Comment #: 28

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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Acenue, NW
Washington DC 20580

Re: FACT Act Affiliate Marketing Rule, Matter No. R411006

Ladies and Gentlemen:

Wells Fargo & Company ("Well Fargo") appreciates the opportunity to comment on the notice of proposed rulemaking (the "Proposed Rule") issued by the Federal Trade Commisson (the "Commission") with respect to the affiliate marketing regulations implementing Section 214 of the Fair and Accurate Credit Transactions Act of 2003. Wells Fargo is one of the country's leading integrated financial services organizations. Wells Fargo includes a national bank with branches in 23 states, a consumer finance company, insurance agencies and brokerages, and securities broker-dealers and investment advisors.

Background

The FCRA expressly permits the sharing of information between and among affiliated entities. For example, the FCRA permits financial institutions to share transaction or experience information between affiliated entities without limitation. The FCRA also permits financial institutions to share information that otherwise would be considered a consumer report with their affiliates if their customers are provided notice and an opportunity to opt out before this information is shared. Section 624 of the FCRA, as added by section 214 of the FACT Act, however, limits the ability of an entity to use certain information obtained from an affiliate for marketing purposes. Specifically, section 624(a)(1) of the FCRA states that "[a]ny person that receives from another person related to it by common ownership or affiliated by corporate control a communication of information that would be a consumer report, but for [the exceptions in] section 603(d)(2)(A), may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless" the consumer is provided notice and an opportunity to opt out, and the consumer does not opt out.

Section 214(b) of the FACT Act requires the Commission, the bank regulatory agencies and the Securities and Exchange Commission, with respect to the entities subject to their respective FCRA enforcement authority, to "prescribe [consistent and comparable] regulations to implement section 624 of the" FCRA. Although the Proposed Rule would implement section 624 of the FCRA, certain requirements of the Proposed Rule differ in nature and structure from the requirements of section 624 of the FCRA, as well as the privacy provisions of the Gramm-Leach-Bliley Act ("GLBA"), and raise questions as to the scope and operation of the affiliate marketing requirements in section 624. In sum, the new and unique provisions introduced in the Proposed Rule have no statutory basis in the FCRA or the FACT Act.

For instance, the Commission has raised questions about the ability of an entity to market to its own customers products or services of its affiliates. Wells Fargo believes that such restrictions are inconsistent with the plain language of the FACT Act and its intent. In addition, we suggest that the final rule follow the statute by making clear that the entity with the obligation to provide the required opt-out notice is the affiliate that receives and wishes to use information from its affiliates, while providing that entity with sufficient flexibility to have that notice sent by another affiliate and/or combined with notification sent on behalf of multiple affiliates. Other comments address a variety of additional issues, including the proposed exceptions, grandfathering of certain eligibility information, consent by customers who have previously opted out or during the opt out "waiting period," and the form, use and timing of the opt-out notice. Finally, Wells Fargo suggests that the Commission provide additional time for mandatory compliance with the final rule. The final rule also should make it clear, as clearly intended by the statute, that an institution may incorporate the new FCRA opt-out notice into its GLBA privacy notice by allowing the new FCRA opt-out notice to be provided at the time of its next regularly scheduled GLBA notice.

The Final Rule Should Not Address Constructive Sharing

The Commission specifically requests comment on whether the Proposed Rule 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." As described by the Commission, constructive sharing occurs when one entity uses its own information to make marketing solicitations to its own customers concerning an affiliate's products or services, and the customers' responses provide the affiliate with discernible eligibility information about these customers. The term constructive sharing is not used in section 624 or any other provision of the FCRA or the FACT Act. However, the very structure of section 624 was designed to encourage financial institutions within the holding company structure to conduct marketing through an affiliate that has a pre-existing business relationship with its customers. Specifically, the pre-existing business relationship exception, as contrasted with the notice requirements imposed by section 624 on the use of eligibility information to market consumers with whom a financial institution does not have a pre-existing business relationship, creates an incentive to conduct marketing in holding companies through the entity or entities with existing customer relationships.

The Supplementary Information to the Proposed Rule ("Supplementary Information") presents the following, hypothetical example of constructive sharing: A finance company provides an affiliated retailer with specific eligibility criteria for the purpose of having the retailer make solicitations on behalf of the finance company to retailer customers who meet those criteria; in addition, a consumer's response provides the finance company with discernible eligibility information, such as a response form that is coded to identify the consumer as meeting the eligibility criteria. As discussed in further detail below, section 624 does not apply to this hypothetical example for several important reasons. Most importantly, the retailer making the solicitation has a pre-existing business relationship with its customers and, thus, may make these marketing solicitations based on its information or information received from an affiliate or other third party. Similarly, if a retailer customer responds to a solicitation directly to the finance company, the finance company also would then have a pre-existing business relationship with the retailer customer due to the consumer's inquiry, and since the finance company can then use all available affiliate information in marketing to that customer, the receipt of information through the customer simply cannot trigger the section 624 notice requirement. In addition, section 624 does not apply to the Commission' hypothetical example because the retailer would not use eligibility information received from an affiliate in order to make solicitations, but only would use its own information to make the solicitations.

