

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Part 41**

[Docket No. 04–16]

RIN 1557–AC88

**BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM****12 CFR Part 222**

[Regulation V; Docket No. R–1203]

**FEDERAL DEPOSIT INSURANCE CORPORATION****12 CFR Part 334**

RIN 3064–AC73

**DEPARTMENT OF THE TREASURY****Office of Thrift Supervision****12 CFR Part 571**

[No. 2004–31]

RIN 1550–AB90

**NATIONAL CREDIT UNION ADMINISTRATION****12 CFR Part 717****Fair Credit Reporting Affiliate Marketing Regulations**

**AGENCIES:** Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS); and National Credit Union Administration (NCUA).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The OCC, Board, FDIC, OTS, and NCUA (Agencies) are publishing for comment proposed regulations 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 proposed regulations generally prohibit 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 an opportunity and simple method to opt out of the making of such solicitations.

**DATES:** Comments must be submitted on or before August 16, 2004.

**ADDRESSES:** Comments should be directed to:

OCC: You should include OCC and Docket Number 04–16 in your comment. You may submit comments by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- OCC Web site: <http://www.occ.treas.gov>. Click on “Contact the OCC,” scroll down and click on “Comments on Proposed Regulations.”
- E-mail address: [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).

- Fax: (202) 874–4448.
- Mail: Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 1–5, Washington, DC 20219.
- Hand Delivery/Courier: 250 E Street, SW., Attn: Public Information Room, Mail Stop 1–5, Washington, DC 20219.

**Instructions:** All submissions received must include the agency name (OCC) and docket number or Regulatory Information Number (RIN) for this notice of proposed rulemaking. In general, OCC will enter all comments received into the docket without change, including any business or personal information that you provide. You may review comments and other related materials by any of the following methods:

- Viewing Comments Personally: You may personally inspect and photocopy comments at the OCC’s Public Information Room, 250 E Street, SW., Washington, DC. You can make an appointment to inspect comments by calling (202) 874–5043.
- Viewing Comments Electronically: You may request e-mail or CD–ROM copies of comments that the OCC has received by contacting the OCC’s Public Information Room at [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).
- Docket: You may also request available background documents and project summaries using the methods described above.

Board: You may submit comments, identified by Docket No. R–1203, by any of the following methods:

- Agency Web site: <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include docket number in the subject line of the message.
- Fax: (202) 452–3819 or (202) 452–3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal

Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board’s Web site at [www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm](http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm) as submitted, except as necessary for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board’s Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

**FDIC:** You may submit comments, identified by RIN number 3064–AC73 by any of the following methods:

- Agency Web site: <http://www.fdic.gov/regulations/laws/federal/propose.html>. Follow instructions for submitting comments on the Agency Web site.
- E-Mail: [Comments@FDIC.gov](mailto:Comments@FDIC.gov). Include the RIN number in the subject line of the message.
- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- Hand Delivery/Courier: Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

**Instructions:** All submissions received must include the agency name and RIN for this rulemaking. All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal/propose.html> including any personal information provided.

**OTS:** You may submit comments, identified by number 2004–31, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail address: [regs.comments@ots.treas.gov](mailto:regs.comments@ots.treas.gov). Please include number 2004–31 in the subject line of the message and include your name and telephone number in the message.
- Fax: (202) 906–6518.
- Mail: Regulation Comments, Chief Counsel’s Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: No. 2004–31.
- Hand Delivery/Courier: Guard’s Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel’s Office, Attention: No. 2004–31.

**Instructions:** All submissions received must include the agency name and docket number or Regulatory

Information Number (RIN) for this rulemaking. All comments received will be posted without change to the OTS Internet Site at <http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1>, including any personal information provided.

**Docket:** For access to the docket to read background documents or comments received, go to <http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1>. In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906-5922, send an e-mail to [public.info@ots.treas.gov](mailto:public.info@ots.treas.gov), or send a facsimile transmission to (202) 906-7755. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

**NCUA:** You may submit comments by any of the following methods. (Please send comments by one method only):

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- NCUA Web site: [http://www.ncua.gov/RegulationsOpinionsLaws/proposed\\_regs/proposed\\_regs.html](http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html). Follow the instructions for submitting comments.

- E-mail: Address to [regcomments@ncua.gov](mailto:regcomments@ncua.gov). Include “[Your name] Comments on Proposed Rule Part 717, Fair Credit Reporting—Affiliate Marketing” in the e-mail subject line.

- Fax: (703) 518-6319. Use the subject line described above for e-mail.

- Mail: Address to Becky Baker, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

- Hand Delivery/Courier: Address to Becky Baker, Secretary of the Board, National Credit Union Administration. Deliver to guard station in the lobby of 1775 Duke Street, Alexandria, Virginia 22314-3428, on business days between 8 a.m. and 5 p.m.

**FOR FURTHER INFORMATION CONTACT:**

**OCC:** Amy Friend, Assistant Chief Counsel, (202) 874-5200; Michael Bylsma, Director, or Stephen Van Meter, Assistant Director, Community and Consumer Law, (202) 874-5750; Patrick T. Tierney, Attorney, Legislative and Regulatory Activities Division, (202) 874-5090; or Carol Turner, Compliance Specialist, Compliance Department,

(202) 874-4858, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

**Board:** David A. Stein, Counsel; Minh-Duc T. Le, Ky Tran-Trong, or Krista P. DeLargy, Senior Attorneys, Division of Consumer and Community Affairs, (202) 452-3667 or (202) 452-2412; or Thomas E. Scanlon, Counsel, Legal Division, (202) 452-3594, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. For users of a Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

**FDIC:** Ruth R. Amberg, Senior Counsel, (202) 898-3736, Robert A. Patrick, Counsel, (202) 898-3757, or Richard M. Schwartz, Counsel, Legal Division, (202) 898-7424; April Breslaw, Chief, Compliance Section, (202) 898-6609; David P. Lafleur, Policy Analyst, Division of Supervision and Consumer Protection, (202) 898-6569, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

**OTS:** Cindy Baltierra, Program Analyst (Compliance), Compliance Policy, (202) 906-6540; Richard Bennett, Counsel (Banking and Finance), (202) 906-7409; or Paul Robin, Special Counsel, Regulations and Legislation Division, (202) 906-6648, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**NCUA:** Chrisanthony J. Loizos, Staff Attorney, Office of General Counsel, (703) 518-6540, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

**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.<sup>1</sup> 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 the person has given the consumer a clear and conspicuous notice that such information may be communicated among affiliates and an opportunity to “opt out” or direct that the information not be communicated, and the consumer has not opted out. The notice and opt out provided in section 603(d)(2)(A)(iii) of the FCRA limits the sharing of information among affiliates and was the subject of the October 20, 2000 proposal by the Federal banking agencies and NCUA. See 65 FR 63120 (Oct. 20, 2000); 65 FR 64168 (Oct. 26, 2000) (the October 2000 proposal).

The current proposal addresses a new notice and opt out provision that applies to a person's use of certain information that it receives from an affiliate to market its products and services to consumers. Although there is a certain degree of overlap between the two opt outs, the two opt outs are distinct and serve different purposes. Therefore, nothing in this proposal regarding the opt out for affiliate marketing supersedes or replaces the affiliate sharing opt out contained in section 603(d)(2)(A)(iii) of the Act.

*The Fair and Accurate Credit Transactions Act of 2003*

The Fair and Accurate Credit Transactions Act of 2003 (FACT Act) was signed into law 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, to increase the accuracy of consumer reports, and to allow consumers to exercise greater control regarding the type and amount of solicitations they receive. The FACT Act also restricts the use and disclosure of sensitive medical information. To bolster efforts to improve financial literacy among consumers, the FACT Act creates a new Financial Literacy and Education Commission empowered to take appropriate actions to improve the financial literacy and education programs, grants, and materials of the Federal government. Lastly, to promote increasingly efficient national credit markets, the FACT Act establishes uniform national standards in key areas

<sup>1</sup> The FCRA creates substantial obligations for a person that meets the definition of a “consumer reporting agency” in section 603(f) of the statute.

of regulation regarding consumer report information.

Section 214 of the FACT Act adds a new section 624 of the FCRA. This new provision gives consumers the right to restrict a person from using certain information about a consumer obtained from an affiliate to make solicitations to that consumer. That section also requires the Agencies, in consultation and coordination with each other, to issue regulations in final form implementing section 214 not later than 9 months after the date of enactment.<sup>2</sup> These rules must become effective not later than 6 months after the date on which they are issued in final form.

## II. Explanation of the Proposed Regulations

New section 624 of the FCRA generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about its products or services, unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and the consumer does not opt out. Section 624 governs the use of information by an affiliate, not the sharing of information with or among affiliates. As such, the new opt out right contained in section 624 is distinct from the existing FCRA opt out right for affiliate sharing under section 603(d)(2)(A)(iii), although these opt out rights and the information subject to these two opt outs overlap to some extent. As noted above, the FCRA allows some information (transaction or experience information) to be shared without giving the consumer notice and an opportunity to opt out, and provides that "other" information may not be shared among affiliates without giving the consumer notice and an opportunity to opt out. The new opt out right for affiliate marketing generally applies to both transaction or experience information and "other" information.

The Agencies seek comment on these proposed regulations implementing section 624 of the FCRA, including in particular the matters discussed below.

### *Responsibility for Providing Notice and an Opportunity To Opt Out*

Section 624 does not specify which affiliate must give the consumer notice and an opportunity to opt out of the use

of the information by an affiliate for marketing purposes. Under one view, the person that receives certain consumer information from its affiliate and wants to use that information to make or send solicitations to the consumer could be responsible for giving the notice because the statute is drafted as a prohibition on the affiliate that receives the information from using such information to send solicitations, rather than as an affirmative duty imposed on the affiliate that sends or communicates that information. On the other hand, section 624(a)(1)(A) provides that the disclosure must state that the information "may be communicated" among affiliates for purposes of making solicitations, suggesting that the affiliate that sends or communicates information about a consumer should be responsible for providing the notice. In addition, section 214(b)(3) of the FACT Act requires the Agencies to consider existing affiliate sharing notification practices and provide for coordinated and consolidated notices. Similarly, section 214 allows for the combination of affiliate marketing opt out notices with other notices required by law, which may include Gramm-Leach-Bliley Act (GLB Act) privacy notices. Thus, the provisions of section 214 suggest that the person communicating information about a consumer to its affiliate should give the notice because that is the person that would likely provide the affiliate sharing opt out notice under section 603(d)(2)(A)(iii) of the FCRA and other disclosures required by law.

The Agencies have proposed that the person communicating information about a consumer to its affiliate should be responsible for satisfying the notice requirement, if applicable. A rule of construction provides 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. This approach provides flexibility and facilitates the use of a single notice. At the same time, it ensures that the notice is not provided solely by the affiliate that receives and uses the information to make or send solicitations, which may be a person from which the consumer would not expect to receive important notices regarding the consumer's opt out rights. The Agencies invite comment on whether the affiliate receiving the information should be permitted to give the notice solely on its own behalf. The Agencies specifically solicit comment on whether a receiving affiliate could provide notice without making or

sending any solicitations at the time of the notice and on whether such a notice would be effective.

### *Scope of Coverage*

The statute specifies certain circumstances, which are included in the proposed regulations, when the requirements do not apply. New section 624(a)(4) provides that the requirements and prohibitions of that section do not apply, for example, when: (1) The affiliate receiving the information has a pre-existing business relationship with the consumer; (2) the information is used to perform services for another affiliate (subject to certain conditions); (3) the information is used in response to a communication initiated by the consumer; or (4) the information is used to make a solicitation that has been authorized or requested by the consumer. The Agencies have incorporated each of these statutory exceptions into the proposed rule.

In defining the circumstances when the regulatory provisions apply, the proposal focuses on the communication of eligibility information among affiliates. Under the proposal, "eligibility information" is defined 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. 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 the 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. The Agencies invite comment on whether the term "eligibility information," as defined, appropriately reflects the scope of coverage, or whether the regulation should track the more complicated language of the statute 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.

<sup>21</sup> The Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) are also required to issue regulations under new section 624 in consultation and coordination with the Agencies. The FTC published its proposed rule on June 15, 2004 (69 FR 33,324). The SEC proposal will also be published in a separate **Federal Register** notice.

### *Duration of Opt Out*

Section 624 provides that a consumer's election to prohibit marketing based on shared information shall be effective for at least 5 years. Accordingly, the proposal provides that a consumer's opt out election is valid for a period of at least 5 years (the opt out period), beginning as soon as reasonably practicable after the consumer's opt out election is received, unless the consumer revokes the election in writing, or if the consumer agrees, electronically, before the opt out period has expired. When a consumer opts out, an affiliate that receives eligibility information about that consumer from another affiliate may not make or send solicitations to the consumer during the opt out period based on that information, unless an exception applies or the opt out is revoked.

To avoid the cost and burden of tracking consumer opt outs over 5-year periods with varying start and end dates and sending out extension notices in 5-year cycles, some companies may choose to treat the consumer's opt out election as effective for a period longer than 5 years, including in perpetuity, unless revoked by the consumer. An institution that chooses to honor a consumer's opt out election for more than 5 years would not violate the proposed regulations.

### *Key Definitions*

Section 624 allows eligibility information shared with an affiliate to be used by that affiliate in making solicitations in certain circumstances, including where the affiliate has a pre-existing business relationship with the consumer. The terms "solicitation" and "pre-existing business relationship" are defined in the statute and the proposed regulation, and discussed in detail below in the Section-by-Section Analysis. The Agencies have the authority to prescribe by regulation circumstances other than those specified in the statute that would constitute a "pre-existing business relationship" or would not constitute a "solicitation." The Agencies seek comment on whether there are additional circumstances that should be deemed a "pre-existing business relationship" or other types of communications that should not be deemed a "solicitation."

The Agencies solicit comment on all aspects of the proposal, including but not limited to items discussed in the Section-by-Section Analysis below.

## **III. Section-by-Section Analysis**

### *Section \_\_.1 Purpose, Scope, and Effective Dates*

Proposed § \_\_.1 sets forth the purpose and scope of each agency's regulations.

### *Section \_\_.2 Examples*

Proposed § \_\_.2 describes the use of examples in the proposed regulations. In particular, the examples in this part are not exclusive. However, 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.

### *Section \_\_.3 Definitions*

Proposed § \_\_.3 contains definitions for the following terms: "affiliate" (as well as the related terms "company" and "control"); "clear and conspicuous"; "communication"; "consumer"; "eligibility information"; "person"; "pre-existing business relationship"; and "solicitation."

### *Affiliate*

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 624(b)(2). Section 2 of the FACT Act defines the term "affiliate" to mean "persons that are related by common ownership or affiliated by corporate control."

The FCRA, the FACT Act, and the GLB Act contain a variety of definitions of "affiliate." Proposed paragraph (b) simplifies 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.<sup>3</sup> The Agencies believe it is important to harmonize the various definitions of affiliate as much as possible and construe the various FCRA and FACT Act definitions to mean the same thing. Comment is solicited on whether there is any meaningful difference between the various FCRA, FACT Act, and GLB Act definitions. In addition, the proposal uses a definition of "control"

<sup>3</sup> For purposes of this regulation, an "affiliate" of a bank or savings association includes an operating subsidiary of such bank or savings association. An affiliate of a credit union includes a credit union service organization that is controlled by a Federal credit union.

that applies exclusively to the control of a "company," and defines "company" to include any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization. *See* proposed paragraphs (d) ("company") and (i) ("control").<sup>4</sup>

### *Clear and Conspicuous*

Proposed paragraph (c) defines the term "clear and conspicuous" to mean reasonably understandable and designed to call attention to the nature and significance of the information presented. Institutions retain flexibility in determining how best to meet the clear and conspicuous standard.

Institutions may wish to consider a number of practices to make their notices clear and conspicuous. A notice or disclosure may be made reasonably understandable through methods that include but are not limited to: 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. Various methods may also be used to design a notice or disclosure to call attention to the nature and significance of the information in it, including but not limited to: using a plain-language heading; using a typeface and type size that are easy to read; using wide margins and ample line spacing; using boldface or italics for key words. 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 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 groupings or other devices. It is unnecessary, however, 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

<sup>4</sup> For purposes of the proposed regulation, NCUA will presume a Federal credit union has a controlling influence over the management or policies of a credit union service organization if it is 67 percent owned by credit unions.

disclosure, for example, where a privacy notice under the GLB Act includes several opt out disclosures in a single notice. Nothing in the clear and conspicuous standard requires the segregation of an affiliate marketing opt out notice when it is combined with a privacy notice under the GLB Act or other required disclosures.

It may not be feasible to incorporate all of the methods described above all the time. For example, an institution may have to use legal terminology, rather than everyday words, in certain circumstances to provide a precise explanation. Institutions are encouraged, but not required, to consider the practices described above in designing their notices or disclosures, as well as using readability testing to devise notices that are understandable to consumers.

#### *Consumer*

Proposed paragraph (e) defines the term “consumer” to mean an individual, which follows the statutory definition in section 603(c) of the FCRA. For purposes of this definition, an individual acting through a legal representative qualifies as a consumer.

#### *Eligibility Information*

Under proposed paragraph (j), 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 FCRA did not apply. Eligibility information may include a person’s own transaction or experience information, such as information about a consumer’s account history with that person, and other information, such as information from credit bureau reports or applications.

#### *Person*

Proposed paragraph (l) defines the term “person” to mean any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity. A person may act through an agent, such as a licensed agent (in the case of an insurance company), a trustee (in the case of a trust), or any other agent. For purposes of this part, actions taken by an agent on behalf of a person that are within the scope of the agency relationship will be treated as actions of that person.

#### *Pre-Existing Business Relationship*

Proposed paragraph (m) defines this term 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 subpart C is made or sent to the consumer; or (3) an inquiry or application by the consumer regarding a product or service offered by that person during the 3-month period immediately preceding the date on which a solicitation covered by subpart C is made or sent to the consumer. The proposed definition generally tracks the statutory definition contained in section 624 of the Act, with certain revisions for clarity.

The Agencies have the statutory authority to define in the regulations other circumstances that qualify as a pre-existing business relationship. The Agencies have not proposed to exercise this authority to expand the definition of “pre-existing business relationship” beyond the circumstances set forth in the statute. Comment is solicited, however, on whether there are other circumstances that the Agencies should include within the definition of “pre-existing business relationship.”

#### *Solicitation*

Proposed paragraph (n) defines this term 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. A communication, such as a telemarketing solicitation, direct mail, or e-mail, is a solicitation if it is directed to a specific consumer based on eligibility information. The proposed definition of solicitation does not, however, include communications that are directed at the general public without regard to eligibility information, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications. The proposed definition tracks the statutory definition contained in section 624 of the Act, with certain revisions for clarity.

The Agencies have the statutory authority to determine by regulation that other communications do not constitute a solicitation. The Agencies have not proposed to exercise this authority to specify other communications that would not be deemed “solicitations” beyond the

circumstances set forth in the statute. Comment is solicited, however, on whether there are other communications that the Agencies should determine do not meet the definition of “solicitation.” Comment is also requested 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 is needed to address Internet marketing.

#### **Section \_\_\_\_\_.20 Use of Eligibility Information by Affiliates for Marketing**

Proposed § \_\_\_\_\_.20 establishes the basic rules governing the requirement to provide the consumer with notice and a reasonable opportunity to opt out of a person’s use of eligibility information that it obtains from an affiliate for the purpose of making or sending solicitations to the consumer. The statute is ambiguous because it does not specify which affiliate must provide the opt out notice to the consumer. The proposed regulation would resolve this ambiguity by imposing certain duties on the person that communicates the eligibility information and certain duties on the affiliate that receives the information with the intent to use that information to make or send solicitations to consumers. These bifurcated duties are set forth in paragraphs (a) and (b).<sup>5</sup>

Paragraph (a) sets forth the duty of a person that communicates eligibility information to an affiliate. Under the proposal, before an affiliate may use eligibility information to make or send solicitations to the consumer, the person that communicates eligibility information about a consumer to an affiliate must provide a notice to the consumer stating that such information may be communicated to and used by the affiliate to make or send solicitations to the consumer regarding the affiliate’s products and services, and must give the consumer a reasonable opportunity and a simple method to opt out.

Some organizations may choose to share eligibility information among affiliates but not allow the affiliates that receive that information to use it for marketing purposes. In that case, proposed paragraph (a) would not apply and an opt out notice would not be required if none of the affiliates that receive eligibility information use it to make or send solicitations to consumers.

<sup>5</sup> Because the proposed regulations generally would impose duties on more than one person in an affiliated group, different Agencies may have enforcement authority over the different affiliates involved in communicating and using eligibility information to make or send solicitation.

Under the proposal, paragraph (a) would not apply if, for example, an insurance company asks its affiliated bank to include insurance company marketing material in periodic statements sent to consumers by the bank without regard to eligibility information. The Agencies invite comment on whether, given the policy objectives of section 214 of the FACT Act, proposed paragraph (a) should apply if affiliated companies seek to avoid providing notice and opt out by engaging in the “constructive sharing” of eligibility information to conduct marketing. For example, the Agencies request commenters to consider the applicability of paragraph (a) in the following circumstance. A consumer has a relationship with a bank, and the bank is affiliated with an insurance company. The insurance company provides the bank with specific eligibility criteria, such as consumers having combined deposit balances in excess of \$50,000, and average monthly demand account deposits in excess of \$10,000, for the purpose of having the bank make solicitations on behalf of the insurance company to consumers that meet those criteria. Additionally, the consumer responses provide the insurance company with discernible eligibility information, such as a response form that is coded to identify the consumer as an individual who meets the specific eligibility criteria.

Proposed paragraph (a) also contains two rules of construction. The first rule of construction provides that the notice may 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 affiliate group of companies that includes the common corporate name used by that person. The rule of construction also provides alternatives regarding the manner in which the notice is given. A person that communicates eligibility information to an affiliate may provide the notice directly to the consumer, or may use an agent to provide the notice on the person's behalf. If the agent is the person's affiliate, the agent may not include any solicitations other than those of the person on or with the notice, unless one of the exceptions in paragraph (c) applies. Additionally, the agent must provide the opt out notice in the name of the person or a common corporate name.<sup>6</sup> If an agent is used, the

person remains responsible for any failure of the agent to fulfill its notice obligations. Alternatively, a person may provide a joint notice with one or more of its affiliates as provided in § \_\_\_.24(c) and discussed more fully below.

