August 12, 2004

Mr. Jonathan Katz
Secretary, Securities and Exchange Commission
450 5th Street, NW
Washington, DC 20549-0609

Re: File Number S7-29-04

Dear Mr. Katz:

The Coalition to Implement the FACT Act ("Coalition") submits this comment letter in response to the Proposed Rule ("Proposal") issued by the Securities and Exchange Commission ("Commission") regarding the affiliate marketing provisions included in Section 624 of Fair Credit Reporting Act ("FCRA") as amended by the Fair and Accurate Credit Transactions Act ("FACT Act"). The Coalition represents a full range of trade associations and companies that furnish and use consumer information, as well as those who collect and disclose such information. The Coalition appreciates the opportunity to comment on the Proposal.

Background

The FACT Act added a new Section 624 to the FCRA. In general, any person that receives from an affiliate information that would be a "consumer report" but for the exceptions to that definition in Section 603(d)(2)(A) ("Eligibility Information"), may not use the information to make a solicitation for marketing purposes to a consumer about its products or services unless it is clearly and conspicuously disclosed to the consumer that the information may be shared for purposes of making solicitations and the consumer is provided an opportunity and simple method to opt out of receiving such solicitations. The FCRA states that a consumer's opt out must be effective for at least five years, although the consumer can extend the opt out in certain circumstances. Section 624 also provides several instances in which Section 624 will not apply. Congress provided that a notice required by Section 624 may be coordinated and consolidated with any other notice that must be provided to the consumer by law, such as the privacy notice required by the Gramm-Leach-Bliley Act ("GLBA").

Benefits of Affiliate Sharing

In a recent report to Congress titled "Security of Personal Financial Information," the Treasury Department concluded that "the sharing of information [including among affiliates]…has increased the access of more consumers to a wider variety of financial services, at lower costs, than ever before." This conclusion is not surprising. In fact, one of the primary drivers behind the enactment of the GLBA was that consumers would benefit from increased products at lower costs that result from the synergies of affiliate relationships permitted as a result of the GLBA.

What is sometimes less understood is reasons why affiliated companies can provide consumers with increased access to products at lower costs. Although there are several reasons

for this key consumer benefit, one critical reason is that affiliates are able to leverage existing relationships and delivery mechanisms to inform consumers about new or improved products in a more targeted and efficient manner than would otherwise be available. For example, affiliated companies, through their distinct and separate relationships with a single consumer, can better understand the needs or desires of that consumer and develop marketing materials based on that consumer's existing behavior. In this regard, a mortgage lender affiliated with a bank and an insurer could provide a consumer with an opportunity for a lower cost home-equity loan if the mortgage lender knows that the consumer has homeowners' insurance with the insurer and a higher cost personal line of credit with the bank. The mortgage lender affiliate in this example is able to leverage the consumer's existing relationships with its affiliates to provide a specialized product to the consumer in which the consumer is likely to have an interest. The mortgage lender's costs of acquisition and product delivery are also reduced as a result of more targeted marketing and the ability to use existing product delivery mechanisms. Therefore, the mortgage lender can afford to provide the product at a lower cost to the consumer in order to obtain a competitive advantage in the marketplace. As the Treasury Department noted, consumers are the true beneficiaries of these synergies in the form of both increased access to products and lower costs.

The Coalition believes it is important to recite the benefits associated with the sharing of information among affiliates for marketing purposes. Congress clearly did not intend to reduce these benefits unnecessarily so shortly after the GLBA was enacted. Rather, Congress simply wished to grant consumers additional control over the types of marketing they receive as a result of the sharing of Eligibility Information. We urge the Commission to consider its Proposal in this light.

In General

The Coalition believes that Section 624 of the FCRA is relatively specific and precise with respect to the obligations it imposes. For example, Section 624 of the FCRA imposes limitations on a person who receives Eligibility Information ("Receiving Affiliate"). Specifically, the Receiving Affiliate cannot make a solicitation for marketing purposes based on a receipt of Eligibility Information from another affiliate ("Disclosing Affiliate") unless the consumer receives a notice and opportunity to opt out of receiving such solicitations. The clarity provided in the statute was the result of careful deliberation by Congress, and the statutory language reflects a clear congressional intent in most instances. Although the Coalition believes the Proposal includes many provisions that reflect the statutory requirements and the congressional intent, we respectfully suggest that the Proposal should be modified to reflect more accurately the plain language of the statute. The clarity provided by Congress with respect to Section 624 stands in contrast to the more general rulemaking directives provided by Congress in other provisions of the FACT Act. The Coalition believes that a final rule ("Final Rule") that adheres closely to the statutory language will, in most instances, provide clear guidance to those subject to the Final Rule and provide the necessary protections to consumers.

Examples (§ 247.2)

The Proposal states that "[t]he examples in [the Proposal] are not exclusive. The examples in this part provide guidance concerning the [Proposal's] application in ordinary circumstances." The Coalition applauds the Commission for providing guidance in the Proposal in the form of examples. We believe that the use of examples can be illustrative for persons seeking to comply with the Final Rule, and we urge the Commission to retain the use of examples in the Final Rule. However, we are concerned that the Commission has stated that the examples in its Proposal would not provide a safe harbor for those who comply with them. This approach differs from that taken by the Federal Trade Commission ("FTC") and the federal banking agencies (collectively, the "Other Agencies") in their similar proposed rules. We strongly urge the Commission to reconsider its approach. We believe it would be unsupportable that a company could adhere to an example provided by the Commission in the same circumstances described by the Commission, but that the Commission could find the company in violation of the Final Rule nonetheless. Failure to provide a safe harbor also creates room for the plaintiffs' bar to file frivolous lawsuits alleging noncompliance with Section 624 of the FCRA despite compliance with the examples. Therefore, we urge the Commission to provide a safe harbor to the extent a company complies with an example in the Final Rule.

Definitions (§ 247.3)

"Clear and Conspicuous"

The Proposal requires that the consumer receive a "clear and conspicuous" notice of certain information. Under the Proposal, "clear and conspicuous" means "reasonably understandable and designed to call attention to the nature and significance of the information presented." The Supplementary Information provides detailed guidance with respect to how a person can make the required notice "clear and conspicuous." The guidance provided in the Supplementary Information is similar to language that had been proposed by the Federal Reserve Board ("Board") in its proposal to redefine "clear and conspicuous" under several other regulations and is similar to the definition of "clear and conspicuous" in the GLBA Rule.

The Coalition believes that the Commission has based its definition of "clear and conspicuous," at least in part, on the definition provided under the GLBA Rule and the Board's proposal to redefine "clear and conspicuous" in other contexts. We do not believe that either of these circumstances provides an appropriate model for the Proposal. For example, the GLBA Rule is predicated on enforcement solely through administrative action—not private rights of action. However, in providing a similar definition to "clear and conspicuous" in the Proposal and the Supplementary Information, the Commission will have created significant liability concerns for entities subject to Section 624, including class action liability. The practical reality of the Proposal would be that the plaintiffs' bar will view the Commission's definition and extensive official guidance as required elements of a "clear and conspicuous" disclosure. Entities seeking to avoid class action liability with respect to this requirement will feel pressured to treat the Supplementary Information as substantive requirements. We also note that the Board has officially withdrawn its proposal with respect to redefining "clear and conspicuous" in the context of other regulations. The Board withdrew the proposal in response, at least in part, to concerns about the compliance burdens and litigation risks generated by its proposal.