Section 624 Does Not Apply to Constructive Sharing

Section 624 does not limit the sharing of information. Section 624 addresses only the use of information after it has been shared and not the sharing of information itself. In effect, section 624, like the Commission's Telemarketing Sales Rule, gives consumers the ability to opt out of certain marketing practices. Specifically, section 624 gives consumers the ability to opt out of the use of information that Congress deemed sensitive for direct marketing when conducted by affiliated companies. As such, the focus and terms of section 624 are much different than the focus of general privacy legislation, such as the privacy provisions of title V of the GLBA that restrict the disclosure, as opposed to the use, of information.

Section 624 of the FCRA applies only if five conditions are met:

(1) An entity has received information from an affiliate;
(2) this information would be a consumer report if the exceptions to the definition of consumer report in the FCRA for transaction and experience information and other information shared with affiliates did not apply;
(3) the entity uses this information to make marketing solicitations to consumers;
(4) the marketing solicitations are for the products or services of the entity receiving the information and making the solicitations; *and*
(5) no exception under section 624 applies.

If any one of these five conditions is not met, section 624 does not require notice and opt out before an entity may make a marketing solicitation to a consumer based on eligibility information received from an affiliate.

The plain language of section 624 of the FCRA does not prohibit an entity from using its own information to solicit its own customers for the products or services of any third party, including an affiliate, regardless of which entity establishes the marketing criteria. Section 624 applies only when an entity uses eligibility information *received from* an affiliate to make a marketing solicitation to a consumer. If an entity uses its own information to market an affiliate's products or services, the entity has not used eligibility information received from an affiliate, and section 624 does not apply. As a result, the entity may make a solicitation to a consumer without the consumer receiving notice and an opportunity to opt out.

In constructive sharing, the entity making the solicitation does not receive eligibility information from an affiliate, and the entity on whose behalf the solicitation is made only receives information from a consumer's response after the solicitation has been made. Therefore, section 624 does not apply. Any other conclusion would mean that an entity could use eligibility information to market a non-affiliate's products and services to its own customers, but could not market the products or services of its affiliates to those same customers without triggering the section 624 notice requirement. The pre-existing business relationship exception was intended to avoid this obviously illogical result.

Constructive Sharing is Covered by Section 624 Exceptions

Even if one were totally to disregard the required conditions discussed above, section 624 of the FCRA still would not apply to "constructive sharing" because one or more exceptions would apply. Section 624 expressly excludes from the notice and opt-out requirement any person who uses information to make marketing solicitations "to a consumer with whom the person has a pre-existing business relationship." The pre-existing business relationship exception is not limited to the entity's own products or services. Therefore, the notice and opt-out requirement does not apply when an entity is making marketing solicitations for an affiliate's products or services to its own customers because the entity has a pre-existing business relationship with its customers. In constructive sharing, the pre-existing business relationship exception applies because an entity makes solicitations to its own customers with whom the entity has a pre-existing business relationship. Furthermore, when the affiliate on whose behalf the solicitations are made receives an application or inquiry from the consumer, which includes the consumer's response to the solicitation that leads to the so-called constructive sharing, that affiliate would be able to receive and use discernable information from affiliated companies in order to respond to the communication because the affiliate would then have a pre-existing business relationship with the consumer as a result of the consumer's inquiry.

As a result of the pre-existing business relationship exception, the section 624 notice and opt-out requirement cannot apply to an entity that makes marketing solicitations to its own customers. Indeed, the literal language of the pre-existing business relationship exception goes well beyond constructive sharing. For example, if a financial institution obtains a list of an affiliate's customers from a common, shared database and applies its own criteria to this list, and then requests an affiliate with an existing business relationship to solicit its own customers for the financial institution's products on its behalf, section 624 should not apply, as long as the affiliate determines on its own whether or not to send the solicitations. In these circumstances,

because the affiliate making the ultimate decision on whether to make the solicitation has a pre-existing business relationship with the consumer, section 624 does not apply. In this regard, the affiliate with the customer relationship that makes the decision whether or not to send the marketing solicitations still has a strong incentive to maintain that customer relationship and would take care not to harm that relationship by over aggressively marketing the products or services of its affiliates.

In addition, as discussed below, the limitation in the servicing exception does not prohibit the affiliate from making solicitations on behalf of an entity, even though the entity could not make those solicitations on its own behalf. The servicing exception in section 624(a)(4)(C) states that "this ***subparagraph*** shall not be construed" to permit an entity to make a solicitation on behalf of an affiliate that could not otherwise provide the solicitation on its own behalf. Clearly, this limitation is limited to the servicing exception only. The exceptions in section 624 are listed in the disjunctive and, as a result, if any exception applies, section 624 and its notice and opt-out requirement does not apply. In no way does the limitation in the servicing exception limit the application of the pre-existing business relationship exception.