This rule of construction strikes a balance between giving institutions flexibility to allow different entities within the affiliated group to provide the notice while ensuring that the notice provided to the consumer is meaningful and designed to be effective. Thus, an opt out notice provided to the consumer solely in the name of an affiliate that receives eligibility information but that is not known or recognizable to the consumer as an entity with which the consumer does or has done business is not likely to be an effective notice. For example, if the consumer has a relationship with the ABC affiliate, but the opt out notice is provided solely in the name of the XYZ affiliate, which does not share a common name with the ABC affiliate, then the notice is not likely to be effective. Indeed, many consumers may disregard a notice from the XYZ affiliate on the assumption that the notice is unsolicited junk mail. If, however, the consumer has a relationship with the ABC affiliate, and the opt out notice is provided jointly in the name of all affiliated companies that share the ABC name and the XYZ name, the notice is likely to be effective.

The second rule of construction makes clear that it is not 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 is broad enough to cover use of that information by each affiliate that receives and uses it to make solicitations. For example, if affiliate A communicates eligibility information to affiliate B, and affiliate B communicates that same information to affiliate C, affiliate B does not have to provide the consumer with an opt out notice, so long as affiliate A's notice is broad enough to cover both B's and C's use of that information to make solicitations to the consumer. Examples are provided to illustrate how the rules of construction work.

Paragraph (a) contemplates that the opt out notice will be provided to the consumer in writing or, if the consumer agrees, electronically. Comment is solicited on whether there are circumstances in which it is necessary and appropriate to allow oral notice and opt out and how an oral notice can satisfy the clear and conspicuous standard in the statute. In this regard,

the Agencies note that certain exceptions to the notice and opt out requirement may be triggered by an oral communication from or with a consumer. These exceptions are contained in paragraph (c) and discussed below.

Paragraph (b) sets forth the general duties of an affiliate that receives eligibility information (“the receiving affiliate”). The receiving affiliate may not use eligibility information it receives from an affiliate to make solicitations to the consumer unless, prior to such use, the consumer has been provided an opt out notice, as described in paragraph (a), that applies to that affiliate's use of eligibility information and a reasonable opportunity and simple method to opt out and the consumer did not opt out of that use.

Paragraphs (a) and (b) focus on whether the information communicated to affiliates meets the definition of “eligibility information.” Section 624(a)(1) of the Act focuses on “a communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A).” The Agencies have proposed to define “eligibility information” in a manner consistent with the statutory definition. The Agencies recognize, however, that there are other exceptions to the statutory definition of “consumer report,” such that it may be burdensome for institutions to determine and track whether consumer report information is eligibility information (to which the marketing opt out provisions of section 624 apply) or information that may be shared with affiliates under other exceptions in the FCRA (to which the marketing opt out provisions of section 624 do not apply). To minimize this burden, the Agencies believe that institutions may satisfy the requirements of section 624 by voluntarily offering consumers the ability to opt out of marketing based on consumer report information that is shared under any of the exceptions in section 603(d)(2) of the FCRA, not just those in section 603(d)(2)(A), as required by section 624.

Proposed § \_\_\_.20(c) contains exceptions to the requirements of subpart C. Paragraph (c) incorporates each of the following statutory exceptions to the affiliate marketing notice and opt out requirements set forth in section 624(a)(4) of the FCRA: (1) Using the information to make a solicitation to a consumer with whom the affiliate has a pre-existing business relationship; (2) using the information to facilitate communications to an

<sup>6</sup> If the agent sending the notice is not an affiliate, the agent would only be permitted to use the information for limited purposes under the GLB Act privacy regulations.

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; (3) using the information to perform services for another affiliate, unless the services involve sending solicitations on behalf of the other affiliate and such affiliate is not permitted to send such solicitations itself as a result of the consumer's decision to opt out; (4) using the information to make solicitations in response to a communication initiated by the consumer; (5) using the information to make solicitations in response to a consumer's request or authorization for a solicitation; or (6) 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). Several of these exceptions are discussed below.

Proposed paragraph (c)(1) clarifies that the provisions of this subpart do not apply where the affiliate using the information to make a solicitation to a consumer has a pre-existing business relationship with that consumer. 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.

The third and fourth elements of the definition are substantially similar to the definition of "established business relationship" under the amended Telemarketing Sales Rule (TSR) (16 CFR 310.2(n)). That definition was informed by Congress's 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.<sup>7</sup> Congress's incorporation of similar language in the definition of "pre-existing business relationship"<sup>8</sup> suggests that it would be appropriate to consider the reasonable expectations of the consumer in determining the scope of this exception. Thus, for purposes of this regulation, 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.<sup>9</sup> 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. Proposed paragraph (d)(1) provides examples of the pre-existing business relationship exception.

Proposed paragraph (c)(3) clarifies that the provisions of this subpart do not apply where the information is used to perform services for another affiliate, except that the exception does not permit the service provider to make or send solicitations on behalf of itself or an affiliate if the service provider or the affiliate, as applicable, would not be permitted to make or send such solicitations as a result of the consumer's election to opt out. Thus, 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 that has received eligibility information from a person that has a relationship with the consumer may not circumvent the opt out by instructing the person with the consumer relationship or another affiliate to make or send solicitations to the consumer on its behalf.

Proposed paragraph (c)(4) incorporates the statutory exception for information used in response to a communication initiated by the consumer. The proposed rule clarifies that this exception may be triggered by an oral, electronic, or written communication initiated by the consumer. To be covered by the proposed exception, use of eligibility information must be responsive to the communication initiated by the consumer. For example, if a consumer calls an affiliate to ask about retail locations and hours, the affiliate may not then 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, if the consumer calls an affiliate to ask about its products or services, then solicitations related to those products or services would be responsive to the communication and thus permitted under the exception. The time period during which solicitations remain responsive to the consumer's communication will depend on the facts and circumstances. The proposal also contemplates that a consumer has not initiated a communication if an affiliate makes the initial call and leaves a message for the consumer to call back, and the consumer responds. Proposed paragraph (d)(2) provides examples of the consumer-initiated communications exception.

Proposed paragraph (c)(5) provides that the provisions of this subpart do not apply where the information is used to make solicitations affirmatively authorized or requested by the consumer. This provision may be triggered by an oral, electronic, or written authorization or request by the consumer. Under the proposal, a pre-selected check box or boilerplate language in a disclosure or contract would not constitute an affirmative authorization or request.

The exception in paragraph (c)(5) 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. Under this exception, the consumer may 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. In addition, the duration of the authorization or request will depend on the facts and circumstances. Finally, nothing in this exception supersedes the restrictions contained in the Telemarketing Sales Rule, including the "Do-Not-Call List" established by the FTC and the Federal Communications Commission. Proposed paragraph (d)(3) provides an example of the affirmative authorization or request exception.

The exceptions in proposed paragraphs (c)(1), (4), and (5) described above overlap in certain situations. For example, if a consumer who has an account with a bank makes a telephone call to the bank's securities affiliate and requests information about brokerage services or mutual funds, the securities affiliate may use information about the consumer it obtains from the bank to make or send solicitations in response

<sup>7</sup> H.R. Rep. No. 102-317, at 14-15 (1991). *See also* 68 FR 4580, 4591-94 (Jan. 29, 2003).

<sup>8</sup> 149 Cong. Rec. S13,980 (daily ed. Nov. 5, 2003) (statement of Senator Feinstein).

<sup>9</sup> *See* 68 FR at 4594.



to the telephone call initiated by the consumer under the exception in paragraph (c)(4) for responding to a communication initiated by the consumer. In addition, the consumer's request for information from the securities affiliate triggers the exceptions in paragraph (c)(1) for inquiries by the consumer regarding a product or service offered by the securities affiliate under the statutory definition of a "pre-existing business relationship" as well as the exception in paragraph (c)(5) for a use in response to a solicitation requested by the consumer.

Proposed paragraph (e) provides that the provisions of this subpart do not apply to eligibility information that was received by an affiliate prior to the date on which compliance with these regulations is required. This incorporates a limitation contained in the statute. The mandatory compliance date will be included in the final rule. Comment is requested on what the mandatory compliance date should be and whether it should be different from the effective date of the final regulations.

Finally, proposed paragraph (f) clarifies 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 Act. Specifically, paragraph (f) provides that nothing in subpart C (the affiliate marketing regulations) limits the responsibility of a company to comply with the notice and opt out provisions of section 603(d)(2)(A)(iii) of the Act before it shares information other than transaction or experience information among affiliates to avoid becoming a consumer reporting agency.

#### *Section \_\_\_\_\_.21 Contents of Opt Out Notice*

Proposed § \_\_\_\_\_.21 addresses the contents of the opt out notice. Proposed paragraph (a) requires 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. Use of a model form in Appendix A in appropriate circumstances would comply with paragraph (a), but is not required. Paragraph (a) reflects the

intent of Congress, as expressed in section 624(a)(2)(B) of the FCRA, that the notice required by this subpart must be "clear, conspicuous, and concise," and that the method for opting out must be "simple."

Proposed paragraph (b) defines the term "concise" to mean a reasonably brief expression or statement. Paragraph (b) also provides that a notice required by subpart C 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 notice under the GLB Act, a notice under section 603(d)(2)(A)(iii) of the FCRA, and other similar consumer disclosures. Finally, paragraph (b) clarifies that the requirement for a concise notice would be satisfied by the appropriate use of one of the model forms contained in Appendix A of this part, although use of the model forms is not required.

Proposed paragraph (c) provides that the notice may 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 gives the consumer the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivering solicitations.

Proposed paragraph (d) provides that, where an institution elects to give consumers a broader right to opt out of marketing than is required by law, 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. Appendix A provides Model Form A-3 that may be helpful for institutions that wish to allow consumers to prevent all marketing from the institution and its affiliates, but use of the model form is not required.

#### *Section \_\_\_\_\_.22 Reasonable Opportunity To Opt Out*

Proposed paragraph (a) provides that before the affiliate uses the eligibility information to make or send solicitations to the consumer, the person that communicates such eligibility information to the affiliate must 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 Agencies believe that a reasonable opportunity to opt out should be construed as a general test that avoids setting a mandatory waiting period in all cases. A general

standard would provide flexibility to allow affiliates to use eligibility information received from another affiliate to make or send solicitations at an appropriate point in time which may vary depending upon the circumstances, while assuring that the consumer is given a realistic opportunity to prevent such use of this information. The Agencies also believe that providing examples for what constitutes a reasonable opportunity to opt out may be useful by illustrating how the opt out might work in different situations and by providing a safe harbor for opt out periods of 30 days in certain situations. Although 30 days is a safe harbor, a person subject to this requirement may decide, at its option, to give consumers more than 30 days in which to decide whether or not to opt out. Whether a shorter waiting period would be adequate in certain situations depends on the circumstances.

Proposed paragraphs (b)(1) and (2) contain examples of reasonable opportunities to opt out by mail or by electronic means. These examples are consistent with examples used in the GLB Act privacy rules.

The example of a reasonable opportunity to opt out for notices given by electronic means in paragraph (b)(2) is triggered by the consumer's acknowledgement of receipt of the electronic notice. Several commenters on the October 2000 proposal sought clarification of an identical acknowledgement of receipt reference in the electronic delivery example, suggesting that such a reference would be inconsistent with the E-Sign Act and beyond the scope of the Agencies' interpretive authority. The current proposal retains the acknowledgement reference. This reference is consistent with an example in the GLB Act privacy regulations and the Agencies' determination that electronic delivery of the FCRA affiliate-marketing opt out notices would not require consumer consent in accordance with E-Sign, because nothing in section 624 of the Act requires that the notice be provided in writing. Moreover, this reference is contained in an example. Thus, affiliates subject to this rule retain flexibility to determine the form of consumer agreement.

Proposed paragraph (b)(3) would provide an example of a reasonable opportunity to opt out where, in a transaction that is conducted electronically, the consumer is 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 provides a simple



process at the Internet Web site that the consumer may 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 Webpage, 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 is required to send a separate e-mail or visit a different Internet Web site in order to opt out. The Agencies seek comment on this example and whether additional protections or clarifications are needed.

Proposed paragraph (b)(4) illustrates that including the affiliate marketing opt out notice in a notice under the GLB Act will satisfy the reasonable opportunity standard. In such cases, the consumer should be allowed to exercise the opt out in the same manner and be given the same amount of time to exercise the opt out as is provided for any other opt out provided in the GLB Act privacy notice. This example is consistent with the statutory requirement that the Agencies consider methods for coordinating and combining notices.

Proposed paragraph (b)(5) illustrates how an "opt in" can 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 constitutes a reasonable opportunity to opt out. The consumer's affirmative consent must be documented, and a pre-selected check box is not evidence of the consumer's affirmative consent.

The proposed regulations do not require institutions subject to this rule to disclose in their opt out notices how long a consumer has to respond to the opt out notice before eligibility information communicated to other affiliates will be used to make or send solicitations to the consumer. Institutions, however, have the flexibility to include such disclosures in their notices. In this respect, the proposed regulations are consistent with the GLB Act privacy regulations.

#### *Section \_\_\_\_\_.23 Reasonable and Simple Methods of Opting Out*

Proposed paragraph (a) sets forth reasonable and simple methods of opting out. These examples generally track the examples of reasonable opt out means from section 7(a)(2)(ii) of the GLB Act privacy regulations with certain revisions to give effect to Congress's mandate that methods of opting out be simple. For simplicity, the example in paragraph (a)(2) contemplates including a self-addressed envelope with the reply form and opt out notice. In addition, the Agencies contemplate that a toll-free telephone number would be adequately designed and staffed to enable consumers to opt out in a single phone call.

Proposed paragraph (b) sets forth methods of opting out that are not reasonable and simple. Such methods include 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. In addition, a consumer who agrees to receive the opt out notice in electronic form only, such as by electronic mail or a process at a Web site, should be allowed to opt out by the same or a substantially similar electronic form and should not be required to opt out solely by telephone or paper mail.

#### *Section \_\_\_\_\_.24 Delivery of Opt Out Notices*

Proposed paragraph (a) provides that an institution must deliver an opt out notice so that each consumer can reasonably be expected to receive actual notice. For opt out notices delivered electronically, the notices may be delivered either in accordance with the electronic disclosure provisions in this subpart or in accordance with the E-Sign Act. For example, the institution may e-mail its notice to a consumer who has agreed to the electronic delivery of information or provide the notice on its Internet Web site for the consumer who obtains a product or service electronically from that Web site.

As indicated by the examples provided in proposed paragraph (b), the standard described in paragraph (a) is a lesser standard than actual notice. For instance, if a person subject to the rule mails a printed copy of its notice to the last known mailing address of a consumer, the person has met its obligation even if the consumer has changed addresses and never receives the notice.

Several commenters on the October 2000 proposal sought clarification of the acknowledgement of receipt reference in the electronic delivery example in

proposed paragraph (b)(1)(iii), suggesting that it would be inconsistent with the E-Sign Act and beyond the scope of the Agencies' interpretive authority. As discussed above with respect to the requirement in proposed § \_\_\_\_\_.22 to provide a reasonable opportunity to opt out, the current proposal retains the acknowledgement reference. This reference is consistent with an example in the GLB Act privacy regulations and the Agencies' determination that electronic delivery of the FCRA opt out notices would not require consumer consent in accordance with E-Sign, because nothing in section 624 of the Act requires that the notice be provided in writing. Moreover, this reference is contained in an example, thus persons subject to the rule retain flexibility to determine the method of delivery that will provide a reasonable expectation of actual notice.

Proposed paragraph (c) permits 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 is accurate with respect to each affiliate jointly issuing the notice. A joint notice does not have to list each affiliate participating in the joint notice by its name. If each affiliate shares a common name, such as "ABC," then the joint notice may state that it applies to "all institutions with the ABC name" or "all affiliates in the ABC family of companies." If, however, an affiliate does not have ABC in its name, then the joint notice must separately identify each family of companies with a common name or the institution.

Proposed paragraph (d)(1) sets out rules that apply when two or more consumers jointly obtain a product or service from a person subject to this rule (referred to in the proposed regulation as joint consumers), such as a joint checking account. For example, a person subject to this rule may provide a single opt out notice to joint accountholders. The notice must indicate whether the person will consider an opt out by a joint accountholder as an opt out by all of the associated accountholders, or whether each accountholder may opt out separately. The person may not require all accountholders to opt out before honoring an opt out direction by one of the joint accountholders. Paragraph (d)(2) gives examples of these rules.

Proposed paragraph (d)(1)(vii) and the example in paragraph (d)(2)(iii) address the situation where only one of two joint consumers has opted out. Those paragraphs are derived from similar provisions in the GLB Act privacy regulations. 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 is 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.

#### *Section \_\_\_\_\_.25 Duration and Effect of Opt Out*

Proposed § \_\_\_\_\_.25 addresses the duration and effect of the consumer's opt out election. Proposed paragraph (a) provides that the consumer's election to opt out shall be effective for the opt out period, which is a period of at least 5 years, beginning as soon as reasonably practicable after the consumer's opt out election is received. Nothing in this paragraph limits the ability of affiliated persons to set an opt out period longer than 5 years, including an opt out period that does not expire unless revoked by the consumer. No opt out period, however, may be less than 5 years. In addition, if a consumer elects to opt out every year, a new opt out period of at least 5 years begins upon receipt of each successive opt out election.

Proposed paragraph (b) provides that a receiving affiliate may not make or send solicitations to a consumer during the opt out period based on eligibility information it receives from an affiliate, except as provided in the exceptions in § \_\_\_\_\_.20(c) or if the opt out is revoked by the consumer. Under this paragraph, the opt out is tied to the consumer, not to the information. Thus, if a consumer initially elects to opt out, but does not extend the opt out upon expiration of the opt out period, a receiving affiliate may use all eligibility information it has received about the consumer from its affiliate, including eligibility information that it received during the opt out period. However, if the consumer subsequently opts out again some time after the initial opt out period has lapsed, a receiving affiliate may not use any eligibility information about the consumer it has received from an affiliate on or after the mandatory compliance date for the regulations under subpart C, including information it received during the period in which no opt out election was in effect.<sup>10</sup> Proposed paragraph (c) clarifies that a consumer may opt out at any time. Thus, 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 is not prompted by an opt out notice, a consumer may still opt out. Regardless of when the consumer opts out, the opt out period must be effective for an opt out period of at least 5 years.

Proposed paragraph (d) describes how the termination of a consumer relationship affects the consumer's opt out. Specifically, if a consumer's relationship with an institution terminates for any reason when a consumer's opt out election is in force, the opt out will continue to apply indefinitely, unless revoked by the consumer.

#### *Section \_\_\_\_\_.26 Extension of Opt Out*

Proposed § \_\_\_\_\_.26 describes the procedures for extension of an opt out. Proposed paragraph (a) provides that a receiving affiliate may 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. If an extension notice is not provided to the consumer, the opt out period continues indefinitely. The requirement to provide an extension notice also applies when a consumer fails to opt out initially, but at a subsequent point in time informs the institution of his or her decision to opt out, which would be effective for a period of at least 5 years. The consumer may extend the opt out at the expiration of each successive opt out period. Paragraph (b) also provides that each opt out extension must comply with § \_\_\_\_\_.25(a), which means that it must be effective for a period of at least 5 years.

Proposed paragraph (c) addresses the contents of an extension notice. A notice under paragraph (c) must be clear and conspicuous, and concise. Paragraph (c) provides some flexibility in the design and contents of the notice. Under one approach, the notice must accurately disclose the same items required to be disclosed in the initial opt out notice under § \_\_\_\_\_.21(a), 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 another 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 Agencies propose to give institutions the flexibility to decide which of these notices best meets their needs.

Institutions do not need to provide extension notices if they treat the consumer's opt out election as valid in perpetuity, unless revoked by the consumer. Comment is requested on whether institutions plan to limit the duration of the opt out or not, and on the relative burdens and benefits of the two approaches.

Proposed paragraph (d) addresses the timing of the extension notice and provides that an extension notice can 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. Providing the extension notice a reasonable period of time before the expiration of the opt out period is appropriate to facilitate the smooth transition of consumers that choose to change their election.

An extension notice given too far in advance of the expiration of the opt out period, however, may be confusing to consumers. The Agencies do 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. Nevertheless, providing an extension notice on or with the last annual privacy notice required by the GLB Act privacy provisions sent to the consumer before the expiration of the opt out period shall be deemed reasonable in all cases. Proposed paragraph (e) makes clear that sending an extension notice to the consumer before the expiration of the opt out period does not shorten the 5-year opt out period.

Including an affiliate marketing opt out notice or an extension notice on an initial or annual notice under the GLB Act raises special issues, because GLB Act notices typically state that the consumer does not need to opt out again if the consumer previously opted out.

<sup>10</sup> Section 624(a)(5) of the FCRA contains a non-retroactivity provision, which provides that nothing shall prohibit the use of information to send a solicitation to a consumer if such information was received prior to the date of which persons are required to comply with the regulations implementing section 624.

This statement would be accurate if the institution and its affiliates choose to make the affiliate marketing opt out effective in perpetuity. However, if the opt out period is limited to a defined period of 5 years or more, such a statement would not be accurate with respect to the extension notice, and the notice would have to make clear to the consumer the necessity of opting out again in order to extend the opt out.

#### *Section \_\_\_\_ .27 Consolidated and Equivalent Notices*

Proposed § \_\_\_\_ .27 implements section 624(b) of the Act, and provides that a notice required by this subpart may 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 Act and the notice required by title V of the GLB Act. A notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of this subpart.

Comment is solicited on whether the affiliate marketing notice will be consolidated with the GLB Act privacy notice or the affiliate sharing opt out notice under section 603(d)(2)(A)(iii) of the FCRA, whether the Agencies have provided sufficient guidance on consolidated notices, and whether consolidation would be helpful to consumers.

#### *Effective Date*

Consistent with the requirements of section 624 of the FACT Act, the proposed regulations will become effective 6 months after the date on which they are issued in final form. Comment is requested on whether there is any need to delay the compliance date beyond the effective date to permit institutions to incorporate the affiliate marketing notice into their next annual GLB Act privacy notice.

#### *Appendix A*

The Agencies are proposing model forms to illustrate by way of example how institutions may comply with the notice and opt out requirements of section 624 and the proposed regulations. Appendix A includes three proposed model forms. Model Form A–1 is a proposed form of an initial opt out notice. Model Form A–2 is a proposed form of an extension notice; it may be used when the consumer's prior opt out has expired or is about to expire. Model Form A–3 is a proposed form that

institutions may use if they offer consumers a broader right to opt out of marketing than is required by law.

Use of the model forms is not mandatory. Institutions have the 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 Model Forms A–1 and A–2 use 5 years as the duration of the opt out period, institutions are free to choose an opt out period of longer than 5 years and substitute the longer time period in the opt out notices. Alternatively, institutions may choose to treat the consumer's opt out as effective in perpetuity and thereby omit any reference to the limited duration of the opt out period or the right to extend the opt out in the initial opt out notice.