The Coalition requests that the Commission delete the definition of "clear and conspicuous" in its Final Rule. Not only would this mitigate the compliance and litigation concerns described above, but we do not believe a definition is necessary to ensure that consumers receive a clear and conspicuous notice as required under Section 624 of the FCRA. In this regard, a similar "clear and conspicuous" affiliate sharing notice and opt-out requirement has operated in the FCRA for several years without a regulatory definition of "clear and conspicuous." The Commission has not provided any evidence that entities have not properly complied with this requirement, nor has it been the subject of significant litigation.

If the Commission feels compelled to provide "specific guidance," as described in Section 624(a)(2)(B) of the FCRA, with respect to how an entity may comply with the requirement to provide a clear and conspicuous notice, we request that the Commission provide such guidance in a manner similar to how it provides guidance for the requirement that the notice be "concise." Specifically, the Commission notes that "concise" means only "reasonably brief". Therefore, it would appear that the Commission does not believe that the detail provided with respect to what could be "clear and conspicuous" is necessary for purposes of meeting the direction provided under Section 624(a)(2)(B). If guidance for "clear and conspicuous" is retained, we ask that it be given in a manner similar to that given for "concise," such as describing it as meaning "reasonably understandable" or "readily understandable."

"Eligibility Information"

Section 624 of the FCRA pertains to the use of "information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A)" of the FCRA. Therefore, in order to be covered under the statute, the information would need to meet the "baseline" definition of a consumer report, *i.e.*, bear on certain qualities such as credit worthiness *and* be collected, used, or expected to be used for certain eligibility determinations. Information that does not meet *both* of these criteria would not be covered by the statute.[1] We are pleased that the Commission has reflected this concept in the Supplementary Information.

The Commission, in its Proposal, intends to use the term "eligibility information" to describe information that would be a consumer report but for the exceptions in Section 603(d)(2)(A) of the FCRA. We applaud the Commission for defining the term in a manner that does not alter the scope of the statutory language. However, unlike the Other Agencies, the Commission omits from its Supplementary Information that the "term 'eligibility information' is designed to facilitate discussion, and not to change the scope of information covered by section 624(a)(1) of the" FCRA, including the fact that the information would need to meet the baseline definition of a consumer report. While we do not believe that the term, as defined, necessarily expands the statutory scope of the term, we are concerned that the Commission's divergence from the Other Agencies in this regard may signal some other interpretation. We urge the Commission to clarify this issue. We also believe the Commission should retain a relatively simple term, such as "eligibility information," to describe the information covered by the Final Rule. The Coalition believes that a simpler approach is appropriate for purposes of

[1] We note that not all such information would be covered by Section 624 of the FCRA, such as information that is excluded from the definition other than as provided under Section 603(d)(2)(A).

understanding the Final Rule, and that using the more complicated language of the statute is not necessary.

"Marketing Solicitation"

The FCRA prohibits an affiliate from using Eligibility Information to make a "solicitation" for marketing purposes to a consumer unless the consumer receives a notice and opportunity to opt out. Congress defined a "solicitation" as "the marketing of a product or service initiated by a person to a particular consumer that is based on an exchange of [Eligibility Information from one affiliate to another], and is intended to encourage the consumer to purchase such product or service, but does not include communications that are directed at the general public or determined not to be a solicitation by the regulations prescribed" by the Commission. The basic definition of a "marketing solicitation" generally restates the statutory definition.[2]

The Proposal includes a provision intended to exclude marketing directed at the general public from the definition of a "marketing solicitation." We applaud the Commission for distinguishing such marketing from "solicitations" as that term is used in Section 624 of the FCRA, and for excluding television, magazine, and billboard advertisements from the definition. Not only did Congress not intend to cover marketing directed at the general public, but it would also be impossible to allow consumers to opt out of receiving such marketing messages. The Coalition believes, however, that the Proposal has inadvertently misstated the types of marketing that would not be a "marketing solicitation." In this regard, the Proposal states that it would "not include communications that are directed at the general public *and* distributed without the use of eligibility information communicated by an affiliate." (Emphasis added.) In short, we believe marketing should be excluded if it is directed at the general public *or* if it is distributed without the use of Eligibility Information. The statute defines a "solicitation" as marketing "to a particular consumer that is based on an exchange of [Eligibility Information from one affiliate to another]." In other words, if the marketing is not "to a particular consumer" *or* if it is not based on use of Eligibility Information, it would not be a solicitation. We ask the Commission to amend the Proposal accordingly.

The Commission also solicits comment on "whether, and to what extent, various tools used in Internet marketing, such as pop-up ads, could constitute marketing solicitations as opposed to communications directed at the general public." The Coalition strongly urges the Commission to avoid discussion of particular Internet marketing practices. We believe the Proposal provides sufficient clarity with respect to its applicability that further discussion of particular delivery mechanisms would be counterproductive. Furthermore, we do not believe Congress intended for "special" provisions to apply to Internet advertising relative to other advertising mechanisms. Therefore, we request that the Commission refrain from specifically addressing the various ways advertisements may be made on the Internet.

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[2] The definition includes a reference to "such product or service" in (j)(1)(ii), however no product or service is mentioned previously in the definition. The Commission should probably amend the definition in (j)(1) to more closely mimic the statute and read "Solicitation means marketing *of a product or service*" to clarify the reference in (j)(1)(ii).

"Pre-Existing Business Relationship"

The concept of a "pre-existing business relationship" is critical to Section 624 of the FCRA. In this regard, the section does not apply to a person using Eligibility Information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship. Therefore, a Receiving Affiliate could use Eligibility Information to make a solicitation to a consumer with whom it has a pre-existing business relationship, regardless of whether the consumer has received a notice and opportunity to opt out.

For purposes of Section 624, the statute defines a "pre-existing business relationship" to be "a relationship between a person, or a person's licensed agent, and a consumer, based on—

> "(A) a financial contract between a person and a consumer which is in force;
>
> "(B) 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 the consumer is sent a solicitation covered by [Section 624];
>
> "(C) 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 the consumer is sent a solicitation covered by this section; or
>
> "(D) any other pre-existing customer relationship defined in the regulations implementing [Section 624]."

We believe that the plain language of the statute provides sufficient guidance to the Commission in defining this term. Indeed, the Commission has included much of the statutory language in the Proposal, and we urge that such language be retained in the Final Rule.

The Coalition is concerned, however, that the Commission has deleted an important component of the statutory definition of a "pre-existing business relationship." In particular, the FCRA states that such a relationship includes a relationship between "a person, *or a person's licensed agent*, and a consumer" based on certain interactions. (Emphasis added.) However, the definition in the Proposal does not include the concept that the relationship can be between a person's licensed agent and the consumer. The Commission provides no explanation for this omission, and we assume it to be inadvertent. We strongly urge the Commission to define a "pre-existing business relationship" as one including a relationship between a person's licensed agent and the consumer. Not only was this the clear and unambiguous intent of Congress, but such a definition is important to allow certain entities to continue to provide full-service treatment to their customers.

