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Via Electronic Mail

August 16, 2004

Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219
Attention: Docket No. 04-16

regs.comments@occ.treas.gov

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1203

regs.comments@federalreserve.gov

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
RIN # 3064-AC73

Comments@FDIC.gov

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: No. 2004-31

regs.comments@ots.treas.gov

Ms. Becky Baker
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

regcomments@ncua.gov

To Whom It May Concern:

MasterCard International Incorporated ("MasterCard")[1] submits this comment letter in response to the Proposed Rule (the "Proposal") issued by the Board of Governors of the Federal Reserve System (the "Board"), the Office of the Comptroller of the Currency (the "OCC"), the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration (collectively, the "Agencies") to implement Section 214 of the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act"). Section 214 of the FACT Act ("Section 214") amends the Fair Credit Reporting Act (the "FCRA") to allow consumers to restrict the use of certain consumer information ("eligibility information") received by one member of a corporate family (the "Receiving Affiliate") from another member of the same corporate family (the "Sharing Affiliate") for purposes of making solicitations based on eligibility information to consumers. MasterCard is pleased to have the opportunity to comment on the Proposal.

In General

The Agencies issued the Proposal pursuant to a charge by Congress to "implement" Section 214. In many cases the Proposal "implements" the statutory language of Section 214. However, we also believe that there are some instances where the Proposal does not necessarily reflect the plain language of the statute, or the intent of Congress, with respect to Section 214. We describe these concerns, among others, in detail below.

Responsibility for Providing Notice and Opportunity To Opt Out

Section 214 of the FACT Act requires that a consumer be given notice and opportunity to opt out of receiving solicitations from Receiving Affiliates before a Receiving Affiliate may make solicitations using eligibility information. The Agencies state that Section 214 is ambiguous with respect to whether the Sharing Affiliate or the Receiving Affiliate is responsible for providing the required notice and opportunity to opt out. In order to address the ambiguity perceived by the Agencies, the Proposal places the responsibility of providing such notice and opportunity to opt out (or ensuring that such notice and opportunity is provided) on the Sharing Affiliate.

The language used by Congress in drafting Section 214 simply requires that a consumer be given a notice and opportunity to opt out of certain solicitations from Receiving Affiliates. MasterCard does not believe that Section 214 is ambiguous. In using the passive voice to state the notice and opt-out requirements in Section 214, Congress intentionally stated the notice and opt-out requirement as a precondition to allowing a Receiving Affiliate to use eligibility information to make solicitations rather than as a duty assigned to a particular entity. Congress intended to give a corporate family the flexibility within its own structure to determine which member within that family is best positioned to give the required notice and opportunity to opt out. MasterCard acknowledges that some corporate families may elect for the Sharing Affiliate to provide the required notice

[1] MasterCard is a SEC-registered private share corporation that licenses financial institutions to use the MasterCard service marks in connection with a variety of payments systems.

and opt out. However, nothing in Section 214 indicates that Congress intended the responsibility for providing such notice and opt out to be placed on the Sharing Affiliate. Indeed, any requirement that the notice be provided by any particular entity is not in the FCRA.

Further, Section 214 imposes obligations only on the Receiving Affiliate. Accordingly, only the Receiving Affiliate using such information should be liable for failing to ensure that notice and an opportunity to opt out has been given prior to making solicitations to consumers. By placing the responsibility and liability for providing notice and opportunity to opt out solely on the Sharing Affiliate, the Proposal inappropriately alters the duties imposed by Congress under Section 214.

MasterCard believes that the content of the notice, not the party responsible for ensuring such notice is given, serves the purpose of informing consumers of their options under Section 214. The requirements and guidance provided in Section 214 and in the Proposal with respect to the content of the required notice and opt out will make the notice sufficiently effective, regardless of the entity responsible for providing such notice. Specifically, by requiring that the notice be "clear and conspicuous" and that the notice sufficiently identify the affiliates covered by the notice and opt out, the Proposal ensures that a consumer will be informed about the effect of electing to opt out or choosing not to opt out. Because the required content of the notice ensures that consumers will be adequately informed, placing responsibility on the Sharing Affiliate as well as the Receiving Affiliate merely opens liability for compliance with the rule to multiple members of a corporate family, without providing any additional benefit to consumers.