Each of the proposed model forms is designed as a stand-alone form. The Agencies anticipate that some institutions may want to combine the opt out form with their GLB Act privacy notice. If so combined, the Agencies expect that institutions would integrate the affiliate marketing opt out notice with other required disclosures and avoid repetition of certain information, such as the methods for opting out. Developing a model form that combines various opt out notices, however, is beyond the scope of this rulemaking.

The proposed model forms have been designed to convey the necessary information to consumers as simply as possible. The Agencies have 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 score.<sup>11</sup> Proposed Model Form A–1 has a Flesch reading ease score of 53.7 and a Flesch-Kincaid grade level score of 9.9. Proposed Model Form A–2 has a Flesch reading ease score of 57.5 and a Flesch-Kincaid grade level score of 9.6. Proposed Model Form A–3 has a Flesch reading ease score of 69.9 and a Flesch-Kincaid grade level score of 6.7. Ideally, the Agencies would test the proposed model forms both alone and in conjunction with other opt out notices under the FCRA and GLB Act. Consumer testing may result in better, more readable notices. However, such testing is unlikely to be completed before this rule is issued in final form.

The Agencies recognize the benefits of working with communications experts and conducting consumer testing in

developing appropriate language for a consumer opt out notice. Comment is solicited on the form and content of the proposed model forms based on commenters' work with communications experts and experience with consumer testing. Comment is also requested on whether institutions would combine the affiliate marketing notice with other opt out notices or issue a separate affiliate marketing opt out notice, and how those two approaches may affect consumer comprehension of the notices and their rights. In developing a final rule, the Agencies will carefully consider any consumer testing that may suggest ways to improve the proposed model forms, including efforts by consumer groups and industry, as well as the Agencies' own initiative to consider alternative forms of privacy notices under the GLB Act. *See* 68 FR 75164 (Dec. 30, 2003).

#### **IV. Regulatory Analysis**

##### *Paperwork Reduction Act*

##### *Request for Comment on Proposed Information Collection*

In accordance with the requirements of the Paperwork Reduction Act of 1995, the Agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Agencies are currently requesting OMB approval of this information collection.

Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the Agency's functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine whether the information collections should be modified. Any material modifications will be submitted to OMB

<sup>11</sup> 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.

for review and approval. All comments will become a matter of public record.

Comments should be addressed to:

**OCC:** Public Information Room, Office of the Comptroller of the Currency, 250 E Street, SW., Mail stop 1-5, Attention: Docket 04-16, Washington, DC 20219; fax number (202) 874-4448; Internet address: [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov). Due to delays in paper mail delivery in the Washington area, commenters are encouraged to submit their comments by fax or e-mail. You can make an appointment to inspect the comments at the Public Information Room by calling (202) 874-5043.

**Board:** Comments should refer to Docket No. R-1203 and may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. However, because paper mail in the Washington area and at the Board of Governors is subject to delay, please consider submitting your comments by e-mail to [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov), or faxing them to the Office of the Secretary at (202) 452-3819 or (202) 452-3102. Members of the public may inspect comments in Room MP-500 between 9 a.m. and 5 p.m. on weekdays pursuant to 261.12, except as provided in 261.14, of the Board's Rules Regarding Availability of Information, 12 CFR 261.12 and 261.14.

**FDIC:** Leneta Gregorie, Legal Division, Room MB-3064, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. All comments should refer to the title of the proposed collection. Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m., Attention: Comments/Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Comments may also be submitted electronically through the FDIC's Web site, <http://fdic.gov/regulations/laws/federal/propose.html>, or by e-mail, [Comments@FDIC.gov](mailto:Comments@FDIC.gov).

**OTS:** Send comments, referring to the collection by title of the proposal, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906-6518; or send an e-mail to [infocollection.comments@ots.treas.gov](mailto:infocollection.comments@ots.treas.gov). OTS will post comments and the related index on the OTS internet site at [www.ots.treas.gov](http://www.ots.treas.gov). In addition, interested persons may inspect the comments at the Public Reading Room,

1700 G Street, NW., by appointment. To make an appointment, call (202) 906-5922, send an e-mail to [publicinfo@ots.treas.gov](mailto:publicinfo@ots.treas.gov), or send a facsimile transmission to (202) 906-7755.

**NCUA:** Joseph F. Lackey, the Office of Information and Regulatory Affairs, OMB, Attn: Joseph F. Lackey, Room 10226, New Executive Office Building, Washington, DC 20503. Please send a copy to the attention of Becky Baker, Secretary of the Board, at NCUA.

**Title of Information Collection:**

**OCC:** Comptroller's Licensing Manual (Formerly Comptroller's Corporate Manual).

**Board:** Information Collection Requirements in Connection with Regulation V (Fair Credit Reporting Act).

**FDIC:** Affiliate Marketing Disclosures/Consumer Opt-Out Notices.

**OTS:** Fair Credit Reporting Affiliate Marketing Regulations.

**NCUA:** Information Collection Requirements in Connection with Fair Credit Reporting Act Regulations.

**Frequency of Response:** On occasion.

**Affected Public:**

**OCC:** National banks, Federal branches and agencies of foreign banks, and their respective operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)).

**Board:** State member banks, branches and agencies of foreign banks (other than federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, Edge and agreement corporations, and bank holding companies and affiliates of such holding companies (other than depository institutions and consumer reporting agencies).

**FDIC:** Insured state nonmember banks.

**OTS:** Savings associations and Federal savings association operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)).

**NCUA:** Federal credit unions with CUSO affiliates.

**Abstract:** The information collections in this proposal involve disclosure and reporting requirements associated with section 624 of the FCRA. This section generally provides that, if a person shares certain information about a consumer with an affiliate and the affiliate intends to use that information to make or send solicitations to the

consumer about its products or services, then the person must give the consumer notice (§ \_\_\_\_\_.21(a)) and a reasonable opportunity to opt out (§ \_\_\_\_\_.23) of such use. A person's obligations to provide a consumer with a notice and a right to opt out applies to the use of "eligibility information," as defined in the proposed rule. The consumer must opt out in order to prevent an affiliate from making solicitations based on such information. If a consumer elects to opt out and the person has notified the consumer that the election is effective for only five years or such longer period as established by the person, then (prior to the expiration of the opt out period or any time after the expiration of the opt out period but before any affiliate makes or sends solicitations that would have been prohibited by the consumer's prior decision to opt out) the person must send the consumer an extension notice and provide the consumer with a reasonable opportunity to opt out (§ \_\_\_\_\_.26(c)). At that time, the consumer can again choose to opt out and prohibit the use of "eligibility information" for marketing solicitations.

In order to help minimize the paperwork burden imposed on covered institutions, the Agencies have provided model disclosures in Appendix A that would apply to some of the examples mentioned in the proposed rule. The proposed rule contains provisions that would permit the use of coordinated and consolidated notices between affiliates, as provided under section 214. The proposed rule also facilitates compliance by allowing a covered entity to combine its affiliate marketing opt-out notice with other notices required by law, as provided under section 214.

**Estimated Burden:** The Agencies estimate that the average amount of time for a person to prepare an initial notice as required under the proposal and distribute the notice to consumers will be approximately 18 hours. Although the amount of time needed for any particular person that actually would be subject to the requirements as proposed may be higher or lower, the Agencies believe that this average figure is a reasonable estimate for several reasons. First, a significant number of persons do not have affiliates, and are not covered by section 214 of the FACT Act or the proposed rule. Second, persons that do have affiliates may choose not to engage in the sharing of certain information or marketing to consumers covered by section 214 or the proposed rule, as explained in the **SUPPLEMENTARY INFORMATION** section. Finally, in an effort to minimize the compliance costs and burdens for persons, particularly small entities, the proposed rule contains

model disclosures and opt out notices that may be used to satisfy the statutory requirements. The proposed rule gives covered persons flexibility to satisfy the notice and opt out requirement by sending the consumer a freestanding opt out notice or by adding the opt out notice to the privacy notices already provided to consumers in accordance with the provisions of title V of the GLB Act. For covered persons that choose to prepare a freestanding opt out notice, the time necessary to prepare a freestanding opt out notice would be minimal, because those persons could simply copy the model disclosure, making minor adjustments as indicated by the model disclosure. Similarly, for covered persons that choose to incorporate the opt out notice into their GLB Act privacy notices, the time necessary to integrate the model opt out notice into their privacy notices would be minimal.

The Agencies estimate that the average consumer will take approximately 5 minutes to respond to the notice and opt out.

As mentioned above, persons that limit the duration of the opt-out time period must notify the consumer of the upcoming expiration. The Agencies are not estimating burden at this time for the notices of opt out expiration because the minimum effective time period for the opt out is five years. The Agencies will estimate the burden for this requirement when they review the information collection in three years.

#### OCC:

*Number of Respondents:* 2,115 National banks and 996,625 Consumers.

*Estimated Time per Response:* 18 hours, Notice to consumers and 5 minutes, Consumer response to opt out notice.

*Total Estimated Annual Burden:* 121,122 hours.

#### Board:

*Number of Respondents:* 6,738 Financial institutions and 1,598,450 Consumers.

*Estimated Time per Response:* 18 hours, Notice to consumers and 5 minutes, Consumer response to opt out notice.

*Total Estimated Annual Burden:* 253,955 hours.

#### FDIC:

*Number of Respondents:* 5,318 Financial institutions and 1,088,850 Consumers.

*Estimated Time per Response:* 18 hours, Notice to consumers and 5 minutes, Consumer response to opt out notice.

*Total Estimated Annual Burden:* 186,099 hours.

#### OTS:

*Number of Respondents:* 916 Financial institutions and 235,200 Consumers.

*Estimated Time per Response:* 18 hours, Notice to consumers and 5 minutes, Consumer response to opt out notice.

*Total Estimated Annual Burden:* 36,010 hours.

#### NCUA:

*Number of Respondents:* 1,065 Financial institutions and 1,023,693 Consumers.

*Estimated Time per Response:* 18 hours, Notice to consumers and 5 minutes, Consumer response to opt out notice.

*Total Estimated Annual Burden:* 104,137 hours.

#### Regulatory Flexibility Act

OCC: The Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA) requires an agency to either provide an Initial Regulatory Flexibility Analysis with a proposed rule or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include banks with assets less than or equal to \$150 million).

#### A. Reasons for Proposed Rule

Section 214 of the FACT Act adds a new section 624 to the FCRA that gives consumers a limited right to restrict a person from using certain information, about the consumer and that is obtained from an affiliate, to make solicitations to that consumer. The statute also requires the OCC, in consultation and coordination with the other financial regulators, to issue regulations in final form implementing section 214 not later than nine months after the date of enactment.

#### B. Statement of Objectives and Legal Basis

The objectives of the proposed rule are described in the **SUPPLEMENTARY INFORMATION** section. In sum, the objectives are: (1) to implement the general statutory provision giving consumers the right to restrict a person from using certain information, about the consumer and that is obtained from an affiliate, to make solicitations to that consumer and (2) to fulfill the statutory mandate to prescribe regulations to implement section 214. The legal bases for the proposed rule are the National Bank Act found at 12 U.S.C. 1 *et seq.*, 24(Seventh), 481, and 484; the Depository Institutions Deregulation and Monetary Control Act of 1980 found

at 12 U.S.C. 93a; the Federal Deposit Insurance Act found at 12 U.S.C. 1818; and the Fair Credit Reporting Act found at 15 U.S.C. 1681 *et seq.*

#### C. Description of Small Entities to Which the Rule Will Apply

The proposed rule would apply to 1,220 national banks, Federal branches, and Federal agencies of foreign banks (which include operating subsidiaries thereof that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956) each with assets of less than or equal to \$150 million.

#### D. Projected Reporting, Recordkeeping and Other Compliance Requirements

Section 214 of the FACT Act generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about its products or services, unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and the consumer does not opt out. The notice and opt out provisions do not apply in certain circumstances such as when an institution has a pre-existing relationship with a consumer, uses a consumer's information in response to a communication initiated by the consumer; or uses a consumer's information in response to solicitations authorized or requested by the consumer.

The proposed rule sets forth the duties on two groups of covered institutions: (1) Institutions that communicate their consumers' eligibility information to their affiliates for use in marketing; and (2) the affiliates that receive such information ("the receiving affiliates"). A person that communicates eligibility information to its affiliates and has a pre-existing business relationship with the consumer will be responsible for providing the consumer with an opt out notice, as specified in the proposed rule. The receiving affiliates must establish systems to prevent solicitations from being sent to consumers who have opted out, as specified in the proposed rule. A system must also be established to ensure that receiving affiliates are informed about consumer opt outs.

Affiliates that communicate or receive eligibility information will likely need the advice of legal counsel to ensure that they comply with the proposed rule, and may also require computer programming changes and additional staff training, which may entail some training costs. Based on the annual

estimate of burden cost for the privacy notices required by regulations implementing title V of the GLB Act, the OCC estimates that this proposed regulation, which the FACT-Act requires to be issued, would have associated implementation costs of \$ 3,998 for each small institution. This estimate was calculated by the following method:

Initial Notice to Consumers  
Requirement:  $1,220 \text{ small banks} \times 18 \text{ average hours per response} = 21,960 \text{ burden hours}$ .

Subsequent Notice to Customers  
Requirement:  $1,220 \text{ small banks} \times 1.6 \text{ average hours per response (divided by 5 to reflect the ability of a person under the proposal to restrict the opt out to 5 years)} = 1,952 \text{ burden hours}$ .

Costs to Institutions to Record Responses, including training, systems changes, etc.:  $96,390 \text{ consumer respondents (481,950 consumer respondents in privacy rules} \times .20 \text{ reflecting the number of these consumers served by smaller institutions)} \times .5 \text{ average hours per response} = 48,195$ .

Total Burden Hours: 72,107.

The OCC estimates the cost of the hour burden (by wage rate category) for small national banks to be as follows:

Clerical (\$25/hour):  $25\% \times 72,107 @ \$25 = \$ 450,669$ .

Managerial/Technical (\$55/hour):  $40\% \times 72,107 @ \$55 = \$ 1,586,354$ .

Senior Management (\$100/hour):  $25\% \times 72,107 @ \$100 = \$ 1,802,675$ .

Legal Counsel (\$144/hour):  $10\% \times 72,107 @ \$144 = \$ 1,038,341$ .

Total Costs: \$ 4,878,039.

Total Costs/number of small national banks =  $\$ 4,878,039 / 1220 = \$ 3,998 \text{ per institution}$ .

The OCC believes that the proposal's burden cost per small institution will likely be lower because institutions that are covered by the proposal have implemented, and are already familiar with, similar notice and opt out procedures. Thus, we expect there to be certain experience efficiencies with the implementation process that will lower the annual burden costs for small institutions.

The OCC seeks information and comment on any costs, such as training costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule in addition to, or which may differ from, those arising from the application of the statute generally.

#### E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

The OCC is unable to identify any statutes or rules, which would overlap or conflict with the proposed regulation. The OCC seeks comment and information about any such statutes or rules, as well as any other State, local, or industry rules or policies that require a covered institution to implement business practices that would comply with the requirements of the proposed rule.

#### F. Discussion of Significant Alternatives

Section 214 of the FACT Act generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about its products or services, unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and the consumer does not opt out. Section 214 provides that the notice and opt out provisions do not apply in certain circumstances as discussed in the **SUPPLEMENTARY INFORMATION** section. As required by the FACT Act, the proposed rule applies to all covered institutions, regardless of the size of the institution. One approach to minimizing the burden on small entities would be to provide a specific exemption for small institutions. The OCC has no authority under section 214 of the FACT Act to grant an exception that would remove small institutions from the scope of the rule.

The proposed rule does, however, provide substantial flexibility so that any bank, regardless of size, may tailor its practices to its individual needs. For example, to minimize the burden the proposal would permit institutions to coordinate and consolidate notice and opt out communications to consumers with any other notice that is required to be issued by applicable law. In addition, the Agencies have included model forms for opt out notices that the Agencies would deem to comply with the requirements of the proposed regulation and that institutions could customize to suit their needs. Furthermore, the proposal would permit institutions to offer consumers a permanent opt out from the sharing of information for making or sending solicitations among affiliates, which would reduce institutional recordkeeping requirements.

The OCC welcomes comments on any significant alternatives, consistent with the mandate in section 214 to restrict

the use of certain information for marketing purposes that would minimize the impact of the proposed rule on small entities.

**Board:** Subject to certain exceptions, the Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA) requires an agency to publish an initial regulatory flexibility analysis with a proposed rule whenever the agency is required to publish a general notice of proposed rulemaking for a proposed rule. The Supplementary Information above describes the reasons why the regulation is being proposed and the objectives and the legal basis of the proposed rule. The **SUPPLEMENTARY INFORMATION** section also describes the compliance requirements of the proposed rule and identifies other relevant Federal rules which may duplicate or overlap with the proposed rule. The Board, in connection with its initial regulatory flexibility analysis, requests public comment in the following areas.

#### A. Reasons for the Proposed Rule

Section 214 of the FACT Act (which adds a new section 624 to the FCRA) generally prohibits a person from using certain information received from an affiliate to make a solicitation for marketing purposes to a consumer, unless the consumer is given notice and an opportunity and simple method to opt out of the making of such solicitations. Section 214 also requires the Agencies and the Federal Trade Commission, in consultation and coordination with each other, to issue regulations implementing the section that are as consistent and comparable as possible.

#### B. Statement of Objectives and Legal Basis

The Supplementary Information above contains this information. The legal basis for the proposed rule is section 214 of the FACT Act.

#### C. Description of Small Entities to Which the Rule Applies

The proposed rule would apply to all banks that are members of the Federal Reserve System (other than national banks), branches and Agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*), bank holding companies and affiliates (other than depository institutions and consumer reporting agencies) of such holding companies. The Board's

proposed rule will apply to the following institutions (numbers approximate): State member banks (932), bank holding companies (5,152), holding company non-bank subsidiaries (2,131), U.S. branches and agencies of foreign banks (289), Edge and agreement corporations (75), for a total of approximately 8,579 institutions. The Board estimates that over 5,000 of these institutions could be considered small institutions with assets less than \$150 million.

#### D. Projected Reporting, Recordkeeping and Other Compliance Requirements

Section 214 of the FACT Act (which adds a new section 624 to the FCRA) generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about its products or services, unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and the consumer does not opt out. The notice and opt out provisions do not apply in certain circumstances.

The proposed rule sets forth the duties on two groups of covered institutions: (1) Institutions that communicate their consumers' eligibility information to their affiliates for use in marketing; and (2) the affiliates that receive such information ("the receiving affiliates"). A person that communicates eligibility to its affiliates about a consumer will be responsible for providing the consumer with an opt out notice, as specified in the rule. The receiving affiliates must not make or send solicitations to consumers who have opted-out, as specified in the rule. Affiliates that communicate or receive eligibility information will likely need the advice of legal counsel to ensure that they comply with the rule, and may also require computer programming changes and additional staff training.

As noted in the burden estimate discussion in the Paperwork Reduction Act section, the Board believes that the costs of complying with the proposed rule would be minimal. Small institutions that do not have affiliates would not have to comply with the proposed rule. Small institutions that have affiliates may choose not to engage in any activity that would require compliance with the proposed rule. For small institutions required to comply with the proposed rule, small institutions may use the proposed model disclosures and opt out notices to minimize the cost of compliance.

The Board seeks information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small institutions.

#### E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

With the exception of the opt out for information other than transaction or experience information in section 603(d)(2)(A)(iii), the Board is unable to identify any federal statutes or regulations that would duplicate, overlap, or conflict with the proposed rule. The overlap of the proposed rule and section 603(d)(2)(A)(iii) is discussed in the Supplementary Information. The Board seeks comment regarding any other statutes or regulations, including State or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed rule.

#### F. Discussion of Significant Alternatives

Section 214 of the FACT Act (which adds a new section 624 to the FCRA) generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about its products or services, unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and the consumer does not opt out. The notice and opt out provisions do not apply in certain circumstances. The proposed rule applies to all covered institutions as specified in the rule, regardless of the size of the institution.

The Board welcomes comments on any significant alternatives, consistent with the mandate in section 214 to restrict the use of certain information for marketing purposes, that would minimize the impact of the proposed rule on small entities.

*FDIC:* Subject to certain exceptions, the Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA) requires an agency to publish an initial regulatory flexibility analysis with a proposed rule whenever the agency is required to publish a general notice of proposed rulemaking for a proposed rule. The Supplementary Information above describes the reasons why the regulation is being proposed and the objectives and the legal basis of the proposed rule. The **SUPPLEMENTARY INFORMATION** section also describes the compliance requirements of the proposed rule and identifies other relevant Federal rules which may duplicate or overlap with the proposed rule. The FDIC, in connection with its

initial regulatory flexibility analysis, requests public comment in the following areas.

#### A. Reasons for the Proposed Rule

Section 214 of the FACT Act (which adds a new section 624 to the FCRA) generally prohibits a person from using certain information received from an affiliate to make a solicitation for marketing purposes to a consumer, unless the consumer is given notice and an opportunity and simple method to opt out of the making of such solicitations. Section 214 also requires the Agencies and the Federal Trade Commission, in consultation and coordination with each other, to issue regulations implementing the section that are as consistent and comparable as possible.

#### B. Statement of Objectives and Legal Basis

The Supplementary Information above contains this information. The legal basis for the proposed rule is section 214 of the FACT Act.

#### C. Description of Small Entities to Which the Rule Applies

The proposed rule would apply to all banks that are insured by the FDIC (other than District Banks and members of the Federal Reserve System) insured State branches of foreign banks and any subsidiaries and affiliates of such entities; and other entities or persons with respect to which the FDIC may exercise its enforcement authority under any provision of law. For purposes of this proposed rule, a subsidiary does not include a broker, dealer, person providing insurance, investment company, and investment advisor. The proposed rule would apply to all State non-member banks, approximately 3,700 of which are small entities as defined by the RFA.

#### D. Projected Reporting, Recordkeeping and Other Compliance Requirements

Section 214 of the FACT Act (which adds a new section 624 to the FCRA) generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about its products or services, unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and the consumer does not opt out. The notice and opt out provisions do not apply in certain circumstances.

The proposed rule sets forth the duties of two groups of covered institutions: (1) Institutions that



communicate their consumers' eligibility information to their affiliates for use in marketing; and (2) the affiliates that receive such information ("the receiving affiliates"). A person that communicates eligibility to its affiliates about a consumer will be responsible for providing the consumer with an opt out notice, as specified in the rule. The receiving affiliates must not make or send solicitations to consumers who have opted-out, as specified in the rule. Affiliates that communicate or receive eligibility information will likely need the advice of legal counsel to ensure that they comply with the rule, and may also require computer programming changes and additional staff training.