The Commission has indicated its desire to interpret the definition of "pre-existing business relationship" in a manner consistent with the similar concept (an "established business relationship") embodied in the FTC's Telemarketing Sales Rule ("TSR"). Under the TSR, an

"established business relationship" remains for 18 months after the purchase, rental or lease, or other financial transaction between the customer and seller. According to the FTC in the TSR's Supplementary Information, "[i]n instances where consumers pay in advance for future services (*e.g.*, purchase a two-year magazine subscription or health club membership), the seller may claim the exemption for 18 months from the last payment or shipment of the product." The FTC correctly reasoned that "[f]or such ongoing relationships, it makes little difference to likely consumer expectations whether the purchase was financed over time or paid for up front." We agree with this interpretation, and we urge the Commission to adopt it explicitly in the Final Rule.

The Coalition also requests the Commission to clarify the application of a "pre-existing business relationship" with respect to certain types of transactions. For example, if a consumer purchases a product, the consumer would have a pre-existing business relationship with the seller of that product, as well as with the manufacturer of that product (if the manufacturer and seller are two different entities). In this regard, the consumer purchased services from the seller and goods of the manufacturer. We submit that the pre-existing business relationship would continue with the manufacturer. One example of this continuing relationship is in instances where the manufacturer provides a warranty on the product purchased by the consumer. An application of this clarification could involve the purchase of a car. If a consumer buys a car, the consumer would have a relationship with the auto dealer as well as the car manufacturer. The manufacturer while not a direct seller of its product to the consumer nevertheless has an ongoing relationship with the consumer well after the vehicle is first obtained from the franchised dealer. The relationship includes warranty obligations, recalls, and other communications relevant to the safety and use of the vehicle whether carried out directly or through its franchised dealer. In this relationship, the determination of the time at which the 18 month period begins should be based on a consideration of when all ongoing relationships between the buyer and the manufacturer cease. In this regard, it seems intuitive that the consumer expects a continuing relationship not only with the auto dealer, but also with the company that is providing the consumer with warranty coverage, recall notices, and other important product information on a continuing basis.[3]

We also ask the Commission to reconsider its guidance in the Supplementary Information with respect to the exception pertaining to inquiries or applications regarding a product or service offered by that person during the 3-month period preceding the solicitation. Specifically, the Commission states that an "inquiry" for purposes of the Proposal would be "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. For example, a consumer would not reasonably expect to receive information from the affiliate if the consumer does not

[3] If the Commission is unwilling to provide this clarification, we ask that the Commission work with the Other Agencies to use the authority under Section 624(d)(1)(D) of the FCRA to recognize that a pre-existing business relationship exists for the purposes of the FCRA with the auto dealer and the car manufacturer in connection with a consumer's purchase of a new car, and that the relationship continues with the entity that provides warranty coverage or similar continuing service as discussed above. Such an exception would be consistent with consumers' expectations. The exception is also similar in concept to the exception provided for licensed agents—although auto dealers are not the licensed agents of manufacturer they are the entity with which the consumer conducts transactions related to the purchase of a vehicle.

request information or does not provide contact information to the affiliate." We strongly urge the Commission to delete this concept from the Final Rule.

Congress was specific when it described the types of inquiries that would suffice for purposes of establishing a "pre-existing business relationship." First, the statute states that the inquiry must be "regarding a product or service offered by that person." Second, the inquiry must be made "during the 3-month period immediately preceding" the solicitation. Therefore, it appears that Congress specified the types of inquiries that would constitute a "pre-existing business relationship." Had Congress intended to further define such inquiries, it could have done so. Furthermore, had Congress intended to have the Commission narrow the types of inquiries for purposes of the definition, it could have done so. Indeed, the next subparagraph in the statute grants the Commission the authority to *expand* the definition of a "pre-existing business relationship." We are not aware of any statutory evidence suggesting Congress intended the Commission to narrow the scope of the definition, nor is there a statutory basis for the Commission to do so.

The Coalition is also concerned that the Commission has established a standard in the Proposal, *i.e.*, that the inquiry is such that "the consumer would reasonably expect to receive information from the affiliate about its services," that creates unnecessary uncertainty for entities wishing to comply with the law. Whether or not a consumer would "reasonably expect to receive information" is an inherently subjective standard that will be subject to varying interpretations, including those of the plaintiffs' bar.

The Commission states that, apparently in all circumstances, "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." If the Commission decides to narrow the exception provided in the statute, we urge the Commission to delete its examples of when a consumer would not reasonably expect to receive information from an affiliate. In this regard, a consumer may not necessarily request information in order to expect to receive information about products or services. For example, a consumer may call to express dissatisfaction with the features of a particular product. It would not seem unreasonable to provide information to the consumer about other products that may be a better fit for the consumer, even if the consumer did not specifically request such information. It is also not appropriate to assume that a consumer will provide contact information to signify that the consumer reasonably expects to receive information. For example, a consumer with a bank account may call the bank's credit card affiliate and reasonably assume, or even expect, the affiliate to have access to the relevant contact information. The consumer may not provide contact information in this circumstance. However, in no way should that be an indicia of whether or not the consumer would reasonably expect to receive information from the affiliate.

Duties of the Disclosing Affiliate (§ 247.20(a))

In General

Congress amended the FCRA to prohibit a Receiving Affiliate from using Eligibility Information to make a solicitation unless the consumer has received a notice and opportunity to

opt out. The FCRA, however, does not impose any direct obligation on a specific party to provide the consumer with a notice and opportunity to opt out. Rather, the statute imposes liability only on the Receiving Affiliate if it uses Eligibility Information to make a solicitation without the consumer having received a notice and opportunity to opt out. Therefore, under the plain language of the statute, the Disclosing Affiliate, the Receiving Affiliate, or any other party could provide the consumer with such notice and opportunity to opt out. This construction provides flexibility to diversified entities to determine how best to provide the consumer with a notice and opportunity to opt out.

In contrast to the statutory language, the Proposal imposes a requirement on a specific entity to provide the consumer with a notice and opportunity to opt out. In particular, the Proposal requires the Disclosing Affiliate to provide a consumer with a notice and a reasonable opportunity to opt out before the Receiving Affiliate can use Eligibility Information to make a solicitation. The Commission explains that "the statute does not specify which affiliate must provide an opt-out notice to the consumer. The [Proposal] would resolve this ambiguity by imposing certain duties on the communicating affiliate and certain duties on the receiving affiliate."

The Coalition respectfully suggests that the Commission has mistaken the congressional intent to provide flexibility with respect to the notice and opt-out process, and the focus on the Receiving Affiliate's duties, as "ambiguity." The statute is not ambiguous. In fact, the plain language of the statute imposes duties and liability solely on the Receiving Affiliate. The statute does not impose a duty on a specific party to provide the notice, nor does it need to do so in order to operate as intended. We strongly believe that the Final Rule should reflect the obligations imposed under the statute, and therefore we ask that the Commission delete any obligation on a specific party to provide the notice and opportunity to opt out to the consumer. There is simply no statutory authority to impose liability on the Disclosing Affiliate.

"Constructive Sharing"

In the Supplementary Information the Commission explains situations in which Section 624 of the FCRA, and therefore the Proposal, would not be implicated. For example, the Commission states that the "requirements of notice and opt-out would only apply if a receiving affiliate uses eligibility information for marketing purposes. Thus, the requirements of [the Proposal] would not apply if no eligibility information is communicated to affiliates, or if no receiving affiliate uses eligibility information to make marketing solicitations." The Coalition agrees with this interpretation, and we hope the Commission will retain it in the Final Rule.