Accordingly, MasterCard requests that the final rule implementing Section 214 simply state that the notice and opt-out requirement is a precondition to the ability of a Receiving Affiliate to make solicitations using eligibility information. The final rule need not and indeed should not specify which affiliate is responsible for providing the notice and opt out. To achieve this, several provisions of the Proposal should be revised. Further, Section ___.20(a) of the Proposal should be revised to make it clear that the requirement of notice and opportunity for opt out is a pre-condition for the Receiving Affiliate to make solicitations, rather than a duty of the Sharing Affiliate. Additionally, other provisions in the Proposal that put an obligation on the Sharing Affiliate, including references to "you" and "your" that refer to the Sharing Affiliate, should be restated so that the duty to comply is not placed on the Sharing Affiliate (*i.e.*, contents of opt-out notice; reasonable opportunity to opt out; reasonable and simple methods of opting out; delivery of opt-out notices; extension of opt out; consolidated and equivalent notice).

Examples

MasterCard appreciates and supports the Agencies' use of illustrative examples in the Proposal. MasterCard also applauds the inclusion of the statement that such examples are not exclusive and that compliance with an example constitutes compliance with the rule. MasterCard encourages the Agencies to retain these components of the Proposal in the final rule.

Definitions

Affiliate

The Proposal defines "affiliate" as "any person that is related by common ownership or common corporate control with another person." The Supplementary Information notes that this definition of "affiliate" differs from other definitions of the same term used in the FCRA, the FACT Act and the Gramm-Leach-Bliley Act ("GLBA"). The Agencies note that "it is important to harmonize the various definitions of affiliate [in the FCRA, the FACT Act and the GLBA] as much as possible and to construe the various FCRA and FACT Act definitions to mean the same thing." MasterCard agrees with the Agencies' view that the term "affiliate" as used in the FCRA, the FACT Act and the GLBA should be construed consistently. Further, MasterCard believes that to prevent unintentional disparate treatment of the term "affiliate" in the context of these laws, the term should be *defined* consistently as well as *construed* consistently. Accordingly, MasterCard requests that the Agencies define the term "affiliate" in the final rule implementing Section 214 in precisely the same manner as that term is defined in the Agencies' regulations implementing the GLBA.

Clear and Conspicuous

Section 214 and the Proposal require that the notice given to consumers be "clear and conspicuous." Section 214 does not define the term "clear and conspicuous." The Proposal defines "clear and conspicuous" to mean "reasonably understandable and designed to call attention to the nature and significance of the information presented." This definition is similar to that used in the regulations issued by the Agencies pursuant to GLBA. Further, the Supplementary Information describes, in detail, the Agencies' views of what constitutes "clear and conspicuous" notice. This description is also similar to the description provided by the Agencies in the GLBA regulations. There is a key difference, however, between Section 214 and the GLBA. Specifically, the provisions of the GLBA are not enforceable by private right of action, as is Section 214. Accordingly, the guidance provided with respect to the "clear and conspicuous" standard in the GLBA serves as a guide for covered entities to comply with the Agencies' regulations and is overseen by the Agencies, but does not expose covered entities to questionable lawsuits brought by individual or class action plaintiffs. We are concerned that providing the same guidance under Section 214 would attract plaintiffs whose attorneys may attempt to elevate the guidance provided by the Agencies to substantive requirements of the regulation. Litigations brought under this approach, if successful, would be fact-based, which could lead to varying results in different jurisdictions. This would make consistent compliance with the "clear and conspicuous" standard extremely difficult for entities that operate in multiple jurisdictions. In fact, the Board recently withdrew a similar proposal to define the "clear and conspicuous" standard in Regulations B, E, M, Z and DD based, in part, on this concern.

Further, MasterCard believes that the "clear and conspicuous" standard is well understood throughout the financial services community because compliance with this standard has been required for many years in other notice provisions required under the

FCRA, such as the affiliate sharing notice in Section 603. We are not aware of concerns about non-compliance with the "clear and conspicuous" standard in these other contexts and there does not appear to be any need to change the standard in the context of Section 214.

For the reasons addressed above, MasterCard strongly urges the Agencies to delete the definition of "clear and conspicuous" from the final rule and to eliminate the guidance with respect thereto set forth in the Supplementary Information.

Eligibility Information

The Agencies request comment on whether the term "eligibility information," as defined in Section ___.3(g) of the Proposal, appropriately reflects the scope of information covered in Section 214. MasterCard believes that the Proposal accurately reflects the information covered by the provisions of Section 214 and does not require further definition or explanation. We commend the Agencies for distilling a complex concept into a relatively concise definition, and we urge the Agencies to retain this definition without amendment in the final rule.

Pre-Existing Business Relationship

Solicitations to consumers who have pre-existing business relationships with a Receiving Affiliate are not subject to the notice and opt-out requirements of Section 214. Therefore, the definition of the term "pre-existing business relationship" is critical to the operation of the rule. MasterCard is pleased that the Agencies have generally reflected the statutory language defining "pre-existing business relationship" of Section 214 in the Proposal.