The FDIC believes that the costs of complying with the proposed rule would be minimal. Small institutions that do not have affiliates would not have to comply with the proposed rule. Small institutions that have affiliates may choose not to engage in any activity that would require compliance with the proposed rule. Those small institutions required to comply with the proposed rule may use the proposed model disclosures and opt out notices to minimize the cost of compliance.

The FDIC seeks information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small institutions.

#### E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

With the exception of the opt out for information other than transaction or experience information in section 603(d)(2)(A)(iii), the FDIC is unable to identify any federal statutes or regulations that would duplicate, overlap, or conflict with the proposed rule. The overlap of the proposed rule and section 603(d)(2)(A)(iii) is discussed in the Supplementary Information. The FDIC seeks comment regarding any other statutes or regulations, including State or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed rule.

#### F. Discussion of Significant Alternatives

Section 214 of the FACT Act (which adds a new section 624 to the FCRA) generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about its products or services, unless the consumer is given notice and a reasonable opportunity to opt out of

such use of the information and the consumer does not opt out. The notice and opt out provisions do not apply in certain circumstances. The proposed rule applies to all covered institutions as specified in the rule, regardless of the size of the institution.

The FDIC welcomes comments on any significant alternatives, consistent with the mandate in section 214 to restrict the use of certain information for marketing purposes, that would minimize the impact of the proposed rule on small entities.

OTS: The Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA) requires an agency to either provide an Initial Regulatory Flexibility Analysis with a proposed rule or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include savings associations with assets of \$150 million or less).

#### A. Reasons for Proposed Rule

Section 214 of the FACT Act adds a new section 624 to the FCRA that generally prohibits a person from using certain information received from an affiliate to make a solicitation for marketing purposes to a consumer, unless the consumer is given notice of the information sharing for marketing purposes and a simple method to opt out of the solicitations. Section 214 requires the Federal banking agencies, the NCUA, the FTC, and the SEC, in consultation and coordination with each other, to issue implementing regulations that, to the extent possible, are consistent and comparable with the regulations prescribed by each other agency.

#### B. Statement of Objectives and Legal Basis

The objectives of the proposed rule are described in the **SUPPLEMENTARY INFORMATION** section. In sum, the objectives are: (1) To implement the general statutory provision giving consumers the right to restrict a person from using certain information about the consumer that is obtained from an affiliate to make solicitations to that consumer and (2) to fulfill the statutory mandate to prescribe regulations to implement section 214. The legal bases for the proposed rule are (1) the Home Owners' Loan Act found at 12 U.S.C. 1462a, 1463, 1464, and 1467a; (2) the Federal Deposit Insurance Act found at 12 U.S.C. 1818; and (3) the Fair Credit Reporting Act found at 15 U.S.C. 1681 *et seq.*

#### C. Description of Small Entities to Which the Rule Will Apply

The proposed rule would apply to all savings associations. In accordance with 12 CFR 559.3(h)(1), it would apply to Federal savings association operating subsidiaries as well.

Small savings associations are generally defined, for Regulatory Flexibility Act purposes, as those with assets of \$150 million or less. 13 CFR 121.201 (2003). OTS calculates (numbers approximate) that of the 917 savings associations, a maximum of 476 of these are small savings associations.

#### D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

Section 214 of the FACT Act generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about its products or services, unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and the consumer does not opt out. The notice and opt-out provisions do not apply in certain circumstances such as when an institution has a pre-existing relationship with a consumer, uses a consumer's information in response to a communication initiated by the consumer, or uses a consumer's information in response to solicitations authorized or requested by the consumer.

The proposed rule sets forth the duties on two groups of covered institutions: (1) Institutions that communicate their consumers' eligibility information to their affiliates for use in marketing and (2) the affiliates that receive such information ("the receiving affiliates"). A person that communicates eligibility information to its affiliates and has a pre-existing business relationship with the consumer will be responsible for providing the consumer with an opt-out notice as specified in the rule. The receiving affiliates must establish systems to prevent solicitations from being sent to consumers who have opted out, as specified in the proposed rule. Implicitly, a system must exist to ensure that receiving affiliates are informed of any opt-outs.

Affiliates that communicate or receive eligibility information will likely need the advice of legal counsel to ensure that they comply with the proposed rule and may also require computer programming changes and additional staff training, which may entail some training costs.

Based in part on the annual estimate of burden cost for the privacy notices required by regulations implementing title V of the GLB Act, OTS estimates that this proposed regulation, which the FACT Act requires to be issued, would have associated implementation costs of \$2,286 for each small institution. This estimate was calculated by the following method:

Notice to consumers requirements:  
476 small thrifts  $\times$  18 average hours per response = 8,568 burden hours.

Subsequent notice to consumers with expired opt-outs requirements: 476 small thrifts  $\times$  1.6 average hours per responses (divided by 5 to reflect the ability of a person under the proposal to restrict the opt out to a minimum of 5 years) = 762 burden hours.

Costs to institutions to record consumer responses, including training, systems changes, etc.: 13,510 consumer respondents (67,550 consumer respondents in privacy rules  $\times$  .20 reflecting the number of these consumers served by smaller institutions)  $\times$  .5 average hours per response = 6,755 burden hours.

*Total Burden Hours:* 16,085.

The OTS estimates the cost of the hour burden (by wage rate category) for small thrifts to be as follows:

Clerical (\$25/hour): 25%  $\times$  16,085 @ \$25 = \$100,531.

Managerial/Technical (\$55/hour): 40%  $\times$  16,085 @ \$55 = \$353,870.

Senior Management (\$100/hour): 25%  $\times$  16,085 @ \$100 = \$402,125.

Legal Counsel (\$144/hour): 10%  $\times$  16,085 @ \$144 = \$231,624.

Total Costs: \$1,088,150.

Total Costs / # of small thrifts = \$1,088,150/476 = \$2,286.

OTS believes that the proposal's burden cost per small institution will likely be lower because institutions that are covered by the proposal have implemented, and are already familiar with, similar notice and opt-out procedures applicable under other statutes and regulations such as the privacy notices required by regulations implementing title V of the GLB Act. Thus we expect there to be certain experience efficiencies with the implementation process that will lower the annual burden costs for small institutions. Further, institutions can reduce the burden of providing notices every 5 years by allowing longer opt-out periods or eliminate that burden entirely by allowing opt-outs in perpetuity.

OTS seeks information and comment on any costs, such as training costs, compliance requirements, or changes in operating procedures arising from the

application of the proposed rule in addition to, or which may differ from, those arising from the application of the statute generally.

#### E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

OTS is unable to identify any statutes or rules that would overlap or conflict with the proposed regulation. OTS notes, however, as discussed in the **SUPPLEMENTARY INFORMATION** section, that section 603(d)(2)(A)(iii) of the FCRA provides that a person may communicate "other" information—that is, non-transaction or experience information—among its affiliates without becoming a consumer reporting agency if the person has given the consumer a clear and conspicuous notice that such information may be communicated among affiliates and an opportunity to "opt out" or direct that the information not be communicated, and the consumer has not opted out. The notice and opt-out provided in section 603(d)(2)(A)(iii) of the FCRA limits the sharing of information among affiliates and was the subject of an October 20, 2000 proposal by the Federal banking agencies. The current proposal addresses a new notice and opt-out provision that applies to the use by affiliates of certain information that they receive from another affiliate to market their products and services to consumers. Although there is a certain degree of overlap between the two opt-outs, the two opt-outs are distinct and serve different purposes. Therefore, nothing in this proposal regarding the opt-out for affiliate marketing supercedes or replaces the affiliate sharing opt-out contained in section 603(d)(2)(A)(iii) of the Act.

OTS seeks comment and information about any such statutes or rules, as well as any other State, local, or industry rules or policies that require a covered institution to implement business practices that would comply with the requirements of the proposed rule.

#### F. Discussion of Significant Alternatives

Section 214 of the FACT Act generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about its products or services, unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and the consumer does not opt out. Section 214 provides that the notice and opt-out provisions do not apply in certain circumstances as discussed in the

**SUPPLEMENTARY INFORMATION** section. As required by the FACT Act, the proposed rule applies to all covered institutions, regardless of the size of the institution.

One approach to minimizing the burden on small entities would be to provide a specific exemption for small institutions. OTS has no authority under section 214 of the FACT Act to grant an exemption that would remove small institutions from the scope of the rule.

The proposed rule does, however, provide substantial flexibility so that any savings association, regardless of size, may tailor its practices to its individual needs. For instance, to minimize the burden the proposal would permit institutions to coordinate and consolidate notice and opt-out communications to consumers with any other notice that applicable law requires. In addition, the Agencies have included model forms for opt-out notices that the Agencies would deem to comply with the requirements of the proposed regulation and that institutions could customize to suit their needs. Furthermore, the proposal would permit institutions to offer consumers a permanent opt-out from the sharing of information for making or sending solicitations among affiliates, which would reduce institutional recordkeeping requirements.

OTS welcomes comments on any significant alternatives, consistent with the mandate in section 214 to restrict the use of certain information for marketing purposes, that would minimize the impact of the proposed rule on small entities.

**NCUA:** The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any proposed regulation may have on a substantial number of small entities (those under \$10 million in assets). NCUA, in connection with its initial regulatory flexibility analysis, requests public comment in the following areas.

#### A. Reasons for the Proposed Rule

Section 214 of the FACT Act (which adds a new section 624 to the FCRA) generally prohibits a person from using certain information received from an affiliate to make a solicitation for marketing purposes to a consumer, unless the consumer is given notice and an opportunity and simple method to opt out of the making of such solicitations. Section 214 also requires the Agencies, the FTC, and the SEC in consultation and coordination with each other, to issue regulations implementing that section.

## B. Statement of Objectives and Legal Basis

The Supplementary Information above contains this information. The legal basis for the proposed rule is section 214 of the FACT Act.

## C. Description of Small Entities to Which the Rule Applies

The proposed rule would apply to all federally chartered credit unions that have CUSO affiliates, which total approximately 1,065. Approximately 84 of those Federal credit unions could be considered small entities with assets less than \$10 million.

## D. Projected Reporting, Recordkeeping and Other Compliance Requirements

Section 214 of the FACT Act (which adds a new section 624 to the FCRA) generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about its products or services, unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and the consumer does not opt out. The notice and opt out provisions do not apply in certain circumstances.

The proposed rule sets forth a Federal credit union's duties when either: (1) The credit union communicates its consumers' eligibility information to an affiliate for use in marketing ("communicating affiliate"); or (2) the credit union receives such information from its affiliate ("receiving affiliate"). Before an affiliate may use eligibility information shared with it by a communicating affiliate to provide solicitations to a consumer, the communicating affiliate must provide the consumer with an opt out notice, as specified in the rule. A receiving affiliate may not use eligibility information it receives from a communicating affiliate to make solicitations to the consumer unless the consumer has been provided an opt out notice, as specified in the rule, and does not opt out of that use. Federal credit unions will likely need the advice of legal counsel to ensure that they comply with the rule, and may also require computer programming changes and additional staff training. NCUA does not have a practicable or reliable basis for quantifying the costs of the proposed rule.

NCUA seeks information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule in addition to or

which may differ from those arising from the application of the statute generally.

## E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

NCUA is unable to identify any Federal statutes or regulations that would duplicate, overlap, or conflict with the proposed rule. NCUA seeks comment regarding any statutes or regulations, including State or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed rule.

## F. Discussion of Significant Alternatives

Section 214 of the FACT Act (which adds a new section 624 to the FCRA) generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about its products or services, unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and the consumer does not opt out. The notice and opt out provisions do not apply in certain circumstances. The proposed rule applies to all Federal credit unions, regardless of asset size.

NCUA welcomes comments on any significant alternatives, consistent with the mandate in section 214 to restrict the use of certain information for marketing purposes that would minimize the impact of the proposed rule on small entities.

### *OCC and OTS Executive Order 12866 Determination*

The OCC and OTS each has determined that its portion of the proposed rulemaking is not a significant regulatory action under Executive Order 12866.

### *OCC Executive Order 13132 Determination*

The OCC has determined that this proposal does not have any federalism implications, as required by Executive Order 13132.

### *NCUA Executive Order 13132 Determination*

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on State and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The proposed rule applies only to federally chartered credit unions and

would not have substantial direct effects on the States, on the connection between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

### *OCC and OTS Unfunded Mandates Reform Act of 1995 Determination*

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC and OTS each has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more. Accordingly, neither the OCC nor the OTS has prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

### *NCUA: The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families*

The NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

### *NCUA: Interpretive Ruling and Policy Statement (IRPS) 87-2, as Amended by IRPS 03-2*

Under NCUA's IRPS 87-2, as amended by IRPS 03-2, the NCUA Board's general policy is to provide a 60-day comment period for a proposed regulation. In this case, the NCUA Board believes that a 30-day comment period will be adequate and is appropriate given that the statutory deadline for the final rule is September 4, 2004. NCUA IRPS 87-2, 52 FR 35231, Sept. 18, 1987, as amended by IRPS 03-2, 68 FR 31949, May 29, 2003.

### *Community Bank Comment Request*

The Agencies invite your comments on the impact of this proposal on

community banks. The Agencies recognize that community banks operate with more limited resources than larger institutions and may present a different risk profile. Thus, the Agencies specifically request comment on the impact of the proposal on community banks' current resources and available personnel with the requisite expertise, and whether the goals of the proposal could be achieved, for community banks, through an alternative approach.

## V. Solicitation of Comments on Use of Plain Language

Section 722 of the GLBA requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Federal banking agencies invite comment on how to make this proposed rule easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?
- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- Would more, but shorter, sections be better? If so, which sections should be changed?
- What else could we do to make the regulation easier to understand?

The Federal banking agencies solicit comment on whether the inclusion of examples in the regulation is appropriate. Elevating the fact patterns to safe harbors in the rule may generate certain problems over time. For example, changes in technology or practices may ultimately impact the fact patterns contained in the examples and require changes to the regulation. Are there alternative methods to offer illustrative guidance of the concepts portrayed by the examples?

### NCUA Regulatory Goal

NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burden. We request your comments on whether the proposed rule is understandable and minimally intrusive if implemented as proposed.

## List of Subjects

### 12 CFR Part 41

Banks, banking, Consumer protection, National banks, Reporting and recordkeeping requirements.

### 12 CFR Part 222

Banks, Banking, Consumer protection, Fair Credit Reporting Act, Holding companies, Privacy, Reporting and recordkeeping requirements, State member banks.

### 12 CFR Part 334

Administrative practice and procedure, Bank deposit insurance, Banks, Banking, Reporting and recordkeeping requirements, Safety and soundness.

### 12 CFR Part 571

Consumer protection, Credit, Fair Credit Reporting Act, Privacy, Reporting and recordkeeping requirements, Savings associations.

### 12 CFR Part 717

Consumer protection, Credit unions, Fair credit reporting, Privacy, Reporting and recordkeeping requirements.

## Office of the Comptroller of the Currency

### 12 CFR Chapter I

## Authority and Issuance

For the reasons set forth in the preamble, the OCC proposes to amend part 41 (as proposed to be added at 69 FR 23394, April 28, 2004) of chapter I of title 12 of the Code of Federal Regulations as follows:

## PART 41—FAIR CREDIT

1. The authority citation for part 41 is revised to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 24(Seventh), 93a, 481, 484, and 1818; 15 U.S.C. 1681a, 1681b, 1681s, and 1681t.

2. In § 41.1 paragraph (b) is republished to read as follows:

### § 41.1 Purpose, scope, and effective dates.

(a) \* \* \* \* \*

(b) *Scope.*

(1) [Reserved]

(2) *Institutions covered.* Except as otherwise provided in this part, these regulations apply to national banks, Federal branches and agencies of foreign banks, and their respective operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)).

3. Section 41.2 is republished to read as follows:

### § 41.2 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.

4. Revise § 41.3 to read as follows:

### § 41.3 Definitions.

For purposes of this part, unless explicitly stated otherwise:

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

(b) *Affiliate* means any person that is related by common ownership or common corporate control with another person.

(c) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

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

(e) *Consumer* means an individual.

(f) [Reserved].

(g) [Reserved].

(h) [Reserved].

(i) *Control* means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the OCC determines.

(j) *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.

(k) [Reserved].

(l) *Person* means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(m) *Pre-existing business relationship* means a relationship between a person and a consumer based on:

(1) 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 subpart C of this part;

(2) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which a solicitation covered by subpart C of this part is made or 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 subpart C of this part is made or sent to the consumer.

(n) *Solicitation*—(1) *General*. Solicitation means marketing 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 subpart C of 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 communications that are directed at the general public and distributed without the use of eligibility information communicated by an affiliate. For example, television, 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 specific consumer that is based on eligibility information communicated by an affiliate.

5. A new Subpart C is added to read as follows:

#### **Subpart C—Affiliate Use of Eligibility Information for Marketing**

Sec.

41.20 Affiliate use of eligibility information for marketing.

41.21 Contents of opt out notice.

41.22 Reasonable opportunity to opt out.

41.23 Reasonable and simple methods of opting out.

41.24 Delivery of opt out notices.

41.25 Duration and effect of opt out.

41.26 Extension of opt out.

41.27 Consolidated and equivalent notices.

#### **Subpart C—Affiliate Use of Eligibility Information for Marketing**

##### **§ 41.20 Affiliate use of eligibility information for marketing.**

For purposes of this subpart, *Bank* means national banks, Federal branches and agencies of foreign banks, and their respective operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)).

(a) *General duties of a person communicating eligibility information to an affiliate*—(1) *Notice and opt out*. If a bank communicates eligibility information about a consumer to its affiliate, the bank's affiliate may not use the information to make or send solicitations to the consumer, unless prior to such use by the affiliate:

(i) The bank provides a clear and conspicuous notice to the consumer stating that the information may be communicated to and used by the bank's affiliate to make or send solicitations to the consumer about its products and services;

(ii) The bank provides the consumer a reasonable opportunity and a simple method to "opt out" of such use of that information by its affiliate; and

(iii) The consumer has not chosen to opt out.

(2) *Rules of construction*—(i) *General*.

The notice required by this paragraph (a) may 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, and may be provided in the following manner:

(A) A bank may provide the notice directly to the consumer;

(B) A bank's agent may provide the notice on the bank's behalf, so long as—

(1) The bank's agent, if an affiliate of the bank, does not include any solicitation other than the bank's on or with the notice, unless it falls within one of the exceptions in paragraph (c) of this section; and

(2) The bank's agent gives the notice in the bank's name or a common name or names used by the family of companies; or

(C) A bank may provide a joint notice with one or more of the bank's affiliates or under a common name or names used by the family of companies as provided in § 41.24(c).

(ii) *Avoiding duplicate notices*. If Affiliate A communicates eligibility information about a consumer to Affiliate B, and Affiliate B

communicates that same information to Affiliate C, Affiliate B does not have to give an opt out notice to the consumer when it provides eligibility information to Affiliate C, so long as Affiliate A's notice is broad enough to cover Affiliate C's use of the eligibility information to make solicitations to the consumer.

(iii) *Examples of rules of construction*. A, B, and C are affiliates. The consumer currently has a business relationship with affiliate A, but has never done business with affiliates B or C. Affiliate A communicates eligibility information about the consumer to B for purposes of making solicitations. B communicates the information it received from A to C for purposes of making solicitations. In this circumstance, the rules of construction would:

(A) Permit B to use the information to make solicitations if:

(1) A has provided the opt out notice directly to the consumer; or

(2) B or C has provided the opt out notice on behalf of A.

(B) Permit B or C to use the information to make solicitations if:

(1) A's notice is broad enough to cover both B's and C's use of the eligibility information; or

(2) A, B, or C has provided a joint opt out notice on behalf of the entire affiliated group of companies.

(C) Not permit B or C to use the information for marketing purposes if B has provided the opt out notice only in B's own name, because no notice would have been provided by or on behalf of A.

(b) *General duties of an affiliate receiving eligibility information*. If the bank receives eligibility information from an affiliate, the bank may not use the information to make or send solicitations to a consumer, unless the consumer has been provided an opt out notice, as described in paragraph (a) of this section, that applies to the bank's use of eligibility information and the consumer has not opted-out.

(c) *Exceptions*. The provisions of this subpart C do not apply if a bank uses eligibility information it receives from an affiliate:

(1) To make or send a marketing solicitation to a consumer with whom a bank has a pre-existing business relationship as defined in § 41.3(m);

(2) To facilitate communications to an individual for whose benefit a bank 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;

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

(4) In response to a communication initiated by the consumer orally, electronically, or in writing;

(5) In response to an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation; or

(6) If a bank's compliance with this subpart C would prevent it from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which the bank is lawfully doing business.

(d) *Examples of exceptions—(1) Examples of pre-existing business relationships.* (i) If a consumer has an insurance policy with a bank's insurance affiliate that is currently in force, the bank's insurance affiliate has a pre-existing business relationship with the consumer and can therefore use eligibility information it has received from the bank to make solicitations.

(ii) If a consumer has an insurance policy with a bank's insurance affiliate that has lapsed, the bank's insurance affiliate has a pre-existing business relationship with the consumer for 18 months after the date on which the policy ceases to be in force and can therefore use eligibility information it has received from the bank to make solicitations for 18 months after the date on which the policy ceases to be in force.

(iii) If a consumer applies to the bank's affiliate for a product or service, or inquires about the affiliate's products or services and provides contact information to the bank's affiliate for receipt of that information, the bank's affiliate has a pre-existing business relationship with the consumer for three months after the date of the inquiry or application and can therefore use eligibility information it has received from the bank to make solicitations for three months after the date of the inquiry or application.

(iv) If a consumer makes a telephone call to a centralized call center for an affiliated group of companies to inquire about the consumer's bank account, the call does not constitute an inquiry with any affiliate other than the bank that holds the consumer's bank account and does not establish a pre-existing business relationship between the consumer and any affiliate of the bank.

(2) *Examples of consumer-initiated communications.* (i) If a consumer who has an account with the bank initiates a telephone call to the bank's securities affiliate to request information about brokerage services or mutual funds and provides contact information for receiving that information, the bank's securities affiliate may use eligibility information about the consumer it obtains from the bank to make solicitations in response to the consumer-initiated call.

(ii) If the bank's affiliate makes the initial marketing call, leaves a message for the consumer to call back, and the consumer responds, the communication is not initiated by the consumer, but by the bank's affiliate.

(iii) If the consumer calls the bank's affiliate to ask about the affiliate's retail locations and hours, but does not request information about the bank's affiliate's products or services, solicitations by the bank's affiliate using eligibility information about the consumer it obtains from the bank would not be responsive to the consumer-initiated communication.