The Commission asks for comment on what it terms "constructive sharing." The Supplementary Information explains that the Proposal "would not apply if, for example, a financing company affiliated with a broker-dealer asks the broker-dealer to include financing-company marketing materials in periodic statements sent to consumers by the broker-dealer without regard to eligibility information." The Coalition agrees. However, the Commission also invite[s] comment on whether, given the policy objectives of section 214 of the FACT Act, [the Proposal] 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 Commission] request[s] commenters to consider the applicability of [the Proposal] in the following circumstances: A consumer has a relationship with a broker-dealer, and the broker-dealer is affiliated with a financing company. The financing company provides the broker-dealer with specific eligibility criteria, such as consumers having a margin loan balance in excess of $10,000,[4] for the purpose of having the broker-dealer make solicitations on behalf of the financing company to consumers that meet those criteria. Additionally, the consumer responses provide the financing 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.

The Coalition believes that the plain language of the statute, which also clearly defines the congressional policy objectives, dictates that the scenario described by the Commission would not be subject to Section 624 of the FCRA. In this regard, the law states simply 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 [Section 603(d)(2)(A) of the FCRA], may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless" the consumer receives a notice and opportunity to opt out. Therefore, there must be an exchange of Eligibility Information among affiliates and the Receiving Affiliate must use that information to make a solicitation in order for Section 624 to apply. There must also be a "solicitation" which, by statutory definition, is marketing based on the use of Eligibility Information by the Receiving Affiliate.

As a primary matter, there is no exchange of Eligibility Information among affiliates in the example provided by the Commission. In fact, it is *the consumer* who provides information to an affiliate that may reveal that the consumer has a $10,000 margin loan balance. Furthermore, information provided by a consumer about the consumer does not meet the "baseline" definition of a consumer report, and therefore the information provided to the finance company in the Commission's example is not Eligibility Information.

Furthermore, in order for Section 624 to apply, the Receiving Affiliate must make a "marketing solicitation." However, a "marketing solicitation" is marketing made based on the use of Eligibility Information. In the Commission's example, the marketing sent to consumers cannot be a solicitation, since it was not made based on the Receiving Affiliate's use of Eligibility Information.

Assuming, strictly *arguendo*, that a communication of information from the consumer to the finance company should be deemed to be a communication of Eligibility Information from the broker-dealer to the finance company, the Proposal would still not apply. In order for Section 624 of the FCRA to apply, the Receiving Affiliate must use Eligibility Information obtained from the Disclosing Affiliate to make a solicitation for its own products or services to the consumer. However, in the Commission's example, the Receiving Affiliate (the finance company) did not use Eligibility Information to make

[4] The Coalition notes that the example does not provide sufficient information to determine whether the margin loan balance would necessarily be Eligibility Information.

the solicitation. The finance company did not receive the Eligibility Information, to the extent it does at all, *until after the solicitation had been made and the consumer responded.*

The Coalition also notes that the example provided by the Commission would be expressly exempt from coverage under the statute. One of the exceptions to the notice and opt-out requirements is the use of Eligibility Information in response to a communication initiated by the consumer. In the Commission's example, there is no exchange of Eligibility Information between affiliates. To the extent there is any exchange of information, it does not take place until the consumer initiates a communication with the finance company in response to the marketing material. Said differently, if the consumer does not respond, there is simply no conceivable argument to suggest that the finance company receives Eligibility Information. In essence, the finance company does not receive, *and therefore cannot use*, Eligibility Information until the consumer initiates a communication with the finance company. Therefore the notice and opt-out requirements would not apply in the Commission's example because the finance company is using Eligibility Information only in response to the communication initiated by the consumer.

Form of Notice

Section 624 of the FCRA requires simply that "it is clearly and conspicuously disclosed to the consumer that [Eligibility Information] may be communicated among" affiliates. The FTC, although not the Commission, notes in its Supplementary Information to its proposed rule implementing Section 624 of the FCRA that "nothing in Section 624 of the [FCRA] requires that the notice be provided in writing." The FTC is correct. Yet, also according to the Commission, the Proposal "contemplates that the opt-out notice will be provided to the consumer in writing or, if the consumer agrees, electronically." The Commission, however, seeks comment on whether "there are circumstances in which it is necessary and appropriate to *allow* an oral notice." (Emphasis added.)[5]

The Coalition respectfully notes that the question of whether an oral notice is permitted has been answered by Congress. In this regard, it has already been noted that "nothing in Section 624 of the [FCRA] requires that the notice be provided in writing." Furthermore, Congress modeled the notice requirement in Section 624 of the FCRA on the notice requirement in Section 603(d)(2)(A)(iii) of the FCRA that excludes certain information from the definition of a "consumer report" "if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among" affiliates. In using this language in the FACT Act, Congress recognized that companies currently comply with Section 603(d)(2)(A)(iii) by providing oral notices, and intended for the same result now and in the future when it enacted the same language in Section 624 of the FCRA.

[5] Despite noting that there is nothing in Section 624 of the FCRA that requires the notice to be given in writing, the FTC includes similar substantive provisions with respect to oral notice in its proposal.

The Commission appears to express some concern with respect to oral notices by asking whether "an oral notice could satisfy the statutory 'clear and conspicuous' standard." The Coalition believes that, like with written notices, compliance with a "clear and conspicuous" requirement is a fact-based inquiry and that oral notices can meet this objective. Indeed, we are unaware of problems relating to existing notices being provided under the FCRA not meeting a "clear and conspicuous" standard simply because they are provided orally. Furthermore, the Coalition respectfully notes that there are many other instances in which "clear and conspicuous" requirements have been imposed in connection with other oral notices, such as some provided under the TSR. We are not aware of any difficulties the Commission or others have had in enforcing existing "clear and conspicuous" requirements with respect to other oral notices.

Duties of the Receiving Affiliate (§ 247.20(b))

The Proposal states that "[i]f you receive eligibility information from an affiliate, you may not use the information to make or send marketing 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." With the exception of the reference to paragraph (a), we believe this portion of the Proposal reflects the true intent of Congress with respect to the duties and obligations imposed under Section 624 of the FCRA. With the inclusion of this portion of the Proposal, the Commission does not need to impose duties on the Disclosing Affiliate. We therefore urge the Commission to retain this provision while deleting the reference to paragraph (a).

Exceptions and Examples of Exceptions (§ 247.20(c) and (d))

Section 624 of the FCRA includes several circumstances in which Section 624 does not apply. The Proposal includes variations on these exceptions, most of which we address below.

Pre-Existing Business Relationship

The Proposal would not apply if the Receiving Affiliate uses Eligibility Information "to make or send a marketing solicitation to a consumer with whom [the Receiving Affiliate] ha[s] a pre-existing business relationship." This exception is consistent with the statutory language in the FCRA. We have provided detailed comments on the definition of a "pre-existing business relationship" above. Otherwise, we urge the Commission to retain this exception in the Final Rule as proposed. The Coalition also generally concurs with the Commission's examples of a "pre-existing business relationship," with the exception of the example provided in § 247.20(d)(iii). As discussed above, we do not believe the Commission has interpreted the statute's intent correctly with respect to whether a consumer must provide contact information as part of an inquiry in order for a pre-existing business relationship to have been established.