MasterCard notes that Section 214 defines the term "pre-existing business relationship" to mean "a relationship between a person, or a person's licensed agent, and a consumer based on" certain enumerated business relationships. However, the reference to "a person's licensed agent" is not included in the definition of "pre-existing business relationship" in the Proposal. No explanation for this omission is provided, and we assume that the omission of this part of the statutory definition was inadvertent. As it was clearly the intent of Congress that this language be included in the definition of "pre-existing business relationship," MasterCard requests that the definition of pre-existing business relationship in the final rule include this language.

With respect to pre-existing business relationships based on inquiries or requests by a consumer, the Agencies state in the Supplementary Information that "an inquiry includes any affirmative request by a consumer for information, such that the consumer would reasonably expect to receive information from the affiliate about its products or services." The Agencies further provide that "[a] consumer would not reasonably expect to receive information from the affiliate if the consumer does not request information or does not provide contact information to the affiliate." The requirement that an inquiry or a request be "affirmative" is not supported by the statute. Specifically, Congress established the minimum criteria for purposes of determining whether a "pre-existing business

relationship" exists. We do not believe the statute supports narrowing the definition. On the other hand, Congress granted the Agencies authority to *expand* the definition of a pre-existing business relationship. By establishing a baseline definition, and granting the Agencies the ability to expand the definition, we do not believe Congress intended the Agencies to narrow the definition. Furthermore, we do not believe that it is valid to assume that a consumer would not reasonably expect to receive information if the consumer does not request information from an affiliate or provide contact information to an affiliate. For example, a consumer may not provide contact information to an affiliate based on the assumption or knowledge that the affiliate has access to the contact information through the corporate family. Accordingly, MasterCard requests that the Agencies remove this guidance from the Supplementary Information upon issuance of the final rule. MasterCard further requests that the example set forth in Section ___.20(d)(1)(iii) be revised to reflect these changes.

Solicitation

Section 214 prohibits Receiving Affiliates from making certain "solicitations" to consumers without the consumer first receiving a notice and opportunity to opt out of receiving such solicitations. The FCRA, as amended by Section 214 of the FACT Act, defines a "solicitation" as "the marketing of a product or service initiated by a person to a particular consumer that is based on an exchange of [eligibility information], and is intended to encourage the consumer to purchase such product or service, but does not include communications that are directed at the general public or determined not to be solicitation by the regulations prescribed under this section." We note that the definition of "solicitation" in the Proposal, generally tracks the definition of "solicitation" set forth in Section 214 of the FACT Act and agree with the Proposal's general approach, subject to the comments below.

MasterCard believes that the exclusion in the first sentence of Section ___.3(n)(2) should be stated in the disjunctive by changing the "and" in that sentence to "or" instead. Specifically, MasterCard believes this sentence should provide "A solicitation does not include communications that are directed at the general public **or** distributed without the use of eligibility information communicated by an affiliate." (Emphasis included for illustration.) This change is supported by the definition of "solicitation" in Section 214 and Section ___.3(n)(2) of the Proposal. To be a "solicitation" under Section 214 and the Proposal, a marketing must be both (1) directed at a particular consumer; and (2) based on eligibility information. Accordingly, if a marketing piece has only one of these characteristics, but does not have the other, the marketing piece would not be, by definition, a "solicitation." Thus, a marketing to the general public using eligibility information would not be a "solicitation," nor would a marketing to a particular consumer that is not based on eligibility information. MasterCard urges the Agencies to replace the "and" in the first sentence of Section ___.3(n)(2) with "or" in the final rule.

Further, as a technical matter, MasterCard notes that Section ___.3(n)(1)(ii) of the Proposal refers to "such product or service;" however, the Agencies did not include within its definition of "solicitation" a prior reference to the terms "product or service." MasterCard requests that the Agencies clarify the definition accordingly.

Finally, the Agencies request comment on whether further guidance is needed with respect to Internet marketing tools, such as pop-up ads. MasterCard believes that the language defining the term "solicitation" provides sufficiently clear guidance to allow entities engaged in marketing to determine whether a specific marketing effort would be considered a "solicitation" under Section 214 and the Proposal, regardless of the means by which the solicitation is delivered. In fact, we caution the Agencies against varying the definition of "solicitation" based on the delivery mechanism.

Affiliate Use of Eligibility Information for Marketing Solicitations

General Duties of Person Communicating Eligibility Information To An Affiliate

As noted above, we strongly believe that the requirement of a notice and opt out should be stated as a general pre-condition to allowing Receiving Affiliates to make solicitations based on eligibility information. Further, any liability associated with such notice should be placed solely on the Receiving Affiliate and not on the Sharing Affiliate.