(3) *Example of consumer affirmative authorization or request.* If a consumer who obtains a mortgage from a bank requests or affirmatively authorizes information about homeowner's insurance from the bank's insurance affiliate, such authorization or request, whether given to the bank or to the bank's insurance affiliate, would permit the bank's insurance affiliate to use eligibility information about the consumer it obtains from the bank to make solicitations about homeowner's insurance to the consumer. A pre-selected check box would not satisfy the requirement for an affirmative authorization or request.

(e) *Prospective application.* The provisions of this subpart C shall not prohibit a bank's affiliate from using eligibility information communicated by the bank to make or send solicitations to a consumer if such information was received by the bank's affiliate prior to [Insert Mandatory Compliance Date].

(f) *Relation to affiliate-sharing notice and opt out.* Nothing in this subpart C limits the responsibility of a company to comply with the notice and opt out provisions of section 603(d)(2)(A)(iii) of the Act before it shares information other than transaction or experience information among affiliates to avoid becoming a consumer reporting agency.

#### **§ 41.21 Contents of opt out notice.**

(a) *General.* A notice must be clear, conspicuous, and concise, and must accurately:

(1) Disclose that the consumer may elect to limit a bank's affiliate from using eligibility information about the consumer that it obtains from the bank to make or send solicitations to the consumer;

(2) Disclose 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) Include a reasonable and simple method for the consumer to opt out.

(b) *Concise—(1) General.* For purposes of this subpart C, the term "concise" means a reasonably brief expression or statement.

(2) *Combination with other required disclosures.* A notice required by this subpart C may be concise even if it is combined with other disclosures required or authorized by Federal or State law.

(3) *Use of model forms.* The requirement for a concise notice is satisfied by use of a model form contained in Appendix A to this part, although use of a model form is not required.

(c) *Providing a menu of opt out choices.* With respect to the opt out election, a bank may allow a consumer to choose from a menu of alternatives when opting out of affiliate use of eligibility information for marketing, such as by selecting certain types of affiliates, certain types of information, or certain methods of delivery from which to opt out, so long as the bank offers as one of the alternatives the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery.

(d) *Alternative contents.* If a bank provides the consumer with a broader right to opt out of marketing than is required by law, the bank satisfies the requirements of this section by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt out rights. A model notice is provided in Appendix A of this part for guidance, although use of the model notice is not required.

#### **§ 41.22 Reasonable opportunity to opt out.**

(a) *General.* Before a bank's affiliate uses eligibility information communicated by the bank to make or send solicitations to a consumer, the bank must provide the consumer with a reasonable opportunity, following the delivery of the opt out notice, to opt out of such use by the bank's affiliate.

(b) *Examples of a reasonable opportunity to opt out.* A bank provides a consumer with a reasonable opportunity to opt out if:

(1) *By mail.* The bank mails the opt out notice to a consumer and gives the consumer 30 days from the date the bank mailed the notice to elect to opt out by any reasonable means.

(2) *By electronic means.* The bank notifies the consumer electronically and gives the consumer 30 days after the date that the consumer acknowledges receipt of the electronic notice to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* The bank provides the opt out notice to the consumer at the time of an electronic transaction, such as a transaction conducted on a Web site, and requests that the consumer decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, so long as the bank provides a simple process at the Internet Web site that the consumer may use at that time to opt out.

(4) *By including in a privacy notice.* The bank includes the opt out notice in a Gramm-Leach-Bliley Act privacy notice (12 CFR part 40, subpart A) and allows the consumer to exercise the opt out within a reasonable period of time and in the same manner as the opt out under the Gramm-Leach-Bliley Act (15 U.S.C. 1681 *et seq.*).

(5) *By providing an opt in.* If a bank has a policy of not allowing an affiliate to use eligibility information to make or send solicitations to the consumer unless the consumer affirmatively consents, the bank gives the consumer the opportunity to opt in by affirmative consent to such use by the bank's affiliate. The bank must document the consumer's affirmative consent. A pre-selected check box does not constitute evidence of the consumer's affirmative consent.

#### **§ 41.23 Reasonable and simple methods of opting out.**

(a) *Reasonable and simple methods of opting out.* A bank provides a reasonable and simple method for a consumer to exercise a right to opt out if it:

(1) Designates check-off boxes in a prominent position on the relevant forms included with the opt out notice required by this subpart C;

(2) Includes a reply form and a self-addressed envelope together with the opt out notice required by this subpart C;

(3) Provides an electronic means to opt out, such as a form that can be electronically mailed or processed at the bank's Web site, if the consumer agrees to the electronic delivery of information; or

(4) Provides a toll-free telephone number that consumers may call to opt out.

(b) *Methods of opting out that are not reasonable or simple.* A bank does not provide a reasonable and simple method for exercising an opt out right if it:

(1) Requires the consumer to write a letter to the bank;

(2) Requires the consumer to call or write the bank to obtain a form for opting out, rather than including the form with the notice; or

(3) Requires the consumer who agrees to receive the opt out notice in electronic form only, such as by electronic mail or at the bank's Web site, to opt out solely by telephone or by paper mail.

#### **§ 41.24 Delivery of opt out notices.**

(a) *General.* A bank must provide an opt out notice so that each consumer can reasonably be expected to receive actual notice. For opt out notices the bank provides electronically, it may either comply with the electronic disclosure provisions in this subpart C or with 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 expectation of actual notice.* (1) A bank may reasonably expect that a consumer will receive actual notice if it:

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

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

(iii) For the consumer who obtains a product or service from a bank electronically, such as at an Internet Web site, post the notice on the bank's electronic Web site and require the consumer to acknowledge receipt of the notice as a necessary step for obtaining a particular product or service.

(2) A bank may not reasonably expect that a consumer will receive actual notice if it:

(i) Only posts a sign in its branch or office or generally publishes advertisements presenting the notice; or

(ii) Sends the notice via electronic mail to a consumer who has not agreed to the electronic delivery of information.

(c) *Joint notice with affiliates*—(1) *General.* A bank may provide a joint notice from it and one or more of the bank's affiliates, as identified in the notice, so long as the notice is accurate with respect to the bank and each affiliate.

(2) *Identification of affiliates.* A bank does not have to list each affiliate providing the joint notice by its name. If each affiliate shares a common name,

such as "ABC," then the joint notice may state that it applies to "all institutions with the ABC name" or "all affiliates in the ABC family of companies." If, however, an affiliate does not have ABC in its name, then the joint notice must separately identify each family of companies with a common name or the institution.

(d) *Joint relationships*—(1) *General.* If two or more consumers jointly obtain a product or service from a bank (joint consumers), the following rules apply:

(i) The bank may provide a single opt out notice.

(ii) Any of the joint consumers may exercise the right to opt out.

(iii) The bank may either:

(A) Treat an opt out direction by a joint consumer as applying to all of the associated joint consumers; or

(B) Permit each joint consumer to opt out separately.

(iv) If a bank permits each joint consumer to opt out separately, the bank must permit:

(A) One of the joint consumers to opt out on behalf of all of the joint consumers; and

(B) One or more joint consumers to notify the bank of their opt out directions in a single response.

(v) A bank must explain in its opt out notice which of the policies in paragraph (d)(1)(iii) of this section the bank will follow, as well as the information required by paragraph (d)(1)(iv) of this section.

(vi) A bank may not require all joint consumers to opt out before it implements any opt out direction.

(vii) If a bank receives an opt out by a particular joint consumer that does not apply to the others, the bank may use eligibility information about the others as long as no eligibility information is used about the consumer who opted out.

(2) *Example.* If consumers A and B, who have different addresses, have a joint checking account with a bank and arrange for the bank to send statements to A's address, the bank may do any of the following, but the bank must explain in the bank's opt out notice which opt out policy the bank will follow. The bank may send a single opt out notice to A's address and:

(i) Treat an opt out direction by A as applying to the entire account. If the bank does so and A opts out, the bank may not require B to opt out as well before implementing A's opt out direction.

(ii) Treat A's opt out direction as applying to A only. If a bank does so, it must also permit:

(A) A and B to opt out for each other; and



(B) A and B to notify the bank of their opt out directions in a single response (such as on a single form) if they choose to give separate opt out directions.

(iii) If A opts out only for A, and B does not opt out, the bank's affiliate may use information only about B to send solicitations to B, but may not use information about A and B jointly to send solicitations to B.

#### § 41.25 Duration and effect of opt out.

(a) *Duration of opt out.* The election of a consumer to opt out shall 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. A bank may establish an opt out period of more than five years, including an opt out period that does not expire unless the consumer revokes it in writing, or if the consumer agrees, electronically.

(b) *Effect of opt out.* A receiving affiliate may not make or send solicitations to a consumer during the opt out period based on eligibility information it receives from an affiliate, except as provided in the exceptions in § 41.20(d) or if the opt out is revoked by the consumer.

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

(d) *Termination of relationship.* If the consumer's relationship with a bank terminates when a consumer's opt out election is in force, the opt out will continue to apply indefinitely, unless revoked by the consumer.

#### § 41.26 Extension of opt out.

(a) *General.* For a consumer who has opted out, a receiving affiliate may 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.

(b) *Duration of extension.* Each opt out extension shall comply with § 41.25(a).

(c) *Contents of extension notice.* The notice provided at extension must be clear, conspicuous, and concise, and must accurately disclose either:

(1) The same contents specified in § 41.21(a) for the initial notice, along with a statement explaining that the consumer's previous opt out has expired or is about to expire, as applicable, and that the consumer must opt out again if

the consumer wishes to keep the opt out election in force; or

(2) Each of the following items:

(i) That the consumer previously elected to limit a bank's affiliate from using information about the consumer that it obtains from the bank to make or send solicitations to the consumer;

(ii) That the consumer's election has expired or is about to expire, as applicable;

(iii) That the consumer may elect to extend the consumer's previous election; and

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

(d) *Timing of the extension notice—*  
(1) *General.* An extension 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 any affiliate makes or sends solicitations to the consumer that would have been prohibited by the expired opt out.

(2) *Reasonable period of time before expiration.* Providing an extension notice on or with the last annual privacy notice required by the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, that is provided to the consumer before expiration of the opt out period shall be deemed reasonable in all cases.

(e) *No effect on opt out period.* The opt out period may not be shortened to a period of less than five years by sending an extension notice to the consumer before expiration of the opt out period.

#### § 41.27 Consolidated and equivalent notices.

(a) *Coordinated and consolidated notices.* A notice required by this subpart C may 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 Act and the Gramm-Leach-Bliley Act privacy notice.

(b) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this subpart C, and that a bank provides to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of this subpart C.

6. Appendix A to part 41 is added to read as follows:

#### Appendix A to 12 CFR Part 41—Model Forms for Opt Out Notices

##### A-1: Model Form for Initial Opt Out Notice

###### *Your Choice To Limit Marketing*

• You may limit our affiliates from marketing their products or services to you

based on information that we share with them, such as your income, your account history with us, and your credit score.

• [Include if applicable.] Your decision to limit marketing offers from our affiliates will apply for 5 years. Once that period expires, you will be allowed to extend your decision.

• [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To limit marketing offers [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box below and mail it to:

[Company name].

[Company address].

I do not want your affiliates to market their products or services to me based on information that you share with them.

##### A-2: Model Form for Extension Notice

###### *Extending Your Choice to Limit Marketing*

• You previously chose to limit our affiliates from marketing their products or services to you based on information that we share with them, such as your income, your account history with us, and your credit score.

• Your choice has expired or is about to expire.

• [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To extend your choice for another 5 years [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box below and mail it to:

[Company name].

[Company address].

I want to extend my choice for another 5 years.

##### A-3: Model Form for Voluntary "No Marketing" Notice

###### *Your Choice To Stop Marketing*

• You may choose to stop all marketing offers from us and our affiliates.

To stop all marketing offers [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box on the form below and mail it to:

[Company name].

[Company address].

I do not want you or your affiliates to send me marketing offers.

#### Board of Governors of the Federal Reserve System

##### 12 CFR Chapter II

##### Authority and Issuance

For the reasons set forth in the joint preamble, title 12, chapter II, of the

Code of Federal Regulations is proposed to be amended as follows:

## **PART 222—FAIR CREDIT REPORTING (REGULATION V)**

1. The authority citation for part 222 is revised to read as follows:

**Authority:** 15 U.S.C. 1681b and 1681s; secs. 3, 214, and 217, Pub. L. 108–159, 117 Stat. 1952.

### **Subpart A—General Provisions**

2. Section 222.1 is amended by adding a new paragraph (a), and paragraph (b)(2)(i) (as proposed to be added at 69 FR 23397, April 28, 2004) is revised to read as follows:

#### **§ 222.1 Purpose, scope, and effective dates.**

(a) *Purpose.* The purpose of this part is to implement the provisions of the Fair Credit Reporting Act applicable to the institutions listed in paragraph (b)(2) of this section. This part generally applies to institutions that obtain and use information about consumers to determine the consumer's eligibility for products, services, or employment, share such information among affiliates, and furnish such information to consumer reporting agencies.

(b) \* \* \*

(2) *Institutions covered.* (i) Except as otherwise provided in paragraph (b)(2) of this section, these regulations apply to banks that are members of the Federal Reserve System (other than national banks), branches and Agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*), and bank holding companies and affiliates of such holding companies (other than depository institutions and consumer reporting agencies).

\* \* \* \* \*

3. Section 222.2 (as proposed to be added at 69 FR 23397, April 28, 2004) is republished to read as follows:

#### **§ 222.2 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.

4. Section 222.3 (as proposed to be added at 69 FR 23397, April 28, 2004) is revised to read as follows:

#### **§ 222.3 Definitions.**

As used in this part, unless the context requires otherwise:

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

(b) *Affiliate* means any person that is related by common ownership or common corporate control with another person.

(c) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

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

(e) *Consumer* means an individual.

(f) [Reserved].

(g) [Reserved].

(h) [Reserved].

(i) *Control* of a company means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the Board determines.

(j) *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.

(k) [Reserved].

(l) *Person* means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(m) *Pre-existing business relationship* means a relationship between a person and a consumer based on—

(1) 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 subpart C of this part;

(2) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which a solicitation covered by subpart C of this part is made or sent to the consumer; or

(3) An inquiry or application by the consumer regarding a product or service offered by that person during the 3-month period immediately preceding the date on which a solicitation covered by subpart C of this part is made or sent to the consumer.

(n) *Solicitation.* (1) *In general.* Solicitation means marketing 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 subpart C of 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 communications that are directed at the general public and distributed without the use of eligibility information communicated by an affiliate. For example, television, 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 specific consumer that is based on eligibility information communicated by an affiliate.

(o) *You* means member banks of the Federal Reserve System (other than national banks), branches and Agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*), and bank holding companies and affiliates of such holding companies (other than depository institutions and consumer reporting agencies).

5. A new subpart C is added to part 222 to read as follows:

### **Subpart C—Affiliate Use of Information for Marketing**

Sec.

222.20 Affiliate use of eligibility information for marketing.

222.21 Contents of opt out notice.

222.22 Reasonable opportunity to opt out.

222.23 Reasonable and simple methods of opting out.

222.24 Delivery of opt out notices.

222.25 Duration and effect of opt out.

222.26 Extension of opt out.

222.27 Consolidated and equivalent notices.

## Subpart C—Affiliate Use of Information for Marketing

### § 222.20 Affiliate use of eligibility information for marketing.

(a) *General duties of a person communicating eligibility information to an affiliate*—(1) *Notice and opt out.* If you communicate eligibility information about a consumer to your affiliate, your affiliate may not use the information to make or send solicitations to the consumer, unless prior to such use by the affiliate—

(i) You provide a clear and conspicuous notice to the consumer stating that the information may be communicated to and used by your affiliate to make or send solicitations to the consumer about its products and services;

(ii) You provide the consumer a reasonable opportunity and a simple method to “opt out” of such use of that information by your affiliate; and

(iii) The consumer has not chosen to opt out.

(2) *Rules of construction*—(i) *In general.* The notice required by this paragraph may 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, and may be provided in the following manner:

(A) You may provide the notice directly to the consumer;

(B) Your agent may provide the notice on your behalf, so long as—

(1) Your agent, if your affiliate, does not include any solicitation other than yours on or with the notice, unless it falls within one of the exceptions in paragraph (c) of this section; and

(2) Your agent gives the notice in your name or a common name or names used by the family of companies; or

(C) You may provide a joint notice with one or more of your affiliates or under a common corporate name or names used by the family of companies as provided in § 222.24(c).

(ii) *Avoiding duplicate notices.* If Affiliate A communicates eligibility information about a consumer to Affiliate B, and Affiliate B communicates that same information to Affiliate C, Affiliate B does not have to give an opt out notice to the consumer when it provides eligibility information to Affiliate C, so long as Affiliate A's notice is broad enough to cover Affiliate C's use of the eligibility information to make solicitations to the consumer.

(iii) *Examples of rules of construction.* A, B, and C are affiliates. The consumer currently has a business relationship with affiliate A, but has never done business with affiliates B or C. Affiliate A communicates eligibility information about the consumer to B for purposes of making solicitations. B communicates the information it received from A to C for purposes of making solicitations. In this circumstance, the rules of construction would—

(A) Permit B to use the information to make solicitations if:

(1) A has provided the opt out notice directly to the consumer; or

(2) B or C has provided the opt out notice on behalf of A.

(B) Permit B or C to use the information to make solicitations if:

(1) A's notice is broad enough to cover both B's and C's use of the eligibility information; or

(2) A, B, or C has provided a joint opt out notice on behalf of the entire affiliated group of companies.

(C) Not permit B or C to use the information for marketing purposes if B has provided the opt out notice only in B's own name, because no notice would have been provided by or on behalf of A.

(b) *General duties of an affiliate receiving eligibility information.* If you receive eligibility information from an affiliate, you may not use the information to make or send solicitations to a consumer, unless the consumer has been provided an opt out notice, as described in paragraph (a) of this section, that applies to your use of eligibility information and the consumer has not opted-out.

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

(1) To make or send a marketing solicitation to a consumer with whom you have a pre-existing business relationship as defined in § 222.3(m);

(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 subparagraph shall not be construed as permitting you to make or send solicitations on your behalf or on behalf of an affiliate if you or the affiliate, as applicable, would not be permitted to make or send the solicitation as a result

of the election of the consumer to opt out under this subpart;

(4) In response to a communication initiated by the consumer orally, electronically, or in writing;

(5) In response to an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation; or

(6) If your compliance with this subpart 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) *Examples of pre-existing business relationships.* (i) If a consumer has an insurance policy with your insurance affiliate that is currently in force, your insurance affiliate has a pre-existing business relationship with the consumer and can therefore use eligibility information it has received from you to make solicitations.

(ii) If a consumer has an insurance policy with your insurance affiliate that has lapsed, your insurance affiliate has a pre-existing business relationship with the consumer for 18 months after the date on which the policy ceases to be in force and can therefore use eligibility information it has received from you to make solicitations for 18 months after the date on which the policy ceases to be in force.

(iii) If a consumer applies to your affiliate for a product or service, or inquires about your affiliate's products or services and provides contact information to your affiliate for receipt of that information, your affiliate has a pre-existing business relationship with the consumer for 3 months after the date of the inquiry or application and can therefore use eligibility information it has received from you to make solicitations for 3 months after the date of the inquiry or application.

(iv) If a consumer makes a telephone call to a centralized call center for an affiliated group of companies to inquire about the consumer's bank account, the call does not constitute an inquiry with any affiliate other than the bank that holds the consumer's bank account and does not establish a pre-existing business relationship between the consumer and any affiliate of the bank.

(2) *Examples of consumer-initiated communications.* (i) If a consumer who has an account with you initiates a telephone call to your securities affiliate to request information about brokerage services or mutual funds and provides contact information for receiving that information, your securities affiliate may use eligibility information about the consumer it obtains from you to

make solicitations in response to the consumer-initiated call.

(ii) If your affiliate makes the initial marketing call, leaves a message for the consumer to call back, and the consumer responds, the communication is not initiated by the consumer, but by your affiliate.

(iii) If the consumer calls your affiliate to ask about retail locations and hours, but does not request information about your affiliate's products or services, solicitations by your affiliate using eligibility information about the consumer it obtains from you would not be responsive to the consumer-initiated communication.

(3) *Example of consumer affirmative authorization or request.* If a consumer who obtains a mortgage from you requests or affirmatively authorizes information about homeowner's insurance from your insurance affiliate, such authorization or request, whether given to you or to your insurance affiliate, would permit your insurance affiliate to use eligibility information about the consumer it obtains from you to make solicitations about homeowner's insurance to the consumer. A pre-selected check box would not satisfy the requirement for an affirmative authorization or request.

(e) *Prospective application.* The provisions of this subpart shall not prohibit your affiliate from using eligibility information communicated by you to make or send solicitations to a consumer if such information was received by your affiliate prior to [Insert Mandatory Compliance Date].

(f) *Relation to affiliate-sharing notice and opt out.* Nothing in this subpart limits the responsibility of a company to comply with the notice and opt out provisions of section 603(d)(2)(A)(iii) of the Act before it shares information other than transaction or experience information among affiliates to avoid becoming a consumer reporting agency.

#### **§ 222.21 Contents of opt out notice.**

(a) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) That the consumer may elect to limit your affiliate from using eligibility information about the consumer that it obtains from you 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.

(b) *Concise*—(1) *In general.* For purposes of this subpart, the term

“concise” means a reasonably brief expression or statement.

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

(3) *Use of model form.* The requirement for a concise notice is satisfied by use of a model form contained in Appendix A of this part, although use of the model form is not required.

(c) *Providing a menu of opt out choices.* With respect to the opt out election, you may allow a consumer to choose from a menu of alternatives when opting out of affiliate use of eligibility information for marketing, such as by selecting certain types of affiliates, certain types of information, or certain methods of delivery from which to opt out, so long as you offer as one of the alternatives the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery.

(d) *Alternative contents.* If you provide the consumer with a broader right to opt out of marketing than is required by law, you satisfy the requirements of this section by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt out rights. A model notice is provided in Appendix A of this part for guidance, although use of the model notice is not required.

#### **§ 222.22 Reasonable opportunity to opt out.**

(a) *In general.* Before your affiliate uses eligibility information communicated by you to make or send solicitations to a consumer, you must provide the consumer with a reasonable opportunity, following the delivery of the opt out notice, to opt out of such use by your affiliate.

(b) *Examples of a reasonable opportunity to opt out.* You provide a consumer with a reasonable opportunity to opt out if:

(1) *By mail.* You mail the opt out notice to a consumer and give the consumer 30 days from the date you mailed the notice to elect to opt out by any reasonable means.

(2) *By electronic means.* You notify the consumer electronically and give the consumer 30 days after the date that the consumer acknowledges receipt of the electronic notice to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* You provide the opt out notice to the consumer at the time of an

electronic transaction, such as a transaction conducted on an Internet Web site, and request that the consumer decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, so long as you provide a simple process at the Internet Web site that the consumer may use at that time to opt out.