Service Providers

Section 624 of the FCRA does not apply to a person "using information to perform services on behalf of another [affiliate], except that this [exception] shall not be construed as permitting a person to send solicitations on behalf of another person, if such other person would not be permitted to send the solicitation on its own behalf as a result of" the consumer opting out. This exception is intended to allow a company to use its own affiliates to perform services that the company could perform itself. Congress ensured that a company could not circumvent the requirements of the statute by having an affiliate send the solicitation on the company's behalf if the company could not send the solicitation itself as a result of the consumer's opt out.

We believe the Proposal implements this exception in a manner that causes unnecessary confusion. In this regard, although the exception applies only to using information to perform services on behalf of another, the Proposal discusses issues related to marketing consumers on one's own behalf. We believe that the clarification of the exception should be no broader than the exception itself, and we urge the Commission to revise this provision accordingly.

Communications Initiated by the Consumer

Another exception to the requirements in Section 624 is the use of Eligibility Information "in response to a communication initiated by the consumer." The plain language of the Proposal appears to implement the exception as intended by Congress. However, the Proposal states that the communication must be initiated "orally, electronically, or in writing." We agree that most, if not all, communications will be initiated orally, electronically, or in writing. However, the Coalition is not aware of any reason to limit the communication to one of the listed methods. Indeed, to limit the scope of the exception to oral, electronic, or written communications may create unnecessary compliance questions, either now or in the future. Therefore, we suggest deleting the words "orally, electronically, or in writing".

Although the language of the Proposal itself appears to implement the statutory exception, the Commission's discussion of this exception in the Supplementary Information suggests otherwise. In particular, the Commission states that "[t]o be covered by the proposed exception, any use of eligibility information would need to 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 could not use eligibility information to make marketing solicitations to the consumer about specific products because those solicitations would not be responsive to the consumer's communication." The Commission further opines that "[t]he time period during which marketing solicitations remain responsive to the consumer's communication would depend on the facts and circumstances."

The Coalition strongly urges the Commission to reject this interpretation in the Final Rule. First, we do not believe that the Commission's interpretation implements the statutory language or the congressional intent of the law. As noted above, the exception

applies to the use of information in response to a communication initiated by a consumer. Congress did not impose an additional qualifier, such as the Commission has proposed, because the exception recognized that responses to consumer inquiries are not interruptions or intrusions into the consumer's routine, and therefore not of the type regulated under Section 624 of the FCRA. The end result will not be a reduction of interruptions in the consumer's life, but a reduction in opportunities to learn of better products or lower costs.

We are also concerned that the Commission's interpretation creates a vague standard that will subject companies to inappropriate compliance risk. The Commission does not provide a clear definition of what will be "responsive" to the consumer, nor can it. The determination will vary by the facts and circumstances. However, if the Commission retains this interpretation, a company can never be certain that it will be in compliance with the law. Furthermore, the standard proposed by the Commission will not necessarily lend itself to customer service scripts and other methods of employee training. Therefore, companies may be discouraged from making use of the exception granted by Congress for fear that customer service representatives do not know how to comply with the Commission's interpretation.

The Supplementary Information also includes the Commission's view that if an affiliate calls the consumer and leaves a message for the consumer to call back, and the consumer calls the affiliate back, the consumer's call would not constitute a communication initiated by the consumer. We disagree. If the consumer decides to initiate contact with a company, the exception should apply. A call by a consumer is a communication initiated by the consumer, regardless of whether the consumer is responding to a television advertisement to "Call now!," or whether he or she is responding to a voice mail urging the same action. The fact that the consumer has decided to call the affiliate is sufficient for purposes of the statute. It would seem the consumer has ample opportunity to "opt out" of any solicitation from the affiliate by not picking up the telephone and calling the affiliate.

Solicitations Authorized or Requested by the Consumer

Congress provided an exception to the notice and opt-out requirements of Section 624 of the FCRA if the Receiving Affiliate uses Eligibility Information for "solicitations authorized or requested by the consumer." In other words, Congress stated that if a consumer authorizes or requests the solicitations, a Receiving Affiliate's use of Eligibility Information to make such solicitations would not be governed by Section 624.

Although the statute provides only that the solicitations be "authorized" or "requested" by the consumer for the exception to apply, the Proposal requires that there be "an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation." The Commission further explains in the Supplementary Information that "a pre-selected check box would not constitute an affirmative authorization or quest. [The Commission] also would not consider boilerplate language in a disclosure or contract to constitute affirmative authorization."

The Coalition believes that the Proposal has inappropriately limited the scope of the exception provided in the plain language of the statute. In this regard, Congress specified that the consumer need only authorize or request the solicitations. Had Congress intended to create a more limited exception, such as requiring that the authorization or request be provided in a specific manner, it could have done so. In fact, by declining to specify how the authorization or request should be presented by the consumer, Congress did not intend to narrow the scope of the exception. We do not believe it is appropriate for the Commission to do so arbitrarily. Furthermore, as discussed in greater detail below in connection with the "opt in" example in § 247.22, the Commission has declared that the resolution of what constitutes consumer's consent, at least in the context of the GLBA Rule, "is appropriately left to the particular circumstances of a given transaction." We are unaware of any policy distinction with respect to Section 624 of the FCRA, or any compliance issues arising under the GLBA Rule, to alter the Commission's prior position.

We also note that the Proposal appears to contradict the interpretation provided by federal courts and senior staff of the FTC with respect to a similar requirement in the FCRA with respect to permissible purposes for obtaining consumer reports. In this regard, one of the permissible purposes for obtaining a consumer's consumer report is "[i]n accordance with the written instructions of the consumer to whom it relates." According to Clarke W. Brinckerhoff of the FTC, in a letter written to Gregory J. Shibley on June 8, 1999, this requirement can be met "if a consumer signs a document that clearly '*authorizes*' a party to procure his or her credit report." (Emphasis added.) Mr. Brinckerhoff then references a federal case, *Hammons v. Enterprise Leasing Co.*, 993 F. Supp. 1388 (1998), to support his interpretation. That case involved a consumer agreeing to a rental car contract that included "boilerplate" language authorizing the rental company to obtain the consumer's credit report. The court found for the defendant due to "the broad written *authorization* Hammons gave Enterprise." *Id.* at 1390. (Emphasis added.) We believe that the court and Mr. Brinckerhoff generally interpreted the statute correctly with respect to obtaining "written instructions," *i.e.*, that the consumer's authorization could be obtained through boilerplate language. In a letter dated May 24, 2001 to Mr. Walter Zalenski, Mr. Brinckerhoff further clarified that as a result of the federal E-SIGN Act, an electronic signature could substitute for one written on paper for purposes of obtaining the consumer's authorization.

We do not understand the Commission's apparent rationale for drawing a distinction in which obtaining the consumer's authorization to obtain the consumer's consumer report is not sufficient for purposes of authorizing solicitations. In effect, the Proposal would create two views with respect to what constitutes "authorization" under the FCRA and providing for the anomalous result of making it easier to obtain the consumer's permission to obtain his or her consumer report in at least some circumstances than to provide the consumer certain solicitations. For example, under the *Hammons* decision (supplemented by the Shibley letter) and the E-SIGN Act, it would appear that a consumer could electronically agree to boilerplate language in a contract (or a pre-selected checkbox) and have it constitute the consumer's "written instructions"

because, to use the *Hammons* court's and senior FTC staff's rationale, such an arrangement would signify the consumer's "authorization" to obtain the consumer's consumer report. Yet, the exact same scenario would appear to fail the Commission's "authorization" standard the Proposal.[6] We do not believe that such a divergent result is appropriate, nor do we believe the discrepancy to be intended by the Commission.