The Policy Behind Section 624 Does Not Support Limiting Constructive Sharing

Not only does the plain language of section 624 of the FCRA not apply, but also the policy and purpose behind section 624 does not support applying the notice and opt-out requirement to constructive sharing. The use of eligibility information by an entity to market an affiliate's products to its own customers does not raise the same concerns as an affiliate using the same information to market another entity's customers. An entity that makes marketing solicitations to its own customers has a strong incentive to maintain those customer relationships and will take care not to jeopardize those relationships by over aggressively marketing its products or services. A recent study by the Secretary of the Treasury Department highlighted this point in its key findings. The study noted that "[m]ost businesses have a powerful market interest in not annoying their customers with unwanted solicitations, particularly businesses that value customer loyalty." An affiliate without a current customer relationship may see less to lose through aggressive marketing practices. The scheme of section 624 that limits the marketing practices of an affiliate without a customer relationship, but does not limit the marketing practices of the institution with a customer relationship, is based on this important distinction. Whether the notice and opt-out requirement applies depends on *who* markets the product not *what* the product is or *whose* product it is. Solicitations for the same product are treated differently depending on who makes those solicitations.

Constructive Sharing is Beyond the Scope of Section 624 Rulemaking

Section 214(b)(1) of the FACT Act requires the Commission to "prescribe regulations to implement section 624 of the" FCRA. The Commission is authorized and directed to write rules to implement the notice and opt-out requirement. If the Commission prescribes rules to limit conduct that is not addressed by section 624, such as by limiting the ability of an entity to market its affiliate's products or services to its own customers, those rules should not be viewed as implementing section 624 unless the language of section 624 was ambiguous. As discussed

above, the language of section 624 is plain and not ambiguous. As a result, if the final rule covers constructive sharing, that rule should not be viewed as implementing section 624. Wells Fargo believes that section 624 does not authorize the Commission to address constructive sharing.

The Final Rule Should Not Impose Responsibilities on a Financial Institution that Shares Eligibility Information with an Affiliate

The Proposed Rule would impose responsibilities on an entity that shares consumer report and certain transaction and experience information (referred to in the Proposed Rule as "eligibility information") with an affiliate. Specifically, proposed section 680.20(a) would require that if an entity communicates eligibility information to an affiliate, the affiliate may not use this information to make or send solicitations to consumers, unless first the entity provides the consumers notice and an opportunity to opt out, and the consumers do not opt out.

Wells Fargo believes that the final rule should not impose such a notice obligation on the entity that *shares* eligibility information with another affiliate. Section 624 of the FCRA does *not* establish a general restriction on the sharing of information with or among affiliates. Instead, section 624 only provides that an affiliate that *receives* eligibility information may not use this information to make marketing solicitations, absent an applicable exception, unless first the consumer is given notice and an opportunity to opt out. Specifically, section 624(a)(1) states that "[a]ny person that receives [eligibility information from an affiliate] may not *use* the information to make a solicitation for marketing purposes." The Commission acknowledges this exact point in the Supplementary Information. The Supplementary Information states that "[s]ection 624 governs the *use* of information by an affiliate, not the *sharing* of information with or among affiliates." In addition, the Supplementary Information states that section 624 "is drafted as a prohibition on the affiliate that receives [eligibility] information from *using* such information to send solicitations, rather than as an affirmative duty imposed on the affiliate that sends or communicates that information." Although the Commission emphasizes this point in the Supplementary Information, the Proposed Rule nonetheless would impose an affirmative duty to provide an opt-out notice on the entity that shares eligibility information. While affiliated companies may well decide among themselves that it is most efficient to have the affiliate that shares the information also provide the notice, there simply is no basis whatsoever in the statute to obligate that affiliate to do so.

Significantly, section 624 of the FCRA is covered by the FCRA private right of action provisions in sections 616 and 617. Under the Proposed Rule, an entity that shares eligibility information with an affiliate could be liable to a consumer if its affiliate uses this information to make a solicitation to the consumer and the entity first did not provide the consumer notice and an opportunity to opt out. By drafting the Proposed Rule as a prohibition on making certain solicitations unless the entity that shares the eligibility information provides an opt out notice, the Commission would create a basis for civil liability against the sharing entity under section 624.

As a result, under the Proposed Rule, an entity seeking to avoid exposure to civil liability would be required to pursue one of several courses of action before sharing eligibility information: require the affiliate to commit that it will not use the information for marketing purposes unless it provides the notice; always provide the notice before sharing eligibility information with an affiliate; or never share eligibility information. In many cases, none of these solutions is practical. Holding companies typically have shared customer information databases that can be accessed by each affiliate, and nothing in section 624 restricts their continued ability to maintain such databases. Even if the sharing entity contracted with its affiliates concerning the use of eligibility information, the entity nonetheless may be exposed to potential liability for negligent noncompliance if the affiliate used the information to make a solicitation to a consumer who had not received notice and an opportunity to opt out.