Constructive Sharing

The Agencies request comment on whether "constructive sharing" should be included within the scope of the regulations implementing Section 214. MasterCard strongly believes extending the requirements of notice and opportunity to opt out of affiliate solicitations to situations described by the Agencies as "constructive sharing" reaches beyond the scope of Section 214 and should not be addressed in the final rule. As discussed above, a marketing must be based on eligibility information shared between affiliates to be considered a "solicitation" under Section 214 and the Proposal. In the example provided in the Supplementary Information, no eligibility information is shared between affiliates. Even accepting the Agencies argument that sharing of such information occurs when the consumer contacts the affiliate, such sharing did not occur prior to the marketing campaign. Therefore, the marketing in question is not a "solicitation" and is not subject to the notice and opt-out requirements. Further, if a consumer that is the subject of such a marketing campaign responds by providing information that meets the definition of "eligibility information," that information is provided by the consumer rather than the affiliate. The information would also be provided in response to, rather than prior to, a marketing campaign and therefore would not be subject to the requirements of notice and opportunity to opt out.[2]

Written Notice

The Agencies provide in the Supplementary Information that "Paragraph (a) [of Section ___.20] contemplates that the opt-out notice will be provided to the consumer in writing or, if the consumer agrees, electronically." However, nothing in the language of Section 214 requires that the notice and opportunity for opt out be provided to a consumer in writing. Section 214 simply requires that the consumer receive notice. The Agencies

[2] Even if the Agencies deemed the Receiving Affiliate to receive eligibility information from the Sharing Affiliate as a result of the consumer's response, such receipt, and therefore use, is in response to a communication initiated by the consumer, and is therefore not subject to Section 214.

themselves make this observation elsewhere in the Supplementary Information ("nothing in section 624 of the [FCRA] requires that the notice be provided in writing"). Further, in drafting Section 214, Congress followed the language of the affiliate-sharing provision of the FCRA with the intention that Section 214 would be interpreted consistently with the current operation of the affiliate-sharing provision of the FCRA, which permits oral notices. Therefore, there is strong support that Section 214 allows notices to be given orally. Accordingly, MasterCard requests that the final rule and its Supplementary Information acknowledge that the notice required by Section 214 may be provided orally.

The Agencies request comment on whether there is any "practical method for meeting the 'clear and conspicuous' standard in oral notices." MasterCard notes that the Federal Trade Commission ("Commission") has issued regulations in other contexts (*e.g.*, the Telemarketing Sales Rule) requiring that clear and conspicuous notice be given to consumers and contemplated that such notice would be given orally. Further the Commission has imposed such requirements without providing specific guidance on what constitutes clear and conspicuous notice when the notice is provided orally. We also note that the OCC has required that oral disclosures be "conspicuous, simple, direct, readily understandable, and designed to call attention to the nature and significance of the information provided" in its regulations pertaining to debt cancellation contracts and debt suspension agreements. MasterCard is not aware of any difficulties that have arisen with respect to these requirements.[3] Therefore, we see no reason to alter this approach at this time. Further, as described above, providing specific guidance or definition of what would or would not constitute "clear and conspicuous" notice could lead to civil litigation over whether the standard has been met and result in a patchwork of compliance obligations that vary by jurisdiction. Accordingly, MasterCard strongly urges the Agencies to refrain from including in the final rule and its Supplementary Information any definition or guidance regarding what constitutes "clear and conspicuous" notice with respect to oral notices.

General Duties of an Affiliate Receiving Eligibility Information

In general, MasterCard believes that Section ___.20(b) of the Proposal reflects the congressional intent with respect to the duties of Receiving Affiliates. We urge the Agencies to retain this general approach.

Exemptions from the Notice and Opt-Out Requirements

Section 214 and Section ___.20(c) and (d) provide several exceptions to the notice and opt-out requirements and examples thereof. Unless otherwise noted below, MasterCard generally agrees with the Agencies' interpretation of these exceptions.

Service Provider

The statute provides that the notice and opt-out requirements do not apply in connection with "using information to perform services on behalf of another [affiliate],

[3] Indeed, the OCC's regulation appears to establish a higher standard than that included in the Proposal, and yet we are unaware of issues related to the ability of national banks to meet that standard in the case of oral notices.

except that this subparagraph shall not be construed as permitting a person to send solicitations on behalf of another person, if such other person would not be permitted to send the solicitation on its own behalf as a result of the" consumer's opt out. Section ___.20(c)(3) of the Proposal implements this exception. However, we are concerned that the Proposal makes this exception more complicated than necessary by deviating from the statutory language and inserting concepts relating to solicitations on one's own behalf. We do not believe it is necessary to address that situation because the exception applies only to "perform[ing] services on behalf of an affiliate." We ask the Agencies to revise the final rule accordingly.