Prospective Application (§ 247.20(e))

Congress provided that the requirements of Section 624 would not apply with respect to "information…received prior to the date on which persons are required to comply with" the Final Rule. The prospective application of the law is necessary in light of the practical realities associated with complying with the new requirement. In particular, it would be difficult for a family of companies to deconstruct its existing databases to determine the exact origin of information so that the statute could be applied appropriately to all information in the family's possession. It is more reasonable to expect a family of companies to develop a compliance program on a prospective basis for information received by the entities within the corporate family after the mandatory compliance date. Therefore, Congress intended to exempt information that had been received by the family of companies prior to the compliance deadline.

The Proposal provides that it "shall not prohibit your affiliate from using eligibility information communicated by you to make or send marketing solicitations to a consumer if such information was received *by your affiliate* prior to" the mandatory compliance date provided in the Final Rule. (Emphasis added.) The Coalition urges the Commission to revise the Proposal to provide a prospective application of the Final Rule to information received by any entity within the corporate family prior to the mandatory compliance date. We believe that such an approach more faithfully reflects the statutory language and legislative intent. If the Commission retains the notion that the information must be received by the Receiving Affiliate prior to the mandatory compliance deadline, we ask the Commission to clarify that any information provided to a centralized database or repository that can be accessed by an affiliate, such as may be provided by a service provider, be deemed to have been provided to such affiliate for purposes of the prospective application of the Proposal. Without this clarification it would be unclear whether companies would need to deconstruct their databases in a manner intended to be avoided by Congress.

Relation to Affiliate-Sharing Notice and Opt-Out (§ 247.20(f))

The Proposal states that nothing in the Proposal "limits the responsibility of a company to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the [FCRA], before it shares information other than transaction or experience information among affiliates to avoid becoming a consumer reporting agency." The Coalition requests that the Commission delete this provision. We are not aware of any

[6] We note, however, that Section 604(a)(2) specifically requires the consumer's instructions to be "written." There is no such requirement in Section 624, indicating that Congress intended for the consumer to be able to provide authorization through other means, as well.

interpretation of Section 624 of the FCRA, or of the Proposal, which could result in the conclusion that the provision of a notice and opt out under Section 624 relieves a company of any obligation related to Section 603(d)(2)(A)(iii). Therefore, the clarification provided in the Proposal is unnecessary and could create unintended confusion with respect to the scope of the Proposal.

If the Commission decides to retain the disclaimer with respect to the notice and opt out described in Section 603(d)(2)(A)(iii), we ask for two revisions. First, the Proposal implies that a notice and opt out would be required for the sharing of any information other than transaction and experience information among affiliates. We urge the Commission to clarify that the notice and opt out described in Section 603(d)(2)(A)(iii) only applies with respect to the sharing of information which would otherwise meet the definition of a consumer report. Second, the Proposal suggests that any sharing of consumer reports among affiliates would automatically cause the Disclosing Affiliate to become a consumer reporting agency. While we agree that an entity that discloses a consumer report to an affiliate *runs the risk* of becoming a consumer reporting agency, such a result is not certain. For example, the entity must also "regularly engage[]" in making such disclosures "for monetary fees, dues, or on a cooperative nonprofit basis." Also, disclosures made pursuant to the joint user exception would not cause the disclosing entity to become a consumer reporting agency. Therefore, if the provision is retained, we ask that the Proposal be amended to state "in order to avoid *the risk* of becoming a consumer reporting agency."

Contents of Opt-Out Notice (§ 247.21)

Under the FCRA, the notice provided pursuant to Section 624 must disclose to the consumer that Eligibility Information may be shared among affiliates for the purpose of making solicitations to the consumer and provide an opportunity and simple method to opt out of receiving such solicitations. The notice must be "clear, conspicuous, and concise." It may also "be coordinated and consolidated with any other notice required to be issued under any other provision of law." The legislative history indicates that Congress specifically intended the notice to be of the type that could be coordinated and consolidated with the privacy notices provided under the GLBA. The notice must allow the consumer to opt out of all solicitations referred to in the notice, but may provide the consumer with a menu of options.

Generally, we believe the Commission has accurately captured the requirements with respect to the contents of the opt-out notice.[7] In this regard, the Proposal states that the notice must inform the consumer of the ability to prevent an entity from using Eligibility Information to make a solicitation to the consumer. The notice must include a reasonable and simple method for the consumer to opt out and, if applicable, that the consumer's election will apply for a specified period of time and that the consumer will be permitted to extend the opt out. The Proposal states that the notice must be "clear,

[7] This portion of the Proposal is drafted to reflect the approach taken throughout the Proposal with respect to the duty on the Disclosing Affiliate to provide the consumer with the notice. As discussed above, we urge the Commission to reject such an approach, and to revise this provision and others accordingly.

conspicuous, and concise," the latter of which is defined as being "reasonably brief." All required disclosures must also be accurate. The Proposal also states that if a menu of opt-out choices is provided, the consumer must have a single alternative to opt out "with respect to all affiliates, all eligibility information, and all methods of delivery."

With respect to the requirement that the notice accurately disclose that the opt out may have an expiration, we urge the Commission to clarify that if a company initially discloses an opt out of limited duration, but then determines to increase the length of the duration (or make the opt out permanent), that the consumer would not be entitled to an additional notice describing such a change. We do not believe there are any consumer benefits to such a requirement that would justify the cost of providing a revised notice.

The Coalition also notes that the statute does not require that the opt-out notice provide "as one of the alternatives the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery." First, Congress required only that the notice allow the consumer to opt out of all covered solicitations—not that one of the options had to be a complete opt out. Second, the requirement pertained only to the solicitations described in the notice, not any potential solicitation pertaining to "all affiliates, all eligibility information, and all methods of delivery." We ask the Commission to revise the Proposal to reflect more accurately the statutory requirements. In particular, as discussed below, the Coalition believes it is important to allow the notice to provide for an opt out on an account-by-account basis. The requirement that the notice must provide an option for "all eligibility information" could be interpreted to suggest that the consumer's opt out could conceivably apply to all eligibility information pertaining to the consumer in perpetuity. We do not believe this was the Commission's intent.

Reasonable Opportunity to Opt Out (§ 247.22)

In General

Section 624 prevents a Receiving Affiliate from making a solicitation to a consumer in certain circumstances unless "the consumer is provided an opportunity…to prohibit the making of such solicitations to the consumer by" the Receiving Affiliate. The Commission has interpreted this language to require that the consumer receive "a reasonable opportunity, following the delivery of the opt-out notice, to opt out of such use" of Eligibility Information by the Receiving Affiliate. The Proposal then provides examples of reasonable opportunities to opt out. The examples are generally similar to those used in connection with a similar regulatory requirement imposed under the GLBA Rule and imply that the rule of thumb would be to give the consumer 30 days to opt out.

