; sections 211(d) and 214(b), Pub. L. 108-159, 117 Stat.1952.

■ 3. Amend § 698.1 by revising paragraph (b) to read as follows:

§ 698.1 Authority and purpose.

* * * * *

(b) *Purpose.* The purpose of this part is to comply with sections 607(d), 609(c), 609(d), 612(a), 615(d), and 624 of the Fair Credit Reporting Act, as amended by the Fair and Accurate Credit Transactions Act of 2003, and sections 211(d) and 214(b) of the Fair and Accurate Credit Transactions Act of 2003.

■ 4. Add Appendix C to Part 698 as follows:

APPENDIX C TO PART 698—MODEL FORMS FOR AFFILIATE MARKETING OPT-OUT NOTICES

A. Although use of the model forms is not required, use of the model forms in this Appendix (as applicable) complies with the requirement in section 624 of the Act for clear, conspicuous, and concise notices.

B. Certain changes may be made 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. Persons making such extensive revisions will lose the safe harbor that this Appendix provides. Acceptable changes include, for example:

1. Rearranging the order of the references to ''your income,'' ''your account history,'' and ''your credit score.''

2. Substituting other types of information for ''income,'' ''account history,'' or ''credit score'' for accuracy, such as ''payment history,'' ''credit history,'' ''payoff status,'' or ''claims history.''

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as ''the [ABC] group of companies,'' including without limitation a statement that the entity providing the notice recently purchased the consumer's account.

4. Substituting other types of affiliates covered by the notice for ''credit card,'' ''insurance,'' or ''securities'' affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt-out period, the notice may omit information about the renewal notice.

6. Adding a statement informing consumers how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: ''If you previously opted out, you do not need to do so again.''

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address.

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

C-1 Model Form for Initial Opt-out Notice (Single-Affiliate Notice)

[Your Choice to Limit Marketing]/ [Marketing Opt-out]

— [Name of Affiliate] is providing this notice.
— [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]
— You may limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].
— Your choice to limit marketing offers from our affiliates will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period

expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years]/[at least another 5 years].
— [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

— **By telephone:** 1-877-###–####
— **On the Web:** *www.—.com*
— **By mail:** check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__ Do not allow your affiliates to use my personal information to market to me.

C-2 Model Form for Initial Opt-out Notice (Joint Notice)

[Your Choice to Limit Marketing]/[Marketing Opt-out]

— The [ABC group of companies] is providing this notice.
— [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]
— You may limit the [ABC companies], such as the [ABC credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].
— Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years]/[at least another 5 years].
— [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from the [ABC] companies, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

— **By telephone:** 1-877-###–####
— **On the Web:** *www.—.com*
— **By mail:** check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__ Do not allow any company [in the ABC group of companies] to use my personal information to market to me.

C-3 Model Form for Renewal Notice (Single-Affiliate Notice)

[Renewing Your Choice to Limit Marketing]/[Renewing Your Marketing Opt-out]

— [Name of Affiliate] is providing this notice.
— [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]
— You previously chose to limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].
— Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

— **By telephone:** 1-877-###–####
— **On the Web:** *www.—.com*
— **By mail:** check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__ Renew my choice to limit marketing for [x] more years.

C-4 Model Form for Renewal Notice (Joint Notice)

[Renewing Your Choice to Limit Marketing]/[Renewing Your Marketing Opt-out]

— The [ABC group of companies] is providing this notice.
— [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]
— You previously chose to limit the [ABC companies], such as the [ABC credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].
— Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

— **By telephone:** 1-877-###–####
— **On the Web:** *www.—.com*
— **By mail:** check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__ Renew my choice to limit marketing for [x] more years.

C-5 Model Form for Voluntary ''No Marketing'' Notice

Your Choice to Stop Marketing

— [Name of Affiliate] is providing this notice.
— You may choose to stop all marketing from us and our affiliates.

To stop all marketing offers, contact us [include all that apply]:

— **By telephone:** 1-877-###–####
— **On the Web:** *www.—.com*
— **By mail:** check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__ Do not market to me.

The Federal Trade Commission.
Dated: October 22, 2007.
By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E7–21348 Filed 10–29–07: 8:45 am]

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