The only practical way to address the affiliate marketing limitation is by placing the sole duty to comply with section 624 on the affiliate using the information, as reflected in the statute itself. Moreover, because section 624 does not limit the ability of entities to share eligibility information with affiliates, by imposing duties on entities that share eligibility information, the Proposed Rule goes beyond the requirements of section 624 and unnecessarily would expose sharing entities to civil liability. The Proposed Rule is not consistent with the statutory language of, or the legislative intent behind, section 624. Wells Fargo believes that the final rule should not impose new duties on entities that share eligibility information with affiliates, as long as this sharing is permitted by section 603.

The Final Rule Should Not Require a Specific Entity to Provide the Notice

Wells Fargo also believes that the final rule should not require a specific entity to provide the notice, but only should require that the consumer receive a notice before an affiliate may make a solicitation to the consumer based on eligibility information received from another affiliate.

In this regard, the FCRA specifically contemplates that the affiliate receiving and using eligibility information to make marketing solicitations to consumers could provide the notice. Section 624(b) of the FCRA states that:

> A notice or other disclosure under this section may be coordinated and consolidated with any other notice required to be issued under any other provision of law ***by a person who is subject to this section***, and a notice or other disclosure that is equivalent to the notice . . . and that is provided ***by a person described in subsection (a)*** to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of subsection (a).

As a result, the Proposed Rule contradicts this plain, unambiguous language. The Commission correctly points out in the Supplementary Information that the FCRA does not specify which entity must provide the opt-out notice. This lack of specification of the party who must provide the notice, however, has no effect on the clear language of section 624(b) that the affiliate using

eligibility information received from an affiliate to make a marketing solicitation may provide the notice.

The Commission states that the FCRA and the FACT Act suggest that the notice should be provided by the entity that communicates the eligibility information. Specifically, the Commission states that section 624(a)(1)(A) requires that the notice disclose to the consumer that "information may be communicated" among affiliates for the purpose of making solicitations, which the Commission concludes suggests that the entity communicating the eligibility information must provide the notice. This statement, however, simply informs the consumer that an entity may make solicitations to the consumer based on information that it receives from an affiliate. Section 624 only provides that the consumer may opt out of the marketing use, and not the sharing, of eligibility information.

The Commission also notes that section 214(b)(3) of the FACT Act requires the Commission to consider existing affiliate sharing notification practices and provide for coordinated and consolidated notices. This provision does not imply that the entity sharing eligibility information with an affiliate *must* provide the notice. Congress only sought to ensure that the notice requirement would be consistent with existing disclosure practices and could be coordinated with other disclosures required by law. Requiring that the notice is provided before eligibility information received from an affiliate may be used to make a solicitation is fully consistent with coordination and consolidation with other notices, because it leaves that coordination to the institution or institutions providing the notices.

Wells Fargo believes that the final rule should not require any specific entity to provide the opt-out notice, but should only require that the consumer receive an opt-out notice that covers an affiliate's use of eligibility information for marketing purposes before a solicitation is made to the consumer. This approach would promote flexibility by allowing any affiliate to provide the notice. In addition, an affiliate may receive eligibility information without intending, or before deciding, to use this information to make solicitations. Allowing the entity that uses eligibility information to provide the notice would not require a determination to be made at the time the information is shared, or placed into a centralized database, whether later it will be used to make a solicitation. In addition, an entity that later decides to use this information for marketing would not be required to contact the affiliate that shared the information to have that affiliate provide the notice. Most importantly, allowing the entity that uses eligibility information received from an affiliate to provide the notice would be consistent with the plain language of section 624(b) of the FCRA.

Exceptions to the Section 624 Notice and Opt-Out Requirement

Proposed section 690.20(c) would list several exceptions to the notice and opt-out requirement that generally track the statutory exceptions in section 624(a)(4) of the FCRA. These proposed exceptions would provide that the notice and opt-out requirement does not apply when an entity uses eligibility information received from an affiliate: (1) to make or send solicitations to consumers with whom the entity has a pre-existing business relationship; (2) to perform services on behalf of an affiliate; (3) to respond to a communication initiated by a

consumer; and (4) to respond to an affirmative authorization or request by the consumer. Importantly, these proposed exceptions are listed in the disjunctive in both section 624 and the Proposed Rule. Nevertheless, Wells Fargo believes that the Commission should state specifically that if any one exception applies that section 624 and the final rule does not apply.

Pre-Existing Business Relationship Exception

Proposed section 680.20(c)(1) would provide an exception for a person that makes or sends a solicitation to a consumer with whom the person has a pre-existing business relationship. Proposed section 690.3(i) would define a "pre-existing business relationship" as a relationship between a consumer and a person that is based on one of three factors. First, a relationship based on a financial contract between the parties that is in force on the date that a solicitation is made or sent to the consumer would qualify as a pre-existing business relationship. Wells Fargo believes that the Commission should clarify that a "financial contract" includes any in-force contract relating to a financial product or service covered by title V of the GLBA.