Although the Supplementary Information indicates that the Commission believes that a reasonable opportunity to opt out "should be construed as a general test that avoids setting a mandatory waiting period," the Coalition is concerned that the Proposal would establish a 30-day floor in virtually all cases. For example, the Commission provides that a 30-day period is appropriate when the notice is provided by mail or electronically. The

only example to the contrary is limited in scope to notices provided to consumers at the time of an electronic transaction that requests the consumer to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction so long as a simple process is provided "at the Internet Web site."[8] Despite the Commission's stated intent to "avoid[] setting a mandatory waiting period," we believe that these examples will be used by the plaintiffs' bar and others to establish a *de facto* 30-day requirement for purposes of opting out.

If the Commission retains the examples, we urge the Commission to continue to provide examples that are consistent with those provided in the GLBA Rule. We believe that, given the clear congressional intent to allow the FCRA and GLBA notices to be provided together, the examples of reasonable opportunities to opt out should be consistent. For this reason, we particularly applaud the Commission for providing for *per se* compliance, as applicable, if the consumer is permitted to exercise the opt out within a reasonable period of time and in the same manner as the opt out provided under the GLBA Rule. However, we ask the Commission to broaden the scope of the example provided in § 247.22(b)(3). In this regard, the example should reflect its applicability to any transaction, not just those conducted in an electronic environment. We are unaware of a justification to differentiate between transactions conducted electronically and those conducted in person, for example, with respect to requesting that the consumer decide as a necessary part of the transaction whether to opt out before completing the transaction.

Providing for an Opt In

The Proposal provides as an example of providing for a reasonable opportunity to opt out that a company could provide an opt in. Although a solicitation should be permitted as a result of the consumer's authorization or request (*i.e.*, the consumer's opt in), such an occurrence would exclude the solicitation from the obligations of Section 624, and therefore the Proposal, altogether. Therefore, in order to avoid confusion, we ask the Commission to delete the reference to an opt in with respect to how a company could comply with the requirements of the Proposal.

We also note that the Commission's discussion of an opt in suggests that the opt in must result from an "affirmative" act by the consumer. In addition to the arguments we present above as to why "affirmative" consent was not intended by Congress, we also note that the Commission's discussion of an "affirmative" act to constitute consent in § 247.22(b)(5) appears to contradict the example pertaining to compliance with the GLBA Rule in § 247.22(b)(4). In this regard, the Commission appears to equate obtaining an opt in as an opt out for purposes of the Proposal. Furthermore, the Commission in § 247.22(b)(4) appears to endorse compliance with the GLBA Rule as compliance with the Proposal for purposes of the opt out (and therefore for the opt in).

The GLBA Rule specifically permits a financial institution to obtain the consumer's "consent" (*i.e.*, opt in), and therefore obtaining consent under the GLBA Rule

[8] We ask the Commission to revise the reference to an "Internet web site" since an electronic transaction may occur through other means, such as e-mail or at an ATM.

would appear, at least under § 247.22(b)(4), to constitute compliance with the Proposal. However, in the context of the GLBA Rule, the Commission affirmatively rejected the notion that the consent must be obtained in any particular way. Specifically, the Commission stated that it has "declined to elaborate on the requirements for obtaining consent or the consumer safeguards that should be in place when a consumer consents. [The Commission] believe[s] that *the resolution of this issue is appropriately left to the particular circumstances of a given transaction*. [The Commission] note[s] that any broker-dealer, fund, or registered adviser that obtains the consent of a consumer to disclose nonpublic personal information should take steps to ensure that the limits of the consent are well understood by both the institution and the consumer." (Emphasis added.) Therefore, it would appear that a company could meet the standard established under § 247.22(b)(4) for obtaining consent while falling short of the example provided under § 247.22(b)(5). We urge the Commission to delete the reference to an "affirmative" opt in order to eliminate this ambiguity and to make the Proposal more consistent with the Commission's approach under the GLBA Rule.

Disclosure of How Long the Consumer Has to Opt Out

The Commission specifically seeks comment on whether companies subject to the Proposal should be required to disclose in their opt out notices how long a consumer has to respond to the opt-out notice. The Coalition does not believe such a disclosure should be required in the Final Rule. First, Congress specified what should be included in the notice provided to consumers pursuant to Section 624, and Congress did not specify that the notice should include such information. Second, as a general matter, we believe that consumers who are interested in opting out will do so shortly after receiving the notice, regardless of whether the "waiting period" is disclosed. Third, Congress intended for the notice to be one that could be "consolidated" in the notice required by the GLBA Rule. We believe it would be awkward to require a company to disclose how long a consumer has to opt out under one provision in the notice, but not another provision in the notice, especially if the time periods could vary. Finally, the Commission has indicated that it does not seek to set a mandatory waiting period in all cases. Therefore, it would appear that the Commission expects that the waiting period could vary, at least depending on the method the notice was delivered. We believe that companies will want to draft and print *one* notice for purposes of Section 624. However, if the company must disclose the "waiting period" to the consumer, the notice that must be given to the consumer may vary depending on the product or the method by which the notice was provided. We believe this causes an unnecessary compliance burden that does not provide benefits to the consumer.

Reasonable and Simple Methods of Opting Out (§ 247.23)

Congress required that any opportunity provided to the consumer to opt out be "simple." The Proposal has implemented this requirement by requiring the opt-out method to be "reasonable and simple." The Proposal then states that a company provides a "reasonable and simple method" to opt out if it does one of four things. The Proposal

also provides that a company does not provide a "reasonable and simple method" if it does one of three things.

The Commission was directed by Congress to provide "specific guidance regarding how to" provide a simple method of opting out. In so doing, we urge the Commission to clarify that the Final Rule is providing *examples* of compliance. As drafted, the plain language of the Proposal could be read to mean that the four methods listed for complying with the requirement are exclusive. We do not believe this was the Commission's intent. Furthermore, we strongly urge the Commission to use the same examples for purposes of the Final Rule as are provided in the GLBA Rule. It does not make sense that Congress would intend to allow coordinated and consolidated notices with respect to the Final Rule and the GLBA Rule, but require different methods of opting out. For example, the Commission should delete the requirement to provide a self-addressed envelope under the Final Rule, since there is no similar requirement under the GLBA Rule. We also strongly urge the Commission to delete the provision that would require an electronic opt-out mechanism for consumers who receive notices electronically. We are not aware of any justification for such a requirement (would consumers who receive the notices in paper form be permitted to opt out only using paper and not a telephone?), nor is the limitation present in the GLBA. We also do not believe that Congress intended to force financial institutions who provide their GLBA notices electronically to develop electronic opt-out mechanisms in order to coordinate their FCRA and GLBA notices.

The Coalition also requests that the Commission clarify that if a reasonable and simple method of opting out is designated, that a company is not required to honor opt out requests that are provided through other mechanisms. For example, the GLBA Rule specifically states that a financial institution "may require each consumer to opt out through a specific means, as long as the means is reasonable for that consumer." For the reasons why the Commission adopted this provision in the GLBA Rule, we believe a similar provision is appropriate for the Final Rule.

Delivery of Opt-Out Notices (§ 247.24)

The Proposal would require that the notice be provided "so that each consumer can reasonably be expected to receive actual notice." This is a standard that is also imposed under the GLBA Rule. We believe the Commission has appropriately recognized that a stricter standard, such as requiring actual notice, would not be possible to achieve, and therefore we generally urge the Commission to retain the proposed standard.