Communications Initiated by the Consumer

One of the exceptions to the notice and opt-out requirements of Section 214 is "using information in response to a communication initiated by a consumer." Section ___.20(c)(4) of the Proposal, however, states this exception as solicitations "in response to a communication initiated by the consumer orally, electronically, or in writing." MasterCard anticipates that, for the near future, consumer communications will probably be received primarily through oral, electronic, or written means. However, the statutory exception does not preclude communications initiated by a consumer through other means. MasterCard believes that the Agencies' implementing regulations, likewise, should not preclude any form of communication from qualifying for this exception. Accordingly, MasterCard requests that the Agencies delete the words "orally, electronically, or in writing" from Section ___.20(c)(4) of the final rule.

Further, the Agencies' discussion of what it means to respond to a communication initiated by a consumer in the Supplementary Information is construed very narrowly. Specifically, the Supplementary Information provides that "[t]o be covered by the proposed exception, use of eligibility information must be responsive to the communication initiated by the consumer" and provides examples to illustrate its interpretation (*e.g.*, store location and retail hours). Such a narrow construction is not supported by either the language of Section 214 or the intent of Congress with respect to scope of this exception. Section 214 allows for "the [use of] information in response to a communication initiated by a consumer" but does not limit the communication by the Receiving Affiliate in response thereto. Further, by enacting Section 214, Congress intended to allow a consumer to control the amount, type, and method of solicitations the consumer receives from affiliates. When a consumer initiates contact with a Receiving Affiliate, the consumer is exercising control of its relationship with that entity and therefore restricting the communication of the Receiving Affiliate is not justified by the purpose of Section 214. Further, a Receiving Affiliate may be better able to address the particular needs of a consumer making a general inquiry when it can access eligibility information and identify the products and services that may be of interest or use to the consumer rather than providing general, and possibly less helpful, information to the consumer. Finally, MasterCard has great concerns over the ability companies will have to monitor the compliance of their customer service representatives under a narrow and vague construction of "responsiveness." In this regard, MasterCard notes that the Agencies acknowledge that whether a communication is responsive to a consumer's inquiry is based on the particular facts and circumstances. Accordingly, in practice, the determination of

what is responsive to a consumer inquiry will be made by individual customer service representatives that have contact with consumers and thus, realistically, will lead to inconsistent judgments about what is "responsive." Accordingly, MasterCard strongly urges the Agencies to delete its discussion about what is "responsive" to a consumer's inquiry from the Supplementary Information accompanying the final rule.

Finally, the Supplementary Information discussing Section ___.20(c) of the Proposal provides that if a consumer returns a call made by a Receiving Affiliate in response to a message left by such affiliate, the return call would not be considered "a communication initiated" by a consumer. Therefore, the consumer's return call would not qualify for an exemption from the notice and opt-out requirements. As a policy matter, no consumer is obligated to return a message left by a Receiving Affiliate and by affirmatively electing to do so the consumer elects to initiate a communication with the Receiving Affiliate. Therefore, MasterCard believes that any call made by a consumer to a Receiving Affiliate (whether in response to a message from that affiliate or otherwise) should be considered "a communication initiated" by a consumer and therefore fall under the exemption set forth in Section ___.20(b)(4) of the Proposal. Moreover, MasterCard believes that this analysis should apply to any other method of communication whereby the consumer responds to a communication initiated by a Receiving Affiliate. MasterCard acknowledges that the Agencies may have concerns that consumers may be misled or manipulated into returning a message left by a Receiving Affiliate. However, MasterCard believes that such misleading or deceptive practices would be more appropriately addressed by statutes and regulations aimed at preventing and prohibiting misleading, deceptive, and fraudulent trade practices rather than in the context of regulations aimed at limiting affiliate marketing.

Solicitations Authorized by the Consumer

Another exception to the notice and opt-out requirements of Section 214 allows "using information in response to solicitations authorized or requested by the consumer." Section ___.20(c)(5) states this exception as pertaining to solicitations "in response to an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation." The Agencies further provide that a pre-selected check box would not meet the requirement of "affirmative authorization."

The language in the FCRA merely requires that the communication be authorized or requested by the consumer rather than "affirmatively" authorized or requested. There is no support in the language of Section 214 requiring the consumer provide "affirmative" authorization for an affiliate to be exempt from the notice and opt-out requirements. Further, if Congress had intended to limit the methods by which a consumer would be permitted to provide authorization or request, it could have done so in the statute.