Second, a relationship based on a consumer's purchase, rental or lease of the person's products or services, or a financial transaction with the person (including holding an active account or an in-force policy) during the 18 months preceding the date that a solicitation is made or sent to the consumer would qualify as a pre-existing business relationship. Although the Commission provides an example of an insurance policy in the Proposed Rule, it is not clear at what point the 18-month time period begins with respect to other transactions. Wells Fargo believes that the Commission should clarify that the 18-month period begins at the time that all contractual responsibilities expire. In addition, it is not clear what constitutes an "active" account that would qualify as a pre-existing business relationship. Any account with outstanding contractual responsibilities on either side of an account relationship should be considered to be an active account, regardless of whether individual transactions occur or do not occur under the account.

Third, a relationship based on a consumer's inquiry or application regarding the person's products or services during the three months preceding the date on which a solicitation is made or sent to the consumer would qualify as a pre-existing business relationship. The Commission states in the Supplementary Information that with respect to consumer inquiries, the FCRA definition is similar to the "established business relationship" under the amended FTC Telemarketing Sales Rule, which the Commission believes "suggests that it would be appropriate to consider the reasonable expectations of the consumer in determining the scope of this exception." As a result, the Commission concludes that "an inquiry includes any affirmative request by a consumer for information, such that the consumer would reasonably expect to receive information from the affiliate about its products or services." Additionally, the Commission states in the Supplementary Information that "[a] consumer would not reasonably expect to receive information from the affiliate if the consumer does not request information or does not provide contact information to the affiliate."

Wells Fargo believes that this "expectation" standard requires an entity receiving an inquiry to hypothesize the consumer's state of mind. Further, in the Supplementary Information

the Commission states that in order for a consumer's inquiry to result in a pre-existing business relationship, the consumer must both request information and provide contact information. In practice, either of these actions should be sufficient to evidence the consumer's expectation that he or she will receive a solicitation. In addition, these terms suggest that specific language must be used for an inquiry to lead to a pre-existing business relationship.

As proposed by the Commission, the expectation standard would severely limit the inquiries and applications that would establish a pre-existing business relationship. Section 624(d)(1)(C) of the FCRA contains no such limitation on the types of inquiries or applications that would comprise a pre-existing business relationship. Under section 624(d)(1)(C), if a consumer has made any inquiry or application within the preceding three months, the pre-existing business relationship exception applies. For example, if a consumer inquires to an entity concerning reasonably identifiable products or services or indicates interest in products, the affiliate that offers those types of products or services should be considered to have a pre-existing business relationship with the consumer.

Proposed section 680.20(d)(1) would provide examples of situations that would qualify and would not qualify as pre-existing business relationships. Proposed section 680.20(d)(1)(iii) states, for example, that if a consumer inquires about an affiliate's products or services and provides contact information for receipt of this information, the affiliate can use eligibility information to make the consumer a solicitation within three months. Although providing contact information may indicate that a consumer reasonably expects to receive solicitations, as noted above, this exception should not hinge on providing contact information or on the consumer's expectation. For example, in the context of an e-mail request, the contact information may be self-evident and the consumer may view it as unnecessary to provide that information a second time. Similarly, the return address on an envelope or the captured telephone number of a consumer requesting information about products or services should be sufficient even if the consumer neglects to provide his or her address or telephone number. Also, the consumer may simply believe that an affiliate will have access to his or her contact information (as will often be the case because of common customer databases) or that the entity with which the consumer already has a relationship will provide it to the affiliate.

Finally, the Commission specifically requests comment on whether there are additional circumstances that should be included within the definition of pre-existing business relationship. Wells Fargo believes that the term pre-existing business relationship should be defined to include relationships arising out of the ownership of servicing rights, a participation interest in lending and other similar relationships.

Servicing Exception

Proposed section 680.20(c)(3) would provide an exception for a person that uses eligibility information to perform services on behalf of an affiliate. Proposed section 680.20(c)(3) states that this exception is not to 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." The servicing exception is a stand-alone exception designed to clarify that any affiliate can provide marketing services to another affiliate. When providing such services, the servicing affiliate cannot use information if the affiliate that has requested the services could not use that information without first providing notice. Obviously, if another exception applies, this caveat to the servicing exception has no application whatsoever. This, again, demonstrates the importance of the Commission clarifying that the limitation in section 624(a)(4)(C) only applies to the servicing exception.

Consumer-Initiated Communications Exception

Proposed section 680.20(c)(4) would provide an exception for a person that uses eligibility information "[i]n response to a communication initiated by the consumer orally, electronically, or in writing." The Supplementary Information indicates that to be covered by the consumer-initiated communication exception, "use of eligibility information must be responsive to the communication initiated by the consumer." The Supplementary Information also states that if a consumer calls an affiliate to ask about the affiliate's products or services, only "solicitations related to those products or services would be responsive to the communication and thus permitted under the exception." The concept of "responsive" is subjective and encourages a narrow reading of this exception. Consumers may not be familiar with the various types of products or services that are available and may rely on the entity to inform the consumer about available options and to offer guidance concerning the products or services that would best suit the consumer's needs. In addition, a consumer may not be familiar with which affiliate offers a specific product or service. Moreover, an entity should not be limited in its ability to use eligibility information obtained from an affiliate to respond to a consumer who initiates a communication with that entity because that communication constitutes an inquiry which makes available an additional section 624 exception.