Duration and Effect of the Opt Out (§ 247.25)

In General

Section 624 requires that the consumer's opt out must last for at least five years "beginning on the date on which the [Receiving Affiliate] receives the election of the

consumer," unless the consumer revokes the opt out. Therefore, Congress established that an opt out would last for five years, although the consumer could revoke the opt out earlier and companies could provide for a longer duration.

Opt-Out Period

The Proposal indicates that an opt out must be effective for a period of at least five years "beginning as soon as reasonably practicable after the consumer's opt-out election is received." It would appear that the Proposal creates some ambiguity with respect to when the opt out period actually begins. Congress determined that the opt out period would begin "on the date on which" the opt out is received. The Proposal, however, refers to a period "beginning as soon as reasonably practicable" after the opt out is received. The Coalition requests that the Commission amend the Proposal to clarify that the opt-out period in fact begins on the date on which the opt out is received.

The Proposal does not refer to the fact that a consumer can revoke his or her opt out prior to the expiration of the opt-out period. In fact, the Supplementary Information states that "[n]o opt-out period…could be shorter than 5 years," which appears to suggest that the consumer could not revoke the opt out during the five years after it has been provided. We believe that Congress explicitly provided that the consumer could revoke the opt out at any time, and we urge the Commission to revise the Proposal accordingly.

The Coalition is also concerned with the Commission's interpretation of the statute in the context of relationships that terminate. The Proposal states that if the consumer's relationship terminates with the Disclosing Affiliate while the consumer's opt out is in force, the opt out will continue to apply indefinitely unless revoked by the consumer. The Coalition does not believe that such an approach is consistent with the statute, nor is it appropriate.[9] In this regard, Congress provided that a consumer's opt out be honored for "at least 5 years." We are unaware of any authority for the Commission to extend, by regulation, the duration of the opt-out period so long as it lasts for "at least 5 years." We also do not believe it is necessary to make the opt-out period permanent after the Disclosing Affiliate no longer has a relationship with the consumer. In particular, the statute provides sufficient assurances that the consumer must receive another notice and opportunity to opt out if the Receiving Affiliate wishes to use Eligibility Information to make a solicitation once the opt out expires.

Effect of Opt Out

The Commission explains in the Supplementary Information that the opt-out would be 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, the

[9] The Coalition also notes that this provision would be eliminated in the Final Rule if the Commission abandoned the general approach of the Proposal that is predicated on notices from the Disclosing Affiliate, presumably an entity with which the consumer has a relationship. If the Final Rule adopts the approach described in the statute, which imposes obligations only on the Receiving Affiliate, the concept of the consumer having a relationship with any affiliate, including the Disclosing Affiliate, would be moot.

receiving affiliate could use all of the 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, the receiving affiliate could not use any eligibility information about the consumer it received from an affiliate on or after the mandatory compliance date for the [Final Rule], including any information it received during the period in which not opt-out election was in effect.

With the exception of the applicability of the non-retroactivity provision in relation to the mandatory compliance date discussed above, we agree with the general concept espoused by the Commission with one important revision. The Commission is correct in explaining that the opt out is not tied to the information. However, we do not agree that the opt out should be tied broadly to the consumer. Rather, it would be more appropriate to allow companies to implement a consumer's opt-out directions on an account-by-account basis. In this circumstance the consumer's opt out would be tied to a particular *account*. This approach is consistent with the approach taken by the Commission under the GLBA Rule. We also believe it is consistent with the statutory language that companies be permitted to provide options to the consumer with respect to "the types of…information covered" (*e.g.*, information relating to specific accounts) by the consumer's opt out. Indeed, it would be difficult if not impossible for many companies to implement an opt out that follows the consumer when the consumer may have a variety of relationships with multiple companies in a single corporate family.

Time to Implement the Opt Out

The Coalition also asks the Commission to clarify the timeframe in which a consumer's opt out must be implemented. For example, under the GLBA Rule, the Commission requires a financial institution to "comply with a consumer's opt-out direction as soon as reasonably practicable after [the financial institution] receive[s] it." We believe that this is an appropriate standard, as to require an opt out to be implemented earlier than "reasonably practicable" would appear to be, by definition, unreasonable. This clarification would apply with respect to the consumer's initial opt out, as well as any extensions to the initial opt out. For the same reasons the Commission included such a clarification in the GLBA Rule, we ask that the same clarification be provided in the Final Rule.

Extension of the Opt Out (§ 247.26)

As discussed above, the FCRA provides that if a consumer has opted out, and the opt out is no longer effective, a Receiving Affiliate cannot use Eligibility Information in certain circumstances to make a solicitation to the consumer "unless the consumer receives a notice and an opportunity to extend the opt-out…*pursuant to the procedures described in paragraph (1)*." (Emphasis added.) The "procedures described in paragraph (1)" are those that describe providing the notice and opportunity to opt out to the consumer. Therefore, it would appear that Congress intended for the notice and opt-out

requirement to be the same, regardless of whether the notice is the first one received by the consumer or one received as a result of the consumer's opt-out election expiring.

The Proposal, on the other hand, contemplates a different notice requirement that deviates from the "procedures described in paragraph (1)" of Section 624(a) of the FCRA. In particular, the Proposal would require that an "extension notice" be provided to the consumer. Unlike the notice requirement described in Section 624(a)(1), which requires only that the consumer be notified of the sharing of Eligibility Information among consumers and that the consumer be given the opportunity to opt out, the Proposal would require that an "extension notice" include notifying the consumer that the consumer's opt-out election has expired or is about to expire. We urge the Commission to refine the Proposal with respect to how notice is to be provided to consumers *in all instances* to make it more consistent with the requirements described by Congress in Section 624(a)(1).

Consolidated and Equivalent Notices (§ 247.27)

The Proposal states that a notice required by the Final Rule may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law, including notices provided pursuant to the GLBA Rule. The Proposal also provides that a notice or other disclosure that is equivalent to the notice required by the Final Rule, and that is provided to a consumer with disclosures required by any other provision of law, satisfies the Final Rule. These provisions are consistent with the statute, and we urge that they be retained in the Final Rule.

Effective Date

The FCRA requires that the Final Rule be issued by September 4, 2004 and that it become effective no later than six months after it is issued. The Commission requests comment on "what the mandatory compliance date should be and whether it should be different from the effective date of the [Final Rule] in order to permit institutions to incorporate the affiliate marketing notice into their next annual GLB Act privacy notice."

We believe that companies will need more than six months to review the Final Rule, determine how it will affect their business model, implement the necessary systems changes, and provide notices to consumers (as needed). Therefore, although the Final Rule may become "effective" six months after it is issued, we ask that compliance not be required for at least an additional six months, and longer if necessary to incorporate the affiliate marketing notice in the next GLBA notice provided after that time. We believe such an approach will provide a more appropriate time period for companies to comply with the Final Rule. We also believe that Congress recognized that an effective date is not necessarily the same as a mandatory compliance date. In this regard, it is not uncommon for banking regulations to have effective dates and mandatory compliance dates that differ. Congress enacted the FACT Act will full knowledge of this practice. Furthermore, the statute explicitly recognizes that the effective date may not necessarily

be the date on which compliance is required (compare Section 624(a)(5) of the FCRA to Section 214(b)(4)(B) of the FACT Act).

Thank you again for allowing the Coalition to comment on this issue. Please do not hesitate to contact me at 202 464 8815 if the Coalition can be of further assistance.

Sincerely,

Jeffrey A. Tassey
Executive Director