We also note that the interpretation provided by the Agencies deviates significantly from a similar provision in the GLBA. In this regard, an exception to the notice and opt-out requirements under the GLBA is provided for disclosures made pursuant to the consumer's consent. In providing for regulations implementing the GLBA, the Agencies *specifically declined* to require affirmative consent in order to qualify for the GLBA's

consent exception. It is certainly likely that, absent language directing the Agencies otherwise, Congress expected the Agencies to provide a similar interpretation to a similar exception in Section 214. Accordingly, MasterCard requests that the word "affirmatively" be deleted from Section ___.20(c)(5) and that the prohibition on pre-selected check boxes and "boilerplate" language be removed from the Supplementary Information accompanying final rule.

The language of this exception is limited to authorizations and requests made orally, electronically, or in writing. For the reasons discussed above, MasterCard requests that the Agencies delete the words "orally, electronically, or in writing to receive a solicitation" in the final rule.

Proscriptive Application

Section 214 provides that the notice and opt-out requirements shall not apply with respect to "the use of information to send a solicitation to a consumer if such information was *received* prior to the [mandatory compliance date for the final rule]." (Emphasis added.) The Proposal, however, provides that a Receiving Affiliate may only use eligibility information "*received by [the Receiving] [A]ffiliate*" prior to the mandatory compliance date without being subject to the notice and opt-out requirements of the Section 214 and its implementing regulations. (Emphasis added.) We do not believe that the Proposal's requirement that the information be "received by the affiliate" is supported by the language of Section 214. Congress intended to grandfather the use of all eligibility information received by a corporate family prior to the mandatory compliance date. To require that a particular affiliate actually receive such information before such information qualifies for the grandfather exception would have the unintended and costly consequence of corporate families that are subject to Section 214 and its implementing regulations transferring eligibility information of each member of a corporate family to each other member of the corporate family prior to the mandatory compliance date. Accordingly, MasterCard respectfully requests that the final rule clarify that an affiliate shall be deemed to have received "eligibility information" by the compliance date if such information was received by any affiliate of the Receiving Affiliate prior to the mandatory compliance date. Alternatively, MasterCard requests that the final rule provide that eligibility information received by a service provider of a Receiving Affiliate on or before the mandatory compliance date will be deemed to be received by the Receiving Affiliate for purposes of the FCRA.

The Agencies request comment on whether there is any need to delay the compliance date beyond the effective date. MasterCard requests that the compliance date for the rule be at least six months after the effective date of the rule, and that companies be given the opportunity to fold any new disclosures into their GLBA privacy notices under their existing notification schedules. This time frame for compliance would be similar to the time frame allowed for compliance with the GLBA privacy regulations. Because the complexity involved in complying with Section 214 is similar to that required for compliance with the GLBA privacy regulations, MasterCard believes including an additional six months for compliance with the affiliate marketing provisions is justified and reasonable.

Contents of Opt-Out Notice

Section ___.21(c) of the Proposal provides that a menu of opt-out alternatives may be provided to allow a consumer to choose to opt out of specific types of solicitations, information used, solicitations from particular affiliates, and delivery methods; provided that one of the opt-out options is "the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery." Section 214, however, merely requires that "the notice...shall allow the consumer to prohibit all [covered solicitations]." Nothing in the Section 214 requires a menu of opt-out alternatives to include a single opt-out option allowing a consumer "the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery." Accordingly, MasterCard requests that the requirement to include a menu of opt-out options be deleted from the final version of the rule.

Reasonable Opportunity to Opt Out

Examples

MasterCard appreciates the Agencies' facts and circumstances approach to the "reasonable opportunity to opt out" requirements and encourages the Agencies to retain this approach in the final rule. However, MasterCard is concerned that the examples/safe harbors which, but for the "at the time of an electronic transaction" example, refer only to a 30-day time period to opt out, would be construed not as examples, but as a requirement to allow for 30 days to opt out. It is financial institutions' experience under the GLBA regulations that the examples of 30-day time period, in practice, have been construed to generally require that covered entities provide consumers no less than 30 days to exercise an opt out. MasterCard's concerns about this issue are magnified in the context of Section 214 because, as discussed above, Section 214 is enforceable by private right of action and plaintiffs' attorneys are likely to attempt to elevate the 30-day safe harbor into a mandatory time period despite the Agencies' facts and circumstances approach.

In the event that the final rule retains such examples, MasterCard requests that the example regarding the opportunity to opt out at the time of an electronic transaction be expanded to apply to all transaction methods. We cannot identify any reason why the example should be limited to electronic transactions.