Moreover, the Proposed Rule's narrow concept of "responsiveness" contradicts the clear legislative history behind the consumer-initiated communication exception. The Senate bill, which went to the FACT Act Conference Committee to be reconciled with the House bill, included a narrower version of the consumer-initiated communication exception. Specifically, this Senate bill stated that the notice and opt-out requirement did not apply to a person "using information in ***direct*** response to a communication initiated by the consumer ***in which the consumer has requested information about a product or service***." This language, however, did not emerge from the Conference Committee and, as a result, was not included as part of the FACT Act as enacted. As a result, section 624(a)(4)(D) of the FCRA, as added by section 214 of the FACT Act, states that the notice and opt-out requirement does not apply to a person "using information in response to a communication initiated by the consumer." The fact that the more restrictive language of the Senate bill was not agreed to in the Conference Committee or included in the FACT Act as enacted demonstrates clear congressional intent not to limit the consumer-initiated communication exception in the manner proposed by the Commission.

The Proposed Rule would provide examples of the consumer-initiated communication exception. For example, proposed section 680.20(d)(2)(i) indicates that if a consumer initiates a call to a securities affiliate concerning its products or services and provides contact information,

the securities affiliate may use eligibility information from an affiliate to make solicitations in response to the call. Requiring that the consumer provide contact information suggests that the affiliate could not directly respond to the consumer's inquiry and make a solicitation over the phone on the same call. Rather, the affiliate would have to mail or e-mail a solicitation to the consumer. As in the case of the pre-existing business relationship exception, nothing in section 624 requires that a consumer's communication include the consumer's contact information in order for the exception to apply.

Proposed section 680.20(d)(2)(ii) would provide an additional example that if an affiliate makes an initial marketing call and leaves a message for the consumer to call back, the consumer's response is a communication initiated by the affiliate and not the consumer. Wells Fargo believes that a consumer's call is a communication "initiated" by the consumer, whether or not the consumer is responding to an affiliate's call or other communication, so long as the affiliate's message makes clear the purpose of the call. If an affiliate has left a message, the consumer is in a position to decide whether they want to return the call based on the product or service or the affiliate involved. If a consumer does not wish to receive a solicitation, he or she does not have to initiate a telephone call in response to the message. Moreover, by making the responsive inquiry, the consumer has triggered the pre-existing business relationship exception, and the requirements of section 624 no longer apply.

Consumer Affirmative Authorization or Request Exception

Proposed section 680.20(c)(5) would provide an exception for a person that uses eligibility information "[i]n response to an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation." This proposed exception does not follow the statutory language. Section 624(a)(4)(E) of the FCRA does not require the consumer's authorization or request to be "affirmative." The Proposed Rule and the Supplementary Information do not indicate how an authorization or request would be "affirmative," or the basis for adding this language, except to say that a preselected check box does not satisfy this requirement. Consumers are familiar with check boxes, and if a consumer has the ability to "unselect" a pre-selected check box, the exception should apply. More broadly, Wells Fargo believes that the exception should not be limited arbitrarily. A request or authorization can take many forms. Adding the requirement that a request or authorization be affirmative will only create uncertainty and needlessly complicate compliance.

The Commission should also make it clear that the authorization or request exception of proposed section 680.20(c)(5) applies to consumers who have previously opted out and during the thirty-day waiting periods of proposed section 680.22(b). An authorization or request under section 680.20(c)(5) is, in effect, a one-time "opt in" and should be controlling with respect to the particular situation in which it is given. Any other interprertation would result in the entity being unable to fulfill customer requests.

In addition, Wells Fargo believes that the Commission should clarify that a consumer's authorization or request does not have to refer to a specific product or service or to a specific provider of products or services in order for the exception to apply. As discussed above, the

exception should apply if the consumer's authorization or request concerns a type of product or service or a type of provider of products or services.

Grandfathering of Certain Eligibility Information

Proposed section 680.20(e) would provide that the notice and opt-out requirement does not apply to the use of eligibility information shared by an affiliate to make or send solicitations to consumers if "such information was received by" the affiliate prior to the mandatory compliance date. This proposed language differs from the corresponding provision in section 624. Section 624(a)(5) states that "the use of information to send a solicitation to a consumer [is not prohibited] if such information was received prior to the date on which persons are required to comply with regulations implementing this section." Section 624 does not limit the information that is grandfathered to eligibility information received by the affiliate that would use this information to make solicitations. Wells Fargo believes that the final rule should grandfather information that is received by any entity in a holding company, regardless of whether it has been shared with a specific affiliate or placed in a common customer database.