(4) *By including in a privacy notice.* You include the opt out notice in a Gramm-Leach-Bliley Act privacy notice and allow the consumer to exercise the opt out within a reasonable period of time and in the same manner as the opt out under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*

(5) *By providing an “opt in”.* If you have a policy of not allowing an affiliate to use eligibility information to make or send solicitations to the consumer unless the consumer affirmatively consents, you give the consumer the opportunity to “opt in” by affirmative consent to such use by your affiliate. You must document the consumer's affirmative consent. A pre-selected check box does not constitute evidence of the consumer's affirmative consent.

#### **§ 222.23 Reasonable and simple methods of opting out.**

(a) *Reasonable and simple methods of opting out.* You provide a reasonable and simple method for a consumer to exercise a right to opt out if you—

(1) Designate check-off boxes in a prominent position on the relevant forms included with the opt out notice required by this subpart;

(2) Include a reply form and a self-addressed envelope together with the opt out notice required by this subpart;

(3) Provide an electronic means to opt out, such as a form that can be electronically mailed or processed at your Web site, if the consumer agrees to the electronic delivery of information; or

(4) Provide a toll-free telephone number that consumers may call to opt out.

(b) *Methods of opting out that are not reasonable or simple.* You do not provide a reasonable and simple method for exercising an opt out right if you—

(1) Require the consumer to write his or her own letter to you;

(2) Require the consumer to call or write to you to obtain a form for opting out, rather than including the form with the notice; or

(3) Require the consumer who agrees to receive the opt out notice in electronic form only, such as by electronic mail or at your Web site, to opt out solely by telephone or by paper mail.

**§ 222.24 Delivery of opt out notices.**

(a) *In general.* You must provide an opt out notice so that each consumer can reasonably be expected to receive actual notice. For opt out notices you provide electronically, you may either comply with the electronic disclosure provisions in this subpart or with 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 expectation of actual notice.* (1) You may reasonably expect that a consumer will receive actual notice if you:

(i) Hand-deliver a printed copy of the notice to the consumer;

(ii) Mail a printed copy of the notice to the last known mailing address of the consumer; or

(iii) For the consumer who obtains a product or service from you electronically, such as on an Internet Web site, post the notice on your electronic site and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular product or service.

(2) You may *not* reasonably expect that a consumer will receive actual notice if you:

(i) Only post a sign in your branch or office or generally publish advertisements presenting your notice; or

(ii) Send the notice via electronic mail to a consumer who has not agreed to the electronic delivery of information.

(c) *Joint notice with affiliates*—(1) *In general.* You may provide a joint notice from you and one or more of your affiliates, as identified in the notice, so long as the notice is accurate with respect to you and each affiliate.

(2) *Identification of affiliates.* You do not have to list each affiliate providing the joint notice by its name. If each affiliate shares a common name, such as “ABC,” then the joint notice may state that it applies to “all institutions with the ABC name” or “all affiliates in the ABC family of companies.” If, however, an affiliate does not have ABC in its name, then the joint notice must separately identify each family of companies with a common name or the institution.

(d) *Joint relationships*—(1) *In general.* If two or more consumers jointly obtain a product or service from you (joint consumers), the following rules apply:

(i) You may provide a single opt out notice.

(ii) Any of the joint consumers may exercise the right to opt out.

(iii) You may either—

(A) Treat an opt out direction by a joint consumer as applying to all of the associated joint consumers; or

(B) Permit each joint consumer to opt out separately.

(iv) If you permit each joint consumer to opt out separately, you must permit:

(A) One of the joint consumers to opt out on behalf of all of the joint consumers; and

(B) One or more joint consumers to notify you of their opt out directions in a single response.

(v) You must explain in your opt out notice which of the policies in paragraph (d)(1)(iii) of this section you will follow, as well as the information required by paragraph (d)(1)(iv) of this section.

(vi) You may not require *all* joint consumers to opt out before you implement *any* opt out direction.

(vii) If you receive an opt out by a particular joint consumer that does not apply to the others, you may use eligibility information about the others as long as no eligibility information is used about the consumer who opted out.

(2) *Example.* If consumers A and B, who have different addresses, have a joint checking account with you and arrange for you to send statements to A's address, you may do any of the following, but you must explain in your opt out notice which opt out policy you will follow. You may send a single opt out notice to A's address and:

(i) Treat an opt out direction by A as applying to the entire account. If you do so and A opts out, you may not require B to opt out as well before implementing A's opt out direction.

(ii) Treat A's opt out direction as applying to A only. If you do so, you must also permit:

(A) A and B to opt out for each other; and

(B) A and B to notify you of their opt out directions in a single response (such as on a single form) if they choose to give separate opt out directions.

(iii) If A opts out only for A, and B does not opt out, your affiliate may use information only about B to send solicitations to B, but may not use information about A and B jointly to send solicitations to B.

**§ 222.25 Duration and effect of opt out.**

(a) *Duration of opt out.* The election of a consumer to opt out shall be effective for the opt out period, which is a period of at least 5 years beginning as soon as reasonably practicable after the consumer's opt out election is received. You may establish an opt out period of more than 5 years, including an opt out period that does not expire

unless the consumer revokes it in writing, or if the consumer agrees, electronically.

(b) *Effect of opt out.* A receiving affiliate may not make or send solicitations to a consumer during the opt out period based on eligibility information it receives from an affiliate, except as provided in the exceptions in § 222.20(c) or if the opt out is revoked by the consumer.

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

(d) *Termination of relationship.* If the consumer's relationship with you terminates when a consumer's opt out election is in force, the opt out will continue to apply indefinitely, unless revoked by the consumer.

**§ 222.26 Extension of opt out.**

(a) *In general.* For a consumer who has opted out, a receiving affiliate may 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.

(b) *Duration of extension.* Each opt out extension shall comply with § 222.25(a).

(c) *Contents of extension notice.* The notice provided at extension must be clear, conspicuous, and concise, and must accurately disclose either:

(1) The same contents specified in § 222.21(a) for the initial notice, along with a statement explaining that the consumer's previous opt out has expired or is about to expire, as applicable, and that the consumer must opt out again if the consumer wishes to keep the opt out election in force; or

(2) Each of the items listed below:

(i) That the consumer previously elected to limit your affiliate from using information about the consumer that it obtains from you to make or send solicitations to the consumer;

(ii) That the consumer's election has expired or is about to expire, as applicable;

(iii) That the consumer may elect to extend the consumer's previous election; and

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

(d) *Timing of the extension notice*—(1) *In general.* An extension 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 any

affiliate makes or sends solicitations to the consumer that would have been prohibited by the expired opt out.

(2) *Reasonable period of time before expiration.* Providing an extension notice on or with the last annual privacy notice required by the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, that is provided to the consumer before expiration of the opt out period shall be deemed reasonable in all cases.

(e) *No effect on opt out period.* The opt out period may not be shortened to a period of less than 5 years by sending an extension notice to the consumer before expiration of the opt out period.

#### **§ 222.27 Consolidated and equivalent notices.**

(a) *Coordinated and consolidated notices.* A notice required by this subpart may 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 Act and the Gramm-Leach-Bliley Act privacy notice.

(b) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this subpart, and that you provide to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of this subpart.

6. A new Appendix A to part 222 is added to read as follows:

#### **Appendix A to Part 222—Model Forms for Opt Out Notices**

- A-1 Model Form for Initial Opt Out Notice
- A-2 Model Form for Extension Notice
- A-3 Model Form for Voluntary “No Marketing” Notice

##### **A-1—Model Form for Initial Opt Out Notice**

###### *Your Choice To Limit Marketing*

- You may limit our affiliates from marketing their products or services to you based on information that we share with them, such as your income, your account history with us, and your credit score.
- [Include if applicable.] Your decision to limit marketing offers from our affiliates will apply for 5 years. Once that period expires, you will be allowed to extend your decision.
- [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To limit marketing offers [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box below and mail it to:

[Company name].  
[Company address].

\_\_\_ I do not want your affiliates to market their products or services to me based on information that you share with them.

##### **A-2—Model Form for Extension Notice**

###### *Extending Your Choice To Limit Marketing*

- You previously chose to limit our affiliates from marketing their products or services to you based on information that we share with them, such as your income, your account history with us, and your credit score.
- Your choice has expired or is about to expire.
- [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To extend your choice for another 5 years [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box below and mail it to:

[Company name].  
[Company address].

\_\_\_ I want to extend my choice for another 5 years.

##### **A-3—Model Form for Voluntary “No Marketing” Notice**

###### *Your Choice To Stop Marketing*

- You may choose to stop all marketing offers from us and our affiliates.

To stop all marketing offers [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box on the form below and mail it to:

[Company name].  
[Company address].

\_\_\_ I do not want you or your affiliates to send me marketing offers.

#### **Federal Deposit Insurance Corporation**

##### **12 CFR Chapter III**

##### **Authority and Issuance**

For the reasons set forth in the joint preamble, the Federal Deposit Insurance Corporation proposes to amend part 334 (as proposed to be added at 69 FR 23399, April 28, 2004) of chapter III of title 12 of the Code of Federal Regulations to read as follows:

#### **PART 334—FAIR CREDIT REPORTING**

1. The authority citation for part 334 continues to read as follows:

**Authority:** 12 U.S.C. 1819 (Tenth) and 1818; 15 U.S.C. 1681b and 1681s.

##### **Subpart A—General Provisions**

2. Section 334.1 is revised to read as follows:

##### **§ 334.1 Purpose, scope, and effective dates.**

(a) *Purpose.* The purpose of this part is to implement the provisions of the Fair Credit Reporting Act applicable to the institutions listed in paragraph (b)(2) of this section. This part generally applies to institutions that obtain and use information about consumers to determine the consumer's eligibility for products, services, or employment, share such information among affiliates, and furnish such information to consumer reporting agencies.

(b) *Scope.*

(1) [Reserved]

(2) *Institutions covered.* (i) Except as otherwise provided in paragraph (b)(2) of this section, these regulations apply to banks insured by the FDIC (other than District Banks and members of the Federal Reserve System) and insured State branches of foreign banks and any subsidiaries and affiliates of such entities; and other entities and persons with respect to which the FDIC may exercise its enforcement authority under any provision of law. For purposes of this definition, a subsidiary does not include a broker, dealer, person providing insurance, investment company, and investment advisor.

3. Section 334.2 is republished to read as follows:

##### **§ 334.2 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.

4. Section 334.3 is revised to read as follows:

##### **§ 334.3 Definitions.**

As used in this part, unless the context requires otherwise:

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

(b) *Affiliate* means any person that is related by common ownership or common corporate control with another person.

(c) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

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

(e) *Consumer* means an individual.

(f) [Reserved].

(g) [Reserved].

(h) [Reserved].

(i) *Control* of a company means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the FDIC determines.

(j) *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.

(k) [Reserved].

(l) *Person* means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(m) *Pre-existing business relationship* means a relationship between a person and a consumer based on—

(1) 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 subpart C of this part;

(2) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which a solicitation covered by subpart C of this part is made or 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 subpart C of this part is made or sent to the consumer.

(n) *Solicitation*—(1) *In general.* Solicitation means marketing 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 subpart C of 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 communications that are directed at the general public and

distributed without the use of eligibility information communicated by an affiliate. For example, television, 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 specific consumer that is based on eligibility information communicated by an affiliate.

(o) *You* means all banks that are insured by the FDIC (other than District Banks and members of the Federal Reserve System); insured State branches of foreign banks and any subsidiaries and affiliates of such entities; and other entities or persons with respect to which the FDIC may exercise its enforcement authority under any provision of law. For purposes of this definition, a subsidiary does not include a broker, dealer, person providing insurance, investment company, and investment advisor.

5. Subpart C is added to read as follows:

#### **Subpart C—Affiliate Use of Information for Marketing**

Sec.

334.20 Affiliate use of eligibility information for marketing.

334.21 Contents of opt out notice.

334.22 Reasonable opportunity to opt out.

334.23 Reasonable and simple methods of opting out.

334.24 Delivery of opt out notices.

334.25 Duration and effect of opt out.

334.26 Extension of opt out.

334.27 Consolidated and equivalent notices.

#### **Subpart C—Affiliate Use of Information for Marketing**

##### **§ 334.20 Affiliate use of eligibility information for marketing.**

(a) *General duties of a person communicating eligibility information to an affiliate*—(1) *Notice and opt out.* If you communicate eligibility information about a consumer to your affiliate, your affiliate may not use the information to make or send solicitations to the consumer, unless prior to such use by the affiliate—

(i) You provide a clear and conspicuous notice to the consumer stating that the information may be communicated to and used by your affiliate to make or send solicitations to the consumer about its products and services;

(ii) You provide the consumer a reasonable opportunity and a simple method to "opt out" of such use of that information by your affiliate; and

(iii) The consumer has not chosen to opt out.

(2) *Rules of construction*—(i) *In general.* The notice required by this paragraph may 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, and may be provided in the following manner:

(A) You may provide the notice directly to the consumer;

(B) Your agent may provide the notice on your behalf, so long as—

(1) Your agent, if your affiliate, does not include any solicitation other than yours on or with the notice, unless it falls within one of the exceptions in paragraph (c) of this section; and

(2) Your agent gives the notice in your name or a common name or names used by the family of companies; or

(C) You may provide a joint notice with one or more of your affiliates or under a common corporate name or names used by the family of companies as provided in § 334.24(c).

(ii) *Avoiding duplicate notices.* If Affiliate A shares eligibility information about a consumer with Affiliate B, and Affiliate B shares that same information with Affiliate C, Affiliate B does not have to give an opt out notice to the consumer when it provides eligibility information to Affiliate C, so long as Affiliate A's notice is broad enough to cover Affiliate C's use of the eligibility information to make solicitations to the consumer.

(iii) *Examples of rules of construction.* A, B, and C are affiliates. The consumer currently has a business relationship with affiliate A, but has never done business with affiliates B or C. Affiliate A communicates eligibility information about the consumer to B for purposes of making solicitations. B communicates the information it received from A to C for purposes of making solicitations. In this circumstance, the rules of construction would—

(A) Permit B to use the information to make solicitations if:

(1) A has provided the opt out notice directly to the consumer; or

(2) B or C has provided the opt out notice on behalf of A.

(B) Permit B or C to use the information to make solicitations if:



(1) A's notice is broad enough to cover both B's and C's use of the eligibility information; or

(2) A, B, or C has provided a joint opt out notice on behalf of the entire affiliated group of companies.

(C) Not permit B or C to use the information for marketing purposes if B has provided the opt out notice only in B's own name, because no notice would be provided by or on behalf of A.

(b) *General duties of an affiliate receiving eligibility information.* If you receive eligibility information from an affiliate, you may not use the information to make or send solicitations to a consumer, unless the consumer has been provided an opt out notice, as described in paragraph (a) of this section, that applies to your use of eligibility information and the consumer has not opted-out.

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

(1) To make or send a marketing solicitation to a consumer with whom you have a pre-existing business relationship as defined in § 334.3(m);

(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 subparagraph shall not be construed as permitting you to make or send solicitations on your behalf or on behalf of an affiliate if you or the affiliate, as applicable, would not be permitted to make or send the solicitation as a result of the election of the consumer to opt out under this subpart;

(4) In response to a communication initiated by the consumer orally, electronically, or in writing;

(5) In response to an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation; or

(6) If your compliance with this subpart 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) Examples of pre-existing business relationships.* (i) If a consumer has an insurance policy with your insurance affiliate that is currently in force, your insurance affiliate has a pre-existing business relationship with the consumer

and can therefore use eligibility information it has received from you to make solicitations.

(ii) If a consumer has an insurance policy with your insurance affiliate that has lapsed, your insurance affiliate has a pre-existing business relationship with the consumer for 18 months after the date on which the policy ceases to be in force and can therefore use eligibility information it has received from you to make solicitations for 18 months after the date on which the policy ceases to be in force.

(iii) If a consumer applies to your affiliate for a product or service, or inquires about your affiliate's products or services and provides contact information to your affiliate for receipt of that information, your affiliate has a pre-existing business relationship with the consumer for three months after the date of the inquiry or application and can therefore use eligibility information it has received from you to make solicitations for three months after the date of the inquiry or application.

(iv) If a consumer makes a telephone call to a centralized call center for an affiliated group of companies to inquire about the consumer's bank account, the call does not constitute an inquiry with any affiliate other than the bank that holds the consumer's bank account and does not establish a pre-existing business relationship between the consumer and any affiliate of the bank.

(2) *Examples of consumer-initiated communications.* (i) If a consumer who has an account with you initiates a telephone call to your securities affiliate to request information about brokerage services or mutual funds and provides contact information for receiving that information, your securities affiliate may use eligibility information about the consumer it obtains from you to make solicitations in response to the consumer-initiated call.

(ii) If your affiliate makes the initial marketing call, leaves a message for the consumer to call back, and the consumer responds, the communication is not initiated by the consumer, but by your affiliate.

(iii) If the consumer calls your affiliate to ask about retail locations and hours, but does not request information about your affiliate's products or services, solicitations by your affiliate using eligibility information about the consumer it obtains from you would not be responsive to the consumer-initiated communication.

(3) *Example of consumer affirmative authorization or request.* If a consumer who obtains a mortgage from you requests or affirmatively authorizes information about homeowner's

insurance from your insurance affiliate, such authorization or request, whether given to you or to your insurance affiliate, would permit your insurance affiliate to use eligibility information about the consumer it obtains from you to make solicitations about homeowner's insurance to the consumer. A pre-selected check box would not satisfy the requirement for an affirmative authorization or request.

(e) *Prospective application.* The provisions of this subpart shall not prohibit your affiliate from using eligibility information communicated by you to make or send solicitations to a consumer if such information was received by your affiliate prior to [Insert Mandatory Compliance Date].

(f) *Relation to affiliate-sharing notice and opt out.* Nothing in this subpart limits the responsibility of a company to comply with the notice and opt out provisions of section 603(d)(2)(A)(iii) of the Act before it shares information other than transaction or experience information among affiliates to avoid becoming a consumer reporting agency.

#### § 334.21 Contents of opt out notice.

(a) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) That the consumer may elect to limit your affiliate from using eligibility information about the consumer that it obtains from you 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.

(b) *Concise—(1) In general.* For purposes of this subpart, the term "concise" means a reasonably brief expression or statement.

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

(3) *Use of model form.* The requirement for a concise notice is satisfied by use of a model form contained in Appendix A of this part, although use of the model form is not required.

(c) *Providing a menu of opt out choices.* With respect to the opt out election, you may allow a consumer to choose from a menu of alternatives when opting out of affiliate use of eligibility information for marketing, such as by selecting certain types of affiliates, certain types of information,

or certain methods of delivery from which to opt out, so long as you offer as one of the alternatives the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery.

(d) *Alternative contents.* If you provide the consumer with a broader right to opt out of marketing than is required by law, you satisfy the requirements of this section by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt out rights. A model notice is provided in Appendix A of this part for guidance, although use of the model notice is not required.

#### **§ 334.22 Reasonable opportunity to opt out.**

(a) *In general.* Before your affiliate uses eligibility information communicated by you to make or send solicitations to a consumer, you must provide the consumer with a reasonable opportunity, following the delivery of the opt out notice, to opt out of such use by your affiliate.

(b) *Examples of a reasonable opportunity to opt out.* You provide a consumer with a reasonable opportunity to opt out if:

(1) *By mail.* You mail the opt out notice to a consumer and give the consumer 30 days from the date you mailed the notice to elect to opt out by any reasonable means.

(2) *By electronic means.* You notify the consumer electronically and give the consumer 30 days after the date that the consumer acknowledges receipt of the electronic notice to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* You provide the opt out notice to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site, and request that the consumer decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, so long as you provide a simple process at the Internet web site that the consumer may use at that time to opt out.

(4) *By including in a privacy notice.* You include the opt out notice in a Gramm-Leach-Bliley Act privacy notice and allow the consumer to exercise the opt out within a reasonable period of time and in the same manner as the opt out under the Gramm-Leach-Bliley Act.

(5) *By providing an "opt in".* If you have a policy of not allowing an affiliate to use eligibility information to make or send solicitations to the consumer unless the consumer affirmatively

consents, you give the consumer the opportunity to "opt in" by affirmative consent to such use by your affiliate. You must document the consumer's affirmative consent. A pre-selected check box does not constitute evidence of the consumer's affirmative consent.

#### **§ 334.23 Reasonable and simple methods of opting out.**

(a) *Reasonable and simple methods of opting out.* You provide a reasonable and simple method for a consumer to exercise a right to opt out if you—

(1) Designate check-off boxes in a prominent position on the relevant forms included with the opt out notice required by this subpart;

(2) Include a reply form and a self-addressed envelope together with the opt out notice required by this subpart;

(3) Provide an electronic means to opt out, such as a form that can be electronically mailed or processed at your Web site, if the consumer agrees to the electronic delivery of information; or

(4) Provide a toll-free telephone number that consumers may call to opt out.

(b) *Methods of opting out that are not reasonable or simple.* You do not provide a reasonable and simple method for exercising an opt out right if you—

(1) Require the consumer to write his or her own letter to you;

(2) Require the consumer to call or write to you to obtain a form for opting out, rather than including the form with the notice; or

(3) Require the consumer who agrees to receive the opt out notice in electronic form only, such as by electronic mail or at your Web site, to opt out solely by telephone or by paper mail.

#### **§ 334.24 Delivery of opt out notices.**

(a) *In general.* You must provide an opt out notice so that each consumer can reasonably be expected to receive actual notice. For opt out notices you provide electronically, you may either comply with the electronic disclosure provisions in this subpart or with 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 expectation of actual notice.* (1) You may reasonably expect that a consumer will receive actual notice if you:

(i) Hand-deliver a printed copy of the notice to the consumer;

(ii) Mail a printed copy of the notice to the last known mailing address of the consumer; or

(iii) For the consumer who obtains a product or service from you

electronically, such as on an Internet Web site, post the notice on your electronic site and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular product or service.

(2) You may *not* reasonably expect that a consumer will receive actual notice if you:

(i) Only post a sign in your branch or office or generally publish advertisements presenting your notice; or

(ii) Send the notice via electronic mail to a consumer who has not agreed to the electronic delivery of information.

(c) *Joint notice with affiliates—(1) In general.* You may provide a joint notice from you and one or more of your affiliates, as identified in the notice, so long as the notice is accurate with respect to you and each affiliate.

(2) *Identification of affiliates.* You do not have to list each affiliate providing the joint notice by its name. If each affiliate shares a common name, such as "ABC," then the joint notice may state that it applies to "all institutions with the ABC name" or "all affiliates in the ABC family of companies." If, however, an affiliate does not have ABC in its name, then the joint notice must separately identify each family of companies with a common name or the institution.

