THE FINANCIAL SERVICES ROUNDTABLE

1001 PENNSYLVANIA AVENUE, NW
SUITE 500 SOUTH
WASHINGTON, DC 20004
TEL 202-289-4322
FAX 202-289-1903

E-Mail rich@fsround.org
www.fsround.org

**RICHARD M. WHITING**
EXECUTIVE DIRECTOR AND
GENERAL COUNSEL

August 16, 2004

Office of the Comptroller of the Currency
250 E Street, S.W.
Public Information Room
Mail Stop 1-5
Washington, D.C. 20219
Attention: Docket No. 04-16

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attention: Docket No. 2004-31

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

Federal Trade Commission/Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, NW
Washington, DC 20580
Matter No. R411006

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Re: RIN 3064-AC73

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 5th Street N.W.
Washington, D.C. 20549
File No. S7-29-04

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

**Re: Fair Credit Reporting Affiliate Marketing Regulations**

Dear Sir or Madam:

The Financial Services Roundtable[1] (the "Roundtable") appreciates the opportunity to comment to the Office of the Comptroller of the Currency, Board of

[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine accounting directly for $18.3 trillion in managed assets, $678 billion in revenue, and 2.1 million jobs.

Governors of the Federal Reserve System, Securities and Exchange Commission, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, and the Federal Trade Commission (collectively, the "Agencies") on the proposed rulemakings in relation to the affiliated marketing provisions in section 214 of the Fair and Accurate Transactions Act of 2003 ("FACT Act").[2]

## I. Background

The Agencies' proposed rules would implement the affiliate marketing provisions in section 214 of the FACT Act, which amends section 624 to the Fair Credit Reporting Act ("FCRA"). The proposals would generally