The Final Rule Should Not Define "Clear and Conspicuous"

Proposed section 680.20(a)(i) would require an entity that shares eligibility information with an affiliate to provide a consumer "a clear and conspicuous notice" that the consumer's information may be communicated to, and used by, an affiliate to make marketing solicitations to the consumer. Proposed section 680.3(c) would define "clear and conspicuous" as "reasonably understandable and designed to call attention to the nature and significance of the information presented." Wells Fargo believes that the Commission should not define "clear and conspicuous" in the final rule.

Wells Fargo believes that the proposed definition of "clear and conspicuous" would significantly increase the risk of civil liability to companies. As noted above, section 624 of the FCRA is covered by the private right of action provisions in sections 616 and 617. Consequently, the proposed definition would expose companies to liability, even if the opt-out notice is completely accurate and even if the consumer is not harmed. As a result, the inclusion of such a definition would foster litigation involving companies without a corresponding benefit to consumers. The perils of this approach, especially in instances where civil liability applies, were more fully discussed in the many comment letters to the FRB in response to its proposal to apply a similar definition of clear and conspicuous to Regulations B, E, M and Z. The resulting recognition of the problems with specifying what it means for information to be "clear and conspicuous" led the FRB to recently withdraw that proposal. Wells Fargo believes that the FCRA affiliate marketing rulemaking is not the appropriate forum to experiment further with defining "clear and conspicuous."

The Final Rule Should Permit Oral Notices

In the Supplementary Information, the Commission indicates that proposed section 680.20(a), which would require the affiliate providing eligibility information to provide

the consumer notice, "contemplates that the opt out notice will be provided to the consumer in writing or, if the consumer agrees, electronically." The Commission specifically requests comment on whether there are circumstances in which it is necessary and appropriate to allow an oral notice. Wells Fargo believes that the final rule should permit oral notices. If an entity communicates with a consumer in person, an exception does not apply and section 624 would require a notice to be provided in order to make solicitations using eligibility information received from an affiliate, the entity should be permitted to provide the consumer an oral notice so that the entity can determine whether or not to offer the consumer a product or service *at that time*. However, if the final rule only permits the entity that shares the eligibility information to provide the notice, the affiliate communicating in person with a consumer could not use eligibility information on the consumer in offering the product or service on that same call even if the consumer fully consents to the affiliate doing so; instead, the affiliate would be required to terminate the call, provide the notice in writing, and then later call the consumer again. Congress could not possibly have intended such a result.

The Final Rule Should Permit Financial Institutions to Allow the Consumer to Opt Out at the Time of the Transaction

Proposed section 680.22(a) would provide that before an affiliate may use eligibility information received from an entity, the entity "must provide the consumer with a reasonable opportunity, following the delivery of the opt out notice, to opt out." For example, proposed section 680.22(b)(1) would provide that an entity provides a consumer a reasonable opportunity to opt out if the entity "mails the opt out notice to a consumer and gives the consumer 30 days from the date [the entity] mailed the notice to elect to opt out by any reasonable means." Proposed section 680.22(b)(3), however, would permit an entity to provide a consumer the opt-out notice at the time of an electronic transaction "and request that the consumer decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction."

Wells Fargo believes that the final rule should permit an entity to provide the opt-out notice at the time of the transaction and provide the consumer with the opportunity to decide whether to opt out as a necessary step in proceeding with the transaction. Clearly, the opt-out decision is no more important than the consumer's decision on the transaction itself, and there is no reason why the consumer's decision cannot be made at that time.

The Final Rule Should Extend the Compliance Date

The Supplementary Information indicates that the mandatory compliance date will be included in the final rules. The Commission specifically requests comment on whether the mandatory compliance date "should be different from the effective date of the final regulations." Section 214(b)(4)(B) of the FACT Act provides that the regulations will become effective within six months after being issued in final form. Wells Fargo believes that the final rule should provide at least an additional three months for compliance for new accounts, *i.e.*, entitiess would be given at least nine months to comply with the notice and opt-out requirement after the rule is issued in final form. This additional compliance time would assist entities that must make

significant changes to programs, practices and procedures in order to comply with the final rule. Entities cannot design comprehensive compliance programs before the rules are issued in final form due to uncertainty surrounding the final language of the rules. This problem is illustrated by the many issues raised in this and other comment letters. Keep in mind, that it is not simply a question of designing the notice based on existing programs and practices. Entities will have to reprogram their systems and redesign their privacy notices before the notices may be sent.