(d) *Joint relationships—(1) In general.* If two or more consumers jointly obtain a product or service from you (joint consumers), the following rules apply:

(i) You may provide a single opt out notice.

(ii) Any of the joint consumers may exercise the right to opt out.

(iii) You may either—

(A) Treat an opt out direction by a joint consumer as applying to all of the associated joint consumers; or

(B) Permit each joint consumer to opt out separately.

(iv) If you permit each joint consumer to opt out separately, you must permit:

(A) One of the joint consumers to opt out on behalf of all of the joint consumers; and

(B) One or more joint consumers to notify you of their opt out directions in a single response.

(v) You must explain in your opt out notice which of the policies in paragraph (d)(1)(iii) of this section you will follow, as well as the information required by paragraph (d)(1)(iv) of this section.

(vi) You may not require *all* joint consumers to opt out before you implement *any* opt out direction.

(vii) If you receive an opt out by a particular joint consumer that does not apply to the others, you may use

eligibility information about the others as long as no eligibility information is used about the consumer who opted out.

(2) *Example.* If consumers A and B, who have different addresses, have a joint checking account with you and arrange for you to send statements to A's address, you may do any of the following, but you must explain in your opt out notice which opt out policy you will follow. You may send a single opt out notice to A's address and:

(i) Treat an opt out direction by A as applying to the entire account. If you do so and A opts out, you may not require B to opt out as well before implementing A's opt out direction.

(ii) Treat A's opt out direction as applying to A only. If you do so, you must also permit:

(A) A and B to opt out for each other; and

(B) A and B to notify you of their opt out directions in a single response (such as on a single form) if they choose to give separate opt out directions.

(iii) If A opts out only for A, and B does not opt out, your affiliate may use information only about B to send solicitations to B, but may not use information about A and B jointly to send solicitations to B.

#### **§ 334.25 Duration and effect of opt out.**

(a) *Duration of opt out.* The election of a consumer to opt out shall be effective for the opt out period, which is a period of at least 5 years beginning as soon as reasonably practicable after the consumer's opt out election is received. You may establish an opt out period of more than 5 years, including an opt out period that does not expire unless the consumer revokes it in writing, or if the consumer agrees, electronically.

(b) *Effect of opt out.* A receiving affiliate may not make or send solicitations to a consumer during the opt out period based on eligibility information it receives from an affiliate, except as provided in the exceptions in § 334.20(c) or if the opt out is revoked by the consumer.

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

(d) *Termination of relationship.* If the consumer's relationship with you terminates when a consumer's opt out election is in force, the opt out will continue to apply indefinitely, unless revoked by the consumer.

#### **§ 334.26 Extension of opt out.**

(a) *In general.* For a consumer who has opted out, a receiving affiliate may 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.

(b) *Duration of extension.* Each opt out extension shall comply with § 334.25(a).

(c) *Contents of extension notice.* The notice provided at extension must be clear, conspicuous, and concise, and must accurately disclose either:

(1) The same contents specified in § 334.21(a) for the initial notice, along with a statement explaining that the consumer's previous opt out has expired or is about to expire, as applicable, and that the consumer must opt out again if the consumer wishes to keep the opt out election in force; or

(2) Each of the items listed below:

(i) That the consumer previously elected to limit your affiliate from using information about the consumer that it obtains from you to make or send solicitations to the consumer;

(ii) That the consumer's election has expired or is about to expire, as applicable;

(iii) That the consumer may elect to extend the consumer's previous election; and

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

(d) *Timing of the extension notice—*(1) *In general.* An extension 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 any affiliate makes or sends solicitations to the consumer that would have been prohibited by the expired opt out.

(2) *Reasonable period of time before expiration.* Providing an extension notice on or with the last annual privacy notice required by the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, that is provided to the consumer before expiration of the opt out period shall be deemed reasonable in all cases.

(e) *No effect on opt out period.* The opt out period may not be shortened to a period of less than 5 years by sending an extension notice to the consumer before expiration of the opt out period.

#### **§ 334.27 Consolidated and equivalent notices.**

(a) *Coordinated and consolidated notices.* A notice required by this subpart may 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 Act and the Gramm-Leach-Bliley Act privacy notice.

(b) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this subpart, and that you provide to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of this subpart.

\* \* \* \* \*

6. Appendix A to part 334 is added to read as follows:

#### **Appendix A to Part 334—Model Forms for Opt Out Notices**

A-1 Model Form for Initial Opt Out Notice

A-2 Model Form for Extension Notice

A-3 Model Form for Voluntary "No Marketing" Notice

##### **A-1—Model Form for Initial Opt Out Notice**

###### *Your Choice To Limit Marketing*

- You may limit our affiliates from marketing their products or services to you based on information that we share with them, such as your income, your account history with us, and your credit score.

- [Include if applicable.] Your decision to limit marketing offers from our affiliates will apply for 5 years. Once that period expires, you will be allowed to extend your decision.

- [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To limit marketing offers [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box below and mail it to:

[Company name].

[Company address].

☐ I do not want your affiliates to market their products or services to me based on information that you share with them.

##### **A-2—Model Form for Extension Notice**

###### *Extending Your Choice To Limit Marketing*

- You previously chose to limit our affiliates from marketing their products or services to you based on information that we share with them, such as your income, your account history with us, and your credit score.

- Your choice has expired or is about to expire.

- [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To extend your choice for another 5 years [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box below and mail it to:

[Company name].

[Company address].

I want to extend my choice for another 5 years.

### A-3—Model Form for Voluntary “No Marketing” Notice

#### Your Choice To Stop Marketing

• You may choose to stop all marketing offers from us and our affiliates.

To stop all marketing offers [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at *www.websiteaddress.com*; or
- Check the box on the form below and mail it to:

[Company name].

[Company address].

I do not want you or your affiliates to send me marketing offers.

### Office of Thrift Supervision

#### 12 CFR Chapter V

#### Authority and Issuance

For the reasons set forth in the joint preamble, the Office of Thrift Supervision proposes to amend chapter V of title 12 of the Code of Federal Regulations by amending part 571 (as proposed to be added at 69 FR 23402, April 28, 2004), as follows:

### PART 571—FAIR CREDIT REPORTING

1. The authority citation for part 571 is revised to read as follows:

**Authority:** 12 U.S.C. 1462a, 1463, 1464, 1467a, 1828, 1831p–1, 1881–1884; 15 U.S.C. 1681b, 1681s, and 1681w; 15 U.S.C. 6801 and 6805(b)(1); Sec. 214, Pub. L. 108–159, 117 Stat. 1952.

2. Amend § 571.1 by adding new paragraphs (a) and (b)(2)(ii).

#### § 571.1 Purpose, scope, and effective dates.

(a) *Purpose.* The purpose of this part is to implement the provisions of the Fair Credit Reporting Act applicable to the institutions listed in paragraph (b)(2) of this section. This part generally applies to institutions that obtain and use information about consumers to determine the consumer's eligibility for products, services, or employment, share such information among affiliates, and furnish such information to consumer reporting agencies.

(b) \* \* \*

(2) \* \* \*

(ii) Subpart C of this part does not apply to federal savings association operating subsidiaries that are functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)).

\* \* \* \* \*

3. Amend § 571.3 by revising paragraphs (b) and (o) and adding new paragraphs (c), (j), (l), (m), and (n).

#### § 571.3 Definitions.

\* \* \* \* \*

(b) *Affiliate* means any person that is related by common ownership or common corporate control with another person.

(c) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

\* \* \* \* \*

(j) *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.

\* \* \* \* \*

(l) *Person* means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(m) *Pre-existing business relationship* means a relationship between a person and a consumer based on—

(1) 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 subpart C of this part;

(2) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which a solicitation covered by subpart C of this part is made or sent to the consumer; or

(3) An inquiry or application by the consumer regarding a product or service offered by that person during the 3-month period immediately preceding the date on which a solicitation covered by subpart C of this part is made or sent to the consumer.

(n) *Solicitation*—(1) *In general.* Solicitation means marketing 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 subpart C of 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 communications that are

directed at the general public and distributed without the use of eligibility information communicated by an affiliate. For example, television, 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 specific consumer that is based on eligibility information communicated by an affiliate.

(o) *You* means savings associations whose deposits are insured by the Federal Deposit Insurance Corporation (and Federal savings association operating subsidiaries in accordance with § 559.3(h)(1) of this chapter). For purposes of subpart C of this part, “You” does not include a Federal savings association operating subsidiary that is functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)).

4. Add a new subpart C to part 571 to read as follows:

#### Subpart C—Affiliate Use of Information for Marketing

Sec.

571.20 Affiliate use of eligibility information for marketing.

571.21 Contents of opt out notice.

571.22 Reasonable opportunity to opt out.

571.23 Reasonable and simple methods of opting out.

571.24 Delivery of opt out notices.

571.25 Duration and effect of opt out.

571.26 Extension of opt out.

571.27 Consolidated and equivalent notices.

#### Subpart C—Affiliate Use of Information for Marketing

##### § 571.20 Affiliate use of eligibility information for marketing.

(a) *General duties of a person communicating eligibility information to an affiliate*—(1) *Notice and opt out.* If you communicate eligibility information about a consumer to your affiliate, your affiliate may not use the information to make or send solicitations to the consumer, unless prior to such use by the affiliate—

(i) You provide a clear and conspicuous notice to the consumer stating that the information may be communicated to and used by your affiliate to make or send solicitations to the consumer about its products and services;

(ii) You provide the consumer a reasonable opportunity and a simple method to "opt out" of such use of that information by your affiliate; and

(iii) The consumer has not chosen to opt out.

(2) *Rules of construction*—(i) *In general.* The notice required by this paragraph (a)(2) may 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, and may be provided in the following manner:

(A) You may provide the notice directly to the consumer;

(B) Your agent may provide the notice on your behalf, so long as—

(1) Your agent, if your affiliate, does not include any solicitation other than yours on or with the notice, unless it falls within one of the exceptions in paragraph (c) of this section; and

(2) Your agent gives the notice in your name or a common name or names used by the family of companies; or

(C) You may provide a joint notice with one or more of your affiliates or under a common corporate name or names used by the family of companies as provided in § 571.24(c).

(ii) *Avoid duplicating notices.* If Affiliate A communicates eligibility information about a consumer to Affiliate B, and Affiliate B communicates that same information to Affiliate C, Affiliate B does not have to give an opt out notice to the consumer when it provides eligibility information to Affiliate C, so long as Affiliate A's notice is broad enough to cover Affiliate C's use of the eligibility information to make solicitations to the consumer.

(iii) *Examples of rules of construction.* A, B, and C are affiliates. The consumer currently has a business relationship with A, but has never done business with B or C. A communicates eligibility information about the consumer to B for purposes of B making solicitations on B's behalf. B communicates the information it received from A to C for purposes of C making solicitations on C's behalf. In this circumstance, the rules of construction would—

(A) Permit B to use the information to make solicitations on B's behalf if:

(1) A has provided the opt out notice directly to the consumer; or

(2) B or C has provided the opt out notice on behalf of A.

(B) Permit B or C to use the information to make solicitations on B's and C's behalf respectively if:

(1) A's notice is broad enough to cover both B's and C's use of the eligibility information; or

(2) A, B, or C has provided a joint opt out notice on behalf of the entire affiliated group of companies.

(C) Not permit B or C to use the information for marketing purposes if B has provided the opt out notice only in B's own name, because no notice would have been provided by or on behalf of A.

(b) *General duties of an affiliate receiving eligibility information.* If you receive eligibility information from an affiliate, you may not use the information to make or send solicitations to a consumer, unless the consumer has been provided an opt out notice, as described in paragraph (a) of this section, that applies to your use of eligibility information and the consumer has not opted out.

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

(1) To make or send a marketing solicitation to a consumer with whom you have a pre-existing business relationship as defined in § 571.3(m);

(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 (c)(3) shall not be construed as permitting you to make or send solicitations on your behalf or on behalf of an affiliate if you or the affiliate, as applicable, would not be permitted to make or send the solicitation as a result of the election of the consumer to opt out under this subpart;

(4) In response to a communication initiated by the consumer orally, electronically, or in writing;

(5) In response to an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation; or

(6) If your compliance with this subpart 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) *Examples of pre-existing business relationships.*

(i) If a consumer has an insurance policy with your insurance affiliate that is currently in force, your insurance

affiliate has a pre-existing business relationship with the consumer and can therefore use eligibility information it has received from you to make solicitations.

(ii) If a consumer has an insurance policy with your insurance affiliate that has lapsed, your insurance affiliate has a pre-existing business relationship with the consumer for 18 months after the date on which the policy ceases to be in force and can therefore use eligibility information it has received from you to make solicitations for 18 months after the date on which the policy ceases to be in force.

(iii) If a consumer applies to your affiliate for a product or service, or inquires about your affiliate's products or services and provides contact information to your affiliate for receipt of that information, your affiliate has a pre-existing business relationship with the consumer for 3 months after the date of the inquiry or application and can therefore use eligibility information it has received from you to make solicitations for 3 months after the date of the inquiry or application.

(iv) If a consumer makes a telephone call to a centralized call center for an affiliated group of companies to inquire about the consumer's bank account, the call does not constitute an inquiry with any affiliate other than the bank that holds the consumer's bank account and does not establish a pre-existing business relationship between the consumer and any affiliate of the bank.

(2) *Examples of consumer-initiated communications.* (i) If a consumer who has an account with you initiates a telephone call to your securities affiliate to request information about brokerage services or mutual funds and provides contact information for receiving that information, your securities affiliate may use eligibility information about the consumer it obtains from you to make solicitations in response to the consumer-initiated call.

(ii) If your affiliate makes the initial marketing call, leaves a message for the consumer to call back, and the consumer responds, the communication is not initiated by the consumer, but by your affiliate.

(iii) If the consumer calls your affiliate to ask about retail locations and hours, but does not request information about your affiliate's products or services, solicitations by your affiliate using eligibility information about the consumer it obtains from you would not be responsive to the consumer-initiated communication.

(3) *Example of consumer affirmative authorization or request.* If a consumer who obtains a mortgage from you

requests or affirmatively authorizes information about homeowner's insurance from your insurance affiliate, such authorization or request, whether given to you or to your insurance affiliate, would permit your insurance affiliate to use eligibility information about the consumer it obtains from you to make solicitations about homeowner's insurance to the consumer. A pre-selected check box would not satisfy the requirement for an affirmative authorization or request.

(e) *Prospective application.* The provisions of this subpart shall not prohibit your affiliate from using eligibility information communicated by you to make or send solicitations to a consumer if such information was received by your affiliate prior to [Insert Mandatory Compliance Date].

(f) *Relation to affiliate-sharing notice and opt out.* Nothing in this subpart limits the responsibility of a company to comply with the notice and opt out provisions of section 603(d)(2)(A)(iii) of the Act before it shares information other than transaction or experience information among affiliates to avoid becoming a consumer reporting agency.

#### **§ 571.21 Contents of opt out notice.**

(a) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) That the consumer may elect to limit your affiliate from using eligibility information about the consumer that it obtains from you 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.

(b) *Concise—(1) In general.* For purposes of this subpart, the term "concise" means a reasonably brief expression or statement.

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

(3) *Use of model form.* The requirement for a concise notice is satisfied by use of a model form contained in Appendix A of this part, although use of the model form is not required.

(c) *Providing a menu of opt out choices.* With respect to the opt out election, you may allow a consumer to choose from a menu of alternatives when opting out of affiliate use of eligibility information for marketing,

such as by selecting certain types of affiliates, certain types of information, or certain methods of delivery from which to opt out, so long as you offer as one of the alternatives the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery.

(d) *Alternative contents.* If you provide the consumer with a broader right to opt out of marketing than is required by law, you satisfy the requirements of this section by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt out rights. A model notice is provided in Appendix A-3 of this part for guidance, although use of the model notice is not required.

#### **§ 571.22 Reasonable opportunity to opt out.**

(a) *In general.* Before your affiliate uses eligibility information communicated by you to make or send solicitations to a consumer, you must provide the consumer with a reasonable opportunity, following the delivery of the opt out notice, to opt out of such use by your affiliate.

(b) *Examples of a reasonable opportunity to opt out.* You provide a consumer with a reasonable opportunity to opt out if:

(1) *By mail.* You mail the opt out notice to a consumer and give the consumer 30 days from the date you mailed the notice to elect to opt out by any reasonable means.

(2) *By electronic means.* You notify the consumer electronically and give the consumer 30 days after the date that the consumer acknowledges receipt of the electronic notice to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* You provide the opt out notice to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site, and request that the consumer decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, so long as you provide a simple process at the Internet web site that the consumer may use at that time to opt out.

(4) *By including in a privacy notice.* You include the opt out notice in a Gramm-Leach-Bliley Act privacy notice and allow the consumer to exercise the opt out within a reasonable period of time and in the same manner as the opt out under the Gramm-Leach-Bliley Act.

(5) *By providing an "opt in".* If you have a policy of not allowing an affiliate to use eligibility information to make or

send solicitations to the consumer unless the consumer affirmatively consents, you give the consumer the opportunity to "opt in" by affirmative consent to such use by your affiliate. You must document the consumer's affirmative consent. A pre-selected check box does not constitute evidence of the consumer's affirmative consent.

#### **§ 571.23 Reasonable and simple methods of opting out.**

(a) *Reasonable and simple methods of opting out.* You provide a reasonable and simple method for a consumer to exercise a right to opt out if you—

(1) Designate check-off boxes in a prominent position on the relevant forms included with the opt out notice required by this subpart;

(2) Include a reply form and a self-addressed envelope together with the opt out notice required by this subpart;

(3) Provide an electronic means to opt out, such as a form that can be electronically mailed or processed at your web site, if the consumer agrees to the electronic delivery of information; or

(4) Provide a toll-free telephone number that consumers may call to opt out.

(b) *Methods of opting out that are not reasonable or simple.* You do not provide a reasonable and simple method for exercising an opt out right if you—

(1) Require the consumer to write his or her own letter to you;

(2) Require the consumer to call or write to you to obtain a form for opting out, rather than including the form with the notice; or

(3) Require the consumer who agrees to receive the opt out notice in electronic form only, such as by electronic mail or at your web site, to opt out solely by telephone or by paper mail.

#### **§ 571.24 Delivery of opt out notices.**

(a) *In general.* You must provide an opt out notice so that each consumer can reasonably be expected to receive actual notice. For opt out notices you provide electronically, you may either comply with the electronic disclosure provisions in this subpart or with 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 expectation of actual notice.* (1) You may reasonably expect that a consumer will receive actual notice if you:

(i) Hand-deliver a printed copy of the notice to the consumer;

(ii) Mail a printed copy of the notice to the last known mailing address of the consumer; or

(iii) For the consumer who obtains a product or service from you electronically, such as on an Internet Web site, post the notice on your electronic site and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular product or service.

(2) You may *not* reasonably expect that a consumer will receive actual notice if you:

(i) Only post a sign in your branch or office or generally publish advertisements presenting your notice; or

(ii) Send the notice via electronic mail to a consumer who has not agreed to the electronic delivery of information.

(c) *Joint notice with affiliates*—(1) *In general.* You may provide a joint notice from you and one or more of your affiliates, as identified in the notice, so long as the notice is accurate with respect to you and each affiliate.

(2) *Identification of affiliates.* You do not have to list each affiliate providing the joint notice by its name. If each affiliate shares a common name, such as “ABC,” then the joint notice may state that it applies to “all institutions with the ABC name” or “all affiliates in the ABC family of companies.” If, however, an affiliate does not have ABC in its name, then the joint notice must separately identify each family of companies with a common name or the institution.

(d) *Joint relationships*—(1) *In general.* If two or more consumers jointly obtain a product or service from you (joint consumers), the following rules apply:

(i) You may provide a single opt out notice.

(ii) Any of the joint consumers may exercise the right to opt out.

(iii) You may either—

(A) Treat an opt out direction by a joint consumer as applying to all of the associated joint consumers; or

(B) Permit each joint consumer to opt out separately.

(iv) If you permit each joint consumer to opt out separately, you must permit:

(A) One of the joint consumers to opt out on behalf of all of the joint consumers; and

(B) One or more joint consumers to notify you of their opt out directions in a single response.

(v) You must explain in your opt out notice which of the policies in paragraph (d)(1)(iii) of this section you will follow, as well as the information required by paragraph (d)(1)(iv) of this section.

(vi) You may not require *all* joint consumers to opt out before you implement any opt out direction.

(vii) If you receive an opt out by a particular joint consumer that does not

apply to the others, you may use eligibility information about the others as long as no eligibility information is used about the consumer who opted out.

(2) *Example.* If consumers A and B, who have different addresses, have a joint checking account with you and arrange for you to send statements to A’s address, you may do any of the following, but you must explain in your opt out notice which opt out policy you will follow. You may send a single opt out notice to A’s address and:

(i) Treat an opt out direction by A as applying to the entire account. If you do so and A opts out, you may not require B to opt out as well before implementing A’s opt out direction.

(ii) Treat A’s opt out direction as applying to A only. If you do so, you must also permit:

(A) A and B to opt out for each other; and

(B) A and B to notify you of their opt out directions in a single response (such as on a single form) if they choose to give separate opt out directions.

(iii) If A opts out only for A, and B does not opt out, your affiliate may use information only about B to send solicitations to B, but may not use information about A and B jointly to send solicitations to B.

#### **§ 571.25 Duration and effect of opt out.**

(a) *Duration of opt out.* The election of a consumer to opt out shall be effective for the opt out period, which is a period of at least 5 years beginning as soon as reasonably practicable after the consumer’s opt out election is received. You may establish an opt out period of more than 5 years, including an opt out period that does not expire unless the consumer revokes it in writing, or if the consumer agrees, electronically.

(b) *Effect of opt out.* A receiving affiliate may not make or send solicitations to a consumer during the opt out period based on eligibility information it receives from an affiliate, except as provided in the exceptions in § 571.20(c) or if the opt out is revoked by the consumer.

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

(d) *Termination of relationship.* If the consumer’s relationship with you terminates when a consumer’s opt out election is in force, the opt out will continue to apply indefinitely, unless revoked by the consumer.

#### **§ 571.26 Extension of opt out.**

(a) *In general.* For a consumer who has opted out, a receiving affiliate may 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.

(b) *Duration of extension.* Each opt out extension shall comply with § 571.25(a).

(c) *Contents of extension notice.* The notice provided at extension must be clear, conspicuous, and concise, and must accurately disclose either:

(1) The same contents specified in § 571.21(a) for the initial notice, along with a statement explaining that the consumer’s previous opt out has expired or is about to expire, as applicable, and that the consumer must opt out again if the consumer wishes to keep the opt out election in force; or

(2) Each of the items listed below:

(i) That the consumer previously elected to limit your affiliate from using information about the consumer that it obtains from you to make or send solicitations to the consumer;

(ii) That the consumer’s election has expired or is about to expire, as applicable;

(iii) That the consumer may elect to extend the consumer’s previous election; and

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

(d) *Timing of the extension notice*—(1) *In general.* An extension notice may be provided to the consumer at 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 any affiliate makes or sends solicitations to the consumer that would have been prohibited by the expired opt out.

(2) *Reasonable period of time before expiration.* Providing an extension notice on or with the last annual privacy notice required by the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, that is provided to the consumer before expiration of the opt out period shall be deemed reasonable in all cases.

(e) *No effect on opt out period.* The fact that you send an extension notice to the consumer before expiration of the opt out period and the consumer fails to extend the opt out, does not shorten the opt out period.

#### **§ 571.27 Consolidated and equivalent notices.**

(a) *Coordinated and consolidated notices.* A notice required by this subpart may 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 Act and the Gramm-Leach-Bliley Act privacy notice.

(b) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this subpart, and that you provide to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of this subpart C.

5. Add a new Appendix A to part 571 to read as follows:

#### Appendix A to Part 571—Model Forms for Opt Out Notices

- A-1 Model Form for Initial Opt Out Notice
- A-2 Model Form for Extension Notice
- A-3 Model Form for Voluntary “No Marketing” Notice

##### A-1—Model Form for Initial Opt Out Notice

###### *Your Choice To Limit Marketing*

- You may limit our affiliates from marketing their products or services to you based on information that we share with them, such as your income, your account history with us, and your credit score.
- [Include if applicable.] Your decision to limit marketing offers from our affiliates will apply for 5 years. Once that period expires, you will be allowed to extend your decision.
- [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To limit marketing offers [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box below and mail it to:

[Company name].  
[Company address].

I do not want your affiliates to market their products or services to me based on information that you share with them.

##### A-2—Model Form for Extension Notice

###### *Extending Your Choice To Limit Marketing*

- You previously chose to limit our affiliates from marketing their products or services to you based on information that we share with them, such as your income, your account history with us, and your credit score.
- Your choice has expired or is about to expire.
- [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To extend your choice for another 5 years [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box below and mail it to:

[Company name].  
[Company address].

I want to extend my choice for another 5 years.

##### A-3—Model Form for Voluntary “No Marketing” Notice

###### *Your Choice To Stop Marketing*

- You may choose to stop all marketing offers from us and our affiliates.
- To stop all marketing offers [include all that apply]:
- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box on the form below and mail it to:

[Company name].  
[Company address].

I do not want you or your affiliates to send me marketing offers.

#### National Credit Union Administration

##### Authority and Issuance

For the reasons set forth in the joint preamble, NCUA proposes to amend title 12, chapter VII, of the Code of Federal Regulations by amending part 717 (as proposed to be added at 69 FR 23405, April 28, 2004) to read as follows:

#### PART 717—FAIR CREDIT REPORTING

1. The authority citation for part 717 is revised to read as follows:

**Authority:** 15 U.S.C. 1681a, 1681b, 1681s, 1681w, 6801 and 6805(b).

##### Subpart A—General Provisions

2. Section 717.1 is revised by adding a new paragraph (a) to read as follows:

###### **§ 717.1 Purpose, scope, and effective dates.**

(a) *Purpose.* This part implements the provisions of the Fair Credit Reporting Act applicable to Federal credit unions. This part applies to Federal credit unions that obtain and use information about consumers to determine the consumer's eligibility for products, services, or employment, share such information among affiliates, and furnish such information to consumer reporting agencies.

\* \* \* \* \*

3. Section 717.2 is republished to read as follows:

###### **§ 717.2 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.

4. Section 717.3 is revised to read as follows:

###### **§ 717.3 Definitions.**

As used in this part, unless the context requires otherwise:

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

(b) *Affiliate* means any person that is related by common ownership or common corporate control with another person.

(c) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

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

(e) *Consumer* means an individual.

(f) [Reserved].

(g) [Reserved].

(h) [Reserved].

(i) *Control* of a company means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the Board determines.

(4) Example. NCUA will presume a credit union has a controlling influence over the management or policies of a CUSO, if the CUSO is 67% owned by credit unions.

(j) *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.

(k) [Reserved].

(l) *Person* means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(m) *Pre-existing business relationship* means a relationship between a person and a consumer based on—

(1) A financial contract between the person and the consumer that is in force on the date on which the consumer is sent a solicitation covered by subpart C of this part;

(2) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction

(including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which a solicitation covered by subpart C of this part is made or sent to the consumer; or

(3) An inquiry or application by the consumer regarding a product or service offered by that person during the 3-month period immediately preceding the date on which a solicitation covered by subpart C of this part is made or sent to the consumer.

(n) *Solicitation*—(1) *In general.* Solicitation means marketing 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 subpart C of 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 communications that are directed at the general public and distributed without the use of eligibility information communicated by an affiliate. For example, television, 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 specific consumer that is based on eligibility information communicated by an affiliate.

(o) *You* means a Federal credit union.

5. A new subpart C is added to part 717 to read as follows:

#### **Subpart C—Affiliate Use of Information for Marketing**

Sec.

717.20 Affiliate use of eligibility information for marketing.

717.21 Contents of opt out notice.

717.22 Reasonable opportunity to opt out.

717.23 Reasonable and simple methods of opting out.

717.24 Delivery of opt out notices.

717.25 Duration and effect of opt out.

717.26 Extension of opt out.

717.27 Consolidated and equivalent notices.

#### **Subpart C—Affiliate Use of Information for Marketing**

##### **§ 717.20 Affiliate use of eligibility information for marketing.**

(a) *General duties of a person communicating eligibility information to an affiliate*—(1) *Notice and opt out.* If you communicate eligibility information about a consumer to your affiliate, your affiliate may not use the information to make or send solicitations to the consumer, unless before such use by the affiliate—

(i) You provide a clear and conspicuous notice to the consumer stating that the information may be communicated to and used by your affiliate to make or send solicitations to the consumer about its products and services;

(ii) You provide the consumer a reasonable opportunity and a simple method to “opt out” of such use of that information by your affiliate; and

(iii) The consumer has not chosen to opt out.

(2) *Rules of construction*—(i) *In general.* The notice required by this paragraph may 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, and may be provided in the following manner:

(A) You may provide the notice directly to the consumer;

(B) Your agent may provide the notice on your behalf, so long as—

(1) Your agent, if your affiliate, does not include any solicitation other than yours on or with the notice, unless it falls within one of the exceptions in paragraph (c) of this section; and

(2) Your agent gives the notice in your name or a common name or names used by the family of companies; or

(C) You may provide a joint notice with one or more of your affiliates or under a common corporate name or names used by the family of companies as provided in § 717.24(c).

(ii) *Avoiding duplicate notices.* If Affiliate X communicates eligibility information about a consumer to Affiliate Y, and Affiliate Y communicates that same information to Affiliate Z, Affiliate Y does not have to give an opt out notice to the consumer when it provides eligibility information to Affiliate Z, so long as Affiliate X's notice is broad enough to cover Affiliate Z's use of the eligibility information to make solicitations to the consumer.

(iii) *Examples of rules of construction.* X, Y, and Z are affiliates. The consumer currently has a business relationship with affiliate X, but has never done business with affiliates Y or Z. Affiliate X communicates eligibility information about the consumer to Y for purposes of making solicitations. Y communicates the information it received from X to Z for purposes of making solicitations. In this circumstance, the rules of construction would—

(A) Permit Y to use the information to make solicitations if:

(1) X has provided the opt out notice directly to the consumer; or

(2) Y or Z has provided the opt out notice on behalf of X.

(B) Permit Y or Z to use the information to make solicitations if:

(1) X's notice is broad enough to cover both Y's and Z's use of the eligibility information; or

(2) X, Y, or Z has provided a joint opt out notice on behalf of the entire affiliated group of companies.

(C) Not permit Y or Z to use the information for marketing purposes if Y has provided the opt out notice only in Y's own name, because no notice would have been provided by or on behalf of X.

(b) *General duties of an affiliate receiving eligibility information.* If you receive eligibility information from an affiliate, you may not use the information to make or send solicitations to a consumer, unless the consumer has been provided an opt out notice, as described in paragraph (a) of this section, that applies to your use of eligibility information and the consumer has not opted-out.

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

(1) To make or send a marketing solicitation to a consumer with whom you have a pre-existing business relationship as defined in § 717.3(m);

(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 subparagraph will not be construed as permitting you to make or send solicitations on your behalf or on behalf of an affiliate if you or the affiliate, as applicable, would not be permitted to make or send the solicitation as a result

of the election of the consumer to opt out under this subpart;

(4) In response to a communication initiated by the consumer orally, electronically, or in writing;

(5) In response to an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation; or

(6) If your compliance with this subpart 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) *Examples of pre-existing business relationships.* (i) If a consumer has an insurance policy with your insurance agency affiliate that is currently in force, your insurance agency affiliate has a pre-existing business relationship with the consumer and can therefore use eligibility information it has received from you to make solicitations.

(ii) If a consumer has an insurance policy with your insurance agency affiliate that has lapsed, your insurance agency affiliate has a pre-existing business relationship with the consumer for 18 months after the date on which the policy ceases to be in force and can therefore use eligibility information it has received from you to make solicitations for 18 months after the date on which the policy ceases to be in force.

(iii) If a consumer applies to your affiliate for a product or service, or inquires about your affiliate's products or services and provides contact information to your affiliate for receipt of that information, your affiliate has a pre-existing business relationship with the consumer for 3 months after the date of the inquiry or application and can therefore use eligibility information it has received from you to make solicitations for 3 months after the date of the inquiry or application.

(iv) If a consumer makes a telephone call to a centralized call center for an affiliated group of companies to inquire about the consumer's credit union account, the call does not constitute an inquiry with any affiliate other than the credit union that holds the consumer's credit union account and does not establish a pre-existing business relationship between the consumer and any affiliate of the credit union.

(2) *Examples of consumer-initiated communications.* (i) If a consumer who has an account with you initiates a telephone call to your securities affiliate to request information about brokerage services or mutual funds and provides contact information for receiving that information, your securities affiliate

may use eligibility information about the consumer it obtains from you to make solicitations in response to the consumer-initiated call.

(ii) If your affiliate makes the initial marketing call, leaves a message for the consumer to call back, and the consumer responds, the communication is not initiated by the consumer, but by your affiliate.

(iii) If the consumer calls your affiliate to ask about retail locations and hours, but does not request information about your affiliate's products or services, solicitations by your affiliate using eligibility information about the consumer it obtains from you would not be responsive to the consumer-initiated communication.

(3) *Example of consumer affirmative authorization or request.* If a consumer who obtains a mortgage from you requests or affirmatively authorizes information about homeowner's insurance from your insurance agency affiliate, such authorization or request, whether given to you or to your insurance agency affiliate, would permit your affiliate to use eligibility information about the consumer it obtains from you to make solicitations about homeowner's insurance to the consumer. A pre-selected check box would not satisfy the requirement for an affirmative authorization or request.

(e) *Prospective application.* The provisions of this subpart do not prohibit your affiliate from using eligibility information communicated by you to make or send solicitations to a consumer if such information was received by your affiliate before [Insert Mandatory Compliance Date].

(f) *Relation to affiliate-sharing notice and opt out.* Nothing in this subpart limits your responsibility to comply with the notice and opt out provisions of section 603(d)(2)(A)(iii) of the Act before you share information other than transaction or experience information among affiliates to avoid becoming a consumer reporting agency.

#### **§ 717.21 Contents of opt out notice.**

(a) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) That the consumer may elect to limit your affiliate from using eligibility information about the consumer that it obtains from you to make or send solicitations to the consumer;

(2) If applicable, that the consumer's election applies for a specified period of time and that the consumer can extend the election once that period expires; and

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

(b) *Concise.*—(1) *In general.* For purposes of this subpart, the term "concise" means a reasonably brief expression or statement.

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

(3) *Use of model form.* Use of a model form contained in Appendix A of this part satisfies the requirement for a concise notice, although use of the model form is not required.

(c) *Providing a menu of opt out choices.* With respect to the opt out election, you may allow a consumer to choose from a menu of alternatives when opting out of affiliate use of eligibility information for marketing, such as by selecting certain types of affiliates, certain types of information, or certain methods of delivery from which to opt out, so long as you offer as one of the alternatives the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery.

(d) *Alternative contents.* If you provide the consumer with a broader right to opt out of marketing than is required by law, you satisfy the requirements of this section by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt out rights. A model notice is provided in Appendix A-3 of this part for guidance, although use of the model notice is not required.

#### **§ 717.22 Reasonable opportunity to opt out.**

(a) *In general.* Before your affiliate uses eligibility information communicated by you to make or send solicitations to a consumer, you must provide the consumer with a reasonable opportunity, following the delivery of the opt out notice, to opt out of such use by your affiliate.

(b) *Examples of a reasonable opportunity to opt out.* You provide a consumer with a reasonable opportunity to opt out if:

(1) *By mail.* You mail the opt out notice to a consumer and give the consumer 30 days from the date you mailed the notice to elect to opt out by any reasonable means.

(2) *By electronic means.* You notify the consumer electronically and give the consumer 30 days after the date that the consumer acknowledges receipt of the electronic notice to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* You provide the opt out

notice to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site, and request that the consumer decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, so long as you provide a simple process at the Internet web site that the consumer may use at that time to opt out.

(4) *By including in a privacy notice.* You include the opt out notice in a Gramm-Leach-Bliley Act privacy notice and allow the consumer to exercise the opt out within a reasonable period of time and in the same manner as the opt out under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*

(5) *By providing an "opt in."* If you have a policy of not allowing an affiliate to use eligibility information to make or send solicitations to the consumer unless the consumer affirmatively consents, you give the consumer the opportunity to "opt in" by affirmative consent to such use by your affiliate. You must document the consumer's affirmative consent. A pre-selected check box does not constitute evidence of the consumer's affirmative consent.

#### **§ 717.23 Reasonable and simple methods of opting out.**

(a) *Reasonable and simple methods of opting out.* You provide a reasonable and simple method for a consumer to exercise a right to opt out if you—

(1) Designate check-off boxes in a prominent position on the relevant forms included with the opt out notice required by this subpart;

(2) Include a reply form and a self-addressed envelope together with the opt out notice required by this subpart;

(3) Provide an electronic means to opt out, such as a form that can be electronically mailed or processed at your Web site, if the consumer agrees to the electronic delivery of information; or

(4) Provide a toll-free telephone number that consumers may call to opt out.

(b) *Methods of opting out that are not reasonable or simple.* You do not provide a reasonable and simple method for exercising an opt out right if you—

(1) Require the consumer to write his or her own letter to you;

(2) Require the consumer to call or write to you to obtain a form for opting out, rather than including the form with the notice; or

(3) Require the consumer who agrees to receive the opt out notice in electronic form only, such as by electronic mail or at your Web site, to

opt out solely by telephone or by paper mail.

#### **§ 717.24 Delivery of opt out notices.**

(a) *In general.* You must provide an opt out notice so that each consumer can reasonably be expected to receive actual notice. For opt out notices you provide electronically, you may either comply with the electronic disclosure provisions in this subpart or with 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 expectation of actual notice.* (1) You may reasonably expect that a consumer will receive actual notice if you:

(i) Hand-deliver a printed copy of the notice to the consumer;

(ii) Mail a printed copy of the notice to the last known mailing address of the consumer; or

(iii) For the consumer who obtains a product or service from you electronically, such as on an Internet Web site, post the notice on your electronic site and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular product or service.

(2) You may *not* reasonably expect that a consumer will receive actual notice if you:

(i) Only post a sign in your branch or office or generally publish advertisements presenting your notice; or

(ii) Send the notice via electronic mail to a consumer who has not agreed to the electronic delivery of information.

(c) *Joint notice with affiliates—(1) In general.* You may provide a joint notice from you and one or more of your affiliates, as identified in the notice, so long as the notice is accurate with respect to you and each affiliate.

(2) *Identification of affiliates.* You do not have to list each affiliate providing the joint notice by its name. If each affiliate shares a common name, such as "ABC," then the joint notice may state that it applies to "all institutions with the ABC name" or "all affiliates in the ABC family of companies." If, however, an affiliate does not have ABC in its name, then the joint notice must separately identify each family of companies with a common name or the institution.

(d) *Joint relationships—(1) In general.* If two or more consumers jointly obtain a product or service from you (joint consumers), the following rules apply:

(i) You may provide a single opt out notice.

(ii) Any of the joint consumers may exercise the right to opt out.

(iii) You may either—

(A) Treat an opt out direction by a joint consumer as applying to all of the associated joint consumers; or

(B) Permit each joint consumer to opt out separately.

(iv) If you permit each joint consumer to opt out separately, you must permit:

(A) One of the joint consumers to opt out on behalf of all of the joint consumers; and

(B) One or more joint consumers to notify you of their opt out directions in a single response.

(v) You must explain in your opt out notice which of the policies in paragraph (d)(1)(iii) of this section you will follow, as well as the information required by paragraph (d)(1)(iv) of this section.

(vi) You may not require *all* joint consumers to opt out before you implement *any* opt out direction.

(vii) If you receive an opt out by a particular joint consumer that does not apply to the others, you may use eligibility information about the others as long as no eligibility information is used about the consumer who opted out.

(2) *Example.* If consumers X and Y, who have different addresses, have a joint checking account with you and arrange for you to send statements to X's address, you may do any of the following, but you must explain in your opt out notice which opt out policy you will follow. You may send a single opt out notice to X's address and:

(i) Treat an opt out direction by X as applying to the entire account. If you do so and X opts out, you may not require Y to opt out as well before implementing X's opt out direction.

(ii) Treat X's opt out direction as applying to X only. If you do so, you must also permit:

(A) X and Y to opt out for each other; and

(B) X and Y to notify you of their opt out directions in a single response (such as on a single form) if they choose to give separate opt out directions.

(iii) If X opts out only for X, and Y does not opt out, your affiliate may use information only about Y to send solicitations to Y, but may not use information about X and Y jointly to send solicitations to Y.

#### **§ 717.25 Duration and effect of opt out.**

(a) *Duration of opt out.* A consumer's election to opt out is effective for the opt out period, which is a period of at least 5 years beginning as soon as reasonably practicable after the consumer's opt out election is received. You may establish an opt out period of more than 5 years, including an opt out period that does

not expire unless the consumer revokes it in writing, or if the consumer agrees, electronically.

(b) *Effect of opt out.* A receiving affiliate may not make or send solicitations to a consumer during the opt out period based on eligibility information it receives from an affiliate, except as provided in the exceptions in § 717.20(c) or if the consumer revokes the opt out.

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

(d) *Termination of relationship.* If the consumer's relationship with you terminates when a consumer's opt out election is in force, the opt out continues to apply indefinitely, unless revoked by the consumer.

#### § 717.26 Extension of opt out.

(a) *In general.* For a consumer who has opted out, a receiving affiliate may 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.

(b) *Duration of extension.* Each opt out extension must comply with § 717.25(a).

(c) *Contents of extension notice.* The notice provided at extension must be clear, conspicuous, and concise, and must accurately disclose either:

(1) The same contents specified in § 717.21(a) for the initial notice, along with a statement explaining that the consumer's previous opt out has expired or is about to expire, as applicable, and that the consumer must opt out again if the consumer wishes to keep the opt out election in force; or

(2) Each of the items listed below:

(i) That the consumer previously elected to limit your affiliate from using information about the consumer that it obtains from you to make or send solicitations to the consumer;

(ii) That the consumer's election has expired or is about to expire, as applicable;

(iii) That the consumer may elect to extend the consumer's previous election; and

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

(d) *Timing of the extension notice—*

(1) *In general.* An extension 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 any

affiliate makes or sends solicitations to the consumer that would have been prohibited by the expired opt out.

(2) *Reasonable period of time before expiration.* Providing an extension notice on or with the last annual privacy notice required by the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, that is provided to the consumer before expiration of the opt out period will be deemed reasonable in all cases.

(e) *No effect on opt out period.* The opt out period may not be shortened to a period of less than 5 years by sending an extension notice to the consumer before expiration of the opt out period.

#### § 717.27 Consolidated and equivalent notices.

(a) *Coordinated and consolidated notices.* A notice required by this subpart may 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 Act and the Gramm-Leach-Bliley Act privacy notice.

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

6. A new Appendix A to part 717 is added to read as follows:

#### Appendix A to Part 717—Model Forms for Opt Out Notices

- A-1 Model Form for Initial Opt Out Notice
- A-2 Model Form for Extension Notice
- A-3 Model Form for Voluntary "No Marketing" Notice

##### A-1—Model Form for Initial Opt Out Notice

###### *Your Choice To Limit Marketing*

- You may limit our affiliates from marketing their products or services to you based on information that we share with them, such as your income, your account history with us, and your credit score.
- [Include if applicable.] Your decision to limit marketing offers from our affiliates will apply for 5 years. Once that period expires, you will be allowed to extend your decision.
- [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To limit marketing offers [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box below and mail it to:

[Company name].  
[Company address].

I do not want your affiliates to market their products or services to me based on information that you share with them.

##### A-2—Model Form for Extension Notice

###### *Extending Your Choice To Limit Marketing*

- You previously chose to limit our affiliates from marketing their products or services to you based on information that we share with them, such as your income, your account history with us, and your credit score.
- Your choice has expired or is about to expire.
- [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To extend your choice for another 5 years [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box below and mail it to:

[Company name].  
[Company address].

I want to extend my choice for another 5 years.

##### A-3—Model Form for Voluntary "No Marketing" Notice

###### *Your Choice To Stop Marketing*

- You may choose to stop all marketing offers from us and our affiliates.

To stop all marketing offers [include all that apply]:

- Call us toll-free at 877-###-####; or
- Visit our Web site at [www.websiteaddress.com](http://www.websiteaddress.com); or
- Check the box on the form below and mail it to:

[Company name].  
[Company address].

I do not want you or your affiliates to send me marketing offers.

Dated: June 18, 2004.

**John D. Hawke, Jr.,**

*Comptroller of the Currency.*

By order of the Board of Governors of the Federal Reserve System, July 1, 2004.

**Jennifer J. Johnson,**

*Secretary of the Board.*

Dated at Washington, DC, this 28th day of June, 2004.

By order of the Board of Directors, Federal Deposit Insurance Corporation.

**Valerie J. Best,**

*Assistant Executive Secretary.*

Dated: May 26, 2004.

By the Office of Thrift Supervision.

**James E. Gilleran,**

*Director.*

By the National Credit Union Administration Board on June 24, 2004.

**Becky Baker,**

*Secretary.*

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