Inclusion of an Opt In

One example the Agencies included as constituting a reasonable opportunity to opt out is prohibiting the use of eligibility information to make solicitations unless "the consumer affirmatively consents..." MasterCard notes that Section 214 provides an exclusion from the notice and opt-out requirements where a consumer authorizes or requests solicitations from the Receiving Affiliate. Further, as discussed with reference to the exception relating to consumer authorization or requests above, to qualify for this exception, the consent of a consumer to receive solicitations need not be "affirmative." For this reason, MasterCard believes that this example merely raises questions about the operation of the exceptions provided for in Section 214. Moreover, in Section

___.22(b)(4) of the Proposal, the Agencies appear to take the view that providing a Section 214 notice with a GLBA notice that complies with the GLBA provisions for notice and opt out would constitute a reasonable opportunity to opt out for purposes of Section 214. As noted above, the GLBA provisions merely require consent of the consumer and do not require affirmative consent or specify the methods of consent that are permissible or impermissible. Accordingly, MasterCard requests that the Agencies delete Section ___.22(b)(5) from the final rule.

Disclosure of Time Period to Effect an Opt Out

The Agencies would not require institutions to disclose in the opt-out notices how long a consumer has to respond to the opt-out notice before eligibility information could be used by a Receiving Affiliate. The Agencies note that "[i]n this respect, the proposed regulations are consistent with the GLB Act privacy regulations." MasterCard applauds the Agencies for proposing such an approach, and we urge that it be retained in the final rule. We believe the Agencies have addressed this issue properly because no such disclosure is required by the language of Section 214, which specifically describes the required content of such notice. Further, Congress intended to allow covered entities to provide the Section 214 notice together with the notice required under the GLBA, which does not require the covered entity to disclose the time period for opt out. Finally, to contain the costs associated with compliance, covered entities may generally prefer to draft a single notice applicable to all methods of delivery and all transactions. Since the Proposal does not specify a mandatory time period for opt out, but rather takes a facts-and-circumstances approach, a requirement to disclose the applicable time frame for opt out could require covered entities to draft and print several notices.

Reasonable and Simple Methods of Opting Out

Section 214 requires that the "consumer is provided an opportunity and simple method to prohibit" solicitation from Receiving Affiliates. In Section ___.23(a), the Agencies have interpreted this requirement to mean both "reasonable and simple" and set forth four methods of opting out that the Agencies would deem to be reasonable and simple methods for opting out and examples of three methods the Agencies would deem to be not reasonable and simple.

MasterCard notes that the Proposal does not specify that the opt-out methods described in Section ___.23(a)(1) through (4) are merely examples of reasonable and simple methods of opt out and does not specify that these four methods do not exclude other reasonable and simple methods of opting out. MasterCard believes that the statute does not support limiting the permissible methods of opting out nor does MasterCard believe that the Agencies intended this result. Accordingly, MasterCard requests that the Agencies provide that the methods of opt out provided in these subsections are illustrative examples and not exclusive.

Moreover, MasterCard notes that the examples of methods of opt out that would and would not be reasonable and simple are not necessarily consistent with the examples provided in the regulations applicable to the notice required by the GLBA. Congress

contemplated that covered entities would be allowed to provide the GLBA notice and the Section 214 notice together in the same communication. Accordingly, MasterCard believes that the permitted methods for opting out with respect to the GLBA notice and Section 214 should be consistent. Specifically, MasterCard notes that the GLBA provisions do not require a self-addressed envelope. Additionally, with respect to Section ___.23(b)(3), MasterCard disagrees that requiring a consumer who agrees to receive opt-out notice in electronic form only to opt out by telephone or paper mail would not be a reasonable and simple method of exercising the right to opt out. We believe that it is equally reasonable and simple for such a consumer to opt out by making a toll-free call as it is for a consumer who receives such notice by mail. In that regard, we note that Section ___.23(a)(4) provides that a toll-free telephone number that consumers may call to opt out would be considered reasonable and simple. Accordingly, MasterCard strongly urges the Agencies to revise the examples in the final rule to ensure consistency with the examples set forth in the Agencies' regulations regarding the GLBA opt out.

MasterCard requests the Agencies to reiterate the position they correctly took with respect to the GLBA and allowing companies to require that a consumer's opt out be provided through the channels established to receive those opt outs. In this regard, if the company provides an opt out mechanism that meets the objectives outlined in the final rule, the company should not be obligated to honor opt outs submitted through other means. We believe it would be unreasonable to require a company to honor any opt out submitted through any means, however unreasonable, if the company has established a reasonable and simple mechanism for the consumer to use. We ask the Agencies to address this issue in the final rule.