In addition, the compliance deadline should take into account annual GLBA privacy notice obligations of financial institutions, and allow a gradual "roll-out" of the new FCRA opt-out notices so that they may be incorporated into the GLBA notices and schedule. Wells Fargo believes that many financial institutions will coordinate and consolidate the affiliate marketing notice with their annual GLBA privacy notice. Section 624 itself clearly contemplates such coordination. However, as a practical matter, the transition dates in section 624 are inadequate. Many GLBA notices are mailed after March of each year. Further, to the extent that the Proposed Rule is finalized later than the September date contemplated by the FACT Act, even more GLBA mailings for 2005 will have been provided. Accordingly, Wells Fargo believes that the Commission should allow those financial institutions that will consolidate the affiliate marketing notice with the GLBA notice for existing customers to begin to comply with the final rule at the time that those institutions provide their next GLBA notice following the mandatory compliance date or December 31, 2005, whichever is earlier. This "roll-out" would allow many financial institutions to coordinate and consolidate the affiliate marketing notice with their "next" GLBA privacy notice, if the institutions so choose, consistent with the statutory directive that the affiliate marketing notice be "coordinated and consolidated with any other notice required to be issued under any other provision of law." In addition, this "roll-out" would also benefit consumers who would receive both the affiliate marketing notice and the GLBA privacy notice together and, therefore, could make all of their privacy choices at the same time.

Exclusions from the Definition of "Solicitation"

Proposed section 680.3(j)(1) would define a "solicitation" as marketing initiated to a particular person that is "[b]ased on eligibility information" received from an affiliate and "[i]ntended to encourage the consumer to purchase" a product or service. Nevertheless, proposed section 680.3(j)(2) would exclude from the definition of "solicitation" "communications that are directed at the general public and distributed without the use of eligibility information."

Wells Fargo supports the Commission's determination that communications that are directed at the general public should not be considered solicitations. However, the Commission also should clarify that all communications that are directed at the general public do not qualify as solicitations, whether or not these communications were developed using eligibility information received from an affiliate. Section 624(d)(2) of the FCRA states that the term "solicitation" "does not include communications that are directed at the general public." The FCRA does not limit or qualify which communications directed at the general public are excluded. An entity should be permitted to use information received from affiliates to develop communications directed at the general public, including television ads. In addition, Wells Fargo

believes that the final rule should clarify that a marketing solicitation that is distributed without the use of eligibility information received from an affiliate does not constitute a solicitation.

The Final Rule Should Not Address Methods of Opt Out that are Not Reasonable or Simple

Proposed section 680.23(b) would provide examples of methods of opting out that are not reasonable or simple. Because of the potential for private litigation based on section 624, Wells Fargo believes that the final rule should not include these, or any other, examples of methods of opting out that are not reasonable or simple. The examples provided in proposed section 680.23(b), including requiring the consumer to write a letter to the entity, find no basis in section 624, which simply requires that the "the method provided [for opting out must] be simple." These examples are likely to be used in litigation to argue that companies are not meeting this standard.

"Affiliate" Should be Defined as Defined in GLBA

Proposed section 680.3(b) would define an "affiliate" as "any person that is related by common ownership or common corporate control with another person." The Supplementary Information indicates that this proposed definition "simplifies the various FCRA and FACT Act formulations [of the term affiliate]." Wells Fargo strongly supports the Commission's efforts to simplify this definition. Wells Fargo believes that the most effective way to simplify this definition will be to make it completely consistent with the definition of the same term in the GLBA rules. The interrelationship between the GLBA and the FCRA is difficult enough without having different definitions of affiliate.

Online Opt Outs are Not Always Feasible

Proposed section 680.23(a)(3) would provide that an entity provides a consumer a reasonable and simple method for opting out if the financial institution "[p]rovides 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." Conversely, proposed section 680.23(b)(3) would provide that an entity does not provide a consumer a reasonable and simple method for opting out if the entity "[r]equires 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." The Supplementary Information states that "a consumer who agrees to receive the opt out notice in electronic form only . . . should be allowed to opt out by the same or a substantially similar electronic form."

Wells Fargo believes that an entity should be permitted to allow consumers to opt out by telephone or by paper mail after receipt of an electronic notice where it is technically necessary to do so. In some instances, an entity may not technically be able to permit consumers to opt out online. In these situations, entities should not be limited to delivering opt-out notices by non-electronic means. The proposal to require electronic opt outs for electronic notices arbitrarily discriminates against the delivery of opt-out notices electronically; for example, entities providing opt-out notices by mail are not required to receive reply forms by mail.

The Final Rule Should Not Address "Sending" Solicitations

Throughout the Proposed Rule, the Commission refers to "making" or "sending" solicitations. For instance, proposed section 680.20(b) would prohibit an affiliate that receives eligibility information from using this information "to make or send" solicitations to a consumer. Wells Fargo believes that the Commission should remove all references to "sending" solicitations from the final rule. Section 624 of the FCRA only concerns the use of eligibility information to "make" solicitations and does not address "sending" solicitations. By referring to sending solicitations, the Proposed Rule would appear to apply the notice and opt-out requirement to servicers that send solicitations on behalf of another entity. Although it is not clear what the Commission believes "send" refers to, reference to "send" would be redundant if it only covered the same use as "make." If "make" and "send" are not synonymous, the Commission would be regulating conduct that is not addressed in section 624.

Wells Fargo is grateful for the opportunity to comment on the Proposed Rule. If you have any questions regarding our comments, please contact the undersigned at (415) 396-0940 or mccorkpl@wellsfargo.com.

Sincerely yours,

Peter L. McCorkell