Delivery of Opt-Out Notices

MasterCard applauds that the Proposal recognizes that providing actual notice to each consumer is not an obtainable goal and therefore does not require actual notice, but rather provides for delivery methods that can reasonably be expected to reach the consumer. MasterCard urges the Agencies to retain this approach in the final rule. Further, MasterCard appreciates the inclusion of the joint opt-out notice provisions that allow a corporate family to provide a single notice that would be effective for all entities within the corporate family. MasterCard urges the Agencies to retain these provisions in the final rule.

Duration and Effect of Opt Out

Beginning of Opt-Out Period

Section 214 provides that the opt-out period will "be effective for at least 5 years, beginning on the date on which the person receives the election of the consumer." The Proposal provides that the opt-out period will begin "as soon as reasonably practicable after the consumer's opt-out election is received." MasterCard believes there is an inconsistency between when the opt-out election period begins to toll under the statute and when it begins under the Proposal. MasterCard requests that the final rule reflect the timing provided in the statute.

Revocation of an Opt-Out Election

Although Section 214 requires the minimum opt-out period offered to a consumer to be five years, Section 214 specifically provides that the duration of an opt-out period elected by a consumer may be shortened upon the revocation of the opt out by the consumer. Section ___.25(a) of the Proposal merely refers to an opt-out period "of at least 5 years" and does not refer to the allowance of a shorter opt-out period if the consumer revokes the opt out. MasterCard believes that this result was not intended by the Agencies and requests that the final rule include a clear statement that an opt-out period may be shortened by the election of a consumer to revoke an opt-out election.

Termination of Relationship

Section ___.25(d) provides that if a consumer's relationship with an entity terminates when an opt-out election is in force, the opt out will apply indefinitely, unless the consumer revokes the opt out. No such provision is included in Section 214, which simply provides that the minimum duration of an opt-out period is five years. Section 214 and the Proposal provide that upon expiration of an opt-out election, another notice and opportunity to extend the opt-out period must be provided. If the notice and opt out is not provided, the consumer's initial opt-out election will remain in force unless revoked by the consumer. Accordingly, MasterCard believes that the provision in Section ___.25(d) is both unsupported by the statutory language in Section 214 and unnecessary for the protection of consumers in light of the extension of opt-out provisions set forth in the statute. Therefore, MasterCard requests that Section ___.25(d) be deleted from the final rule.

Opting Out at Account Level

The Agencies highlight that an opt out is not tied to the information, but that it is tied to the consumer. MasterCard requests that the Agencies clarify this approach to ensure its consistency with the GLBA and the statutory language. In particular, we believe that companies should have the opportunity to implement the consumer's opt out at the account level, as opposed to tying the opt out to the consumer. For example, if a consumer opts out during a relationship with a company, ends the relationship, and years later enters into a new relationship with the company, the original opt out would not apply to the new relationship (*e.g.*, the new account). Such an approach is consistent with the approach taken by the Agencies with respect to the GLBA in similar circumstances. We also believe this approach is consistent with the statutory language allowing companies to provide a menu of opt outs with respect to varying types of information (*e.g.*, information pertaining to different accounts). We ask the Agencies to adopt this approach with respect to the final rule.

Extension of Opt Out

Section ___.26(c)(1) of the Proposal requires that text be included in the notice provided upon expiration of a consumer's original opt-out election explaining that the consumer's prior opt-out election is about to expire or has expired. Section 214 merely

requires a notice and opportunity to opt out upon expiration of a prior opt-out election. The statute does not dictate that the content of such notice be different than that contained in the original notice. A requirement of different text in an extension notice would increase the costs and burdens associated with compliance with Section 214 by requiring covered entities to draft and print multiple notices and develop systems to alternate notices as necessary. MasterCard believes that this additional requirement would not provide any additional benefit to the consumers. MasterCard believes that the text provided in the initial notice and opt out gives a consumer all the information necessary to inform the consumer of the rights afforded to consumers under Section 214 and to elect to continue to opt out of receiving solicitations from Receiving Affiliates. Accordingly, MasterCard requests that the requirement of separate text for an election to extend an opt out be deleted from the final rule.

Consolidated and Equivalent Notices

MasterCard believes that the provisions related to consolidated and equivalent notice reflect the language of Section 214 and the intent of Congress. Accordingly, MasterCard urges the Agencies to retain these provisions, without amendment, in the final rule.

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Once again, MasterCard appreciates the opportunity to comment on the Proposal. If you have any questions concerning the comments contained in this letter, or if MasterCard may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Michael F. McEneney at Sidley Austin Brown & Wood LLP, at (202) 736-8368, our counsel in connection with this matter.

Sincerely,

Jodi Golinsky

Jodi Golinsky
Vice President &
Senior Regulatory Counsel

cc: Michael F. McEneney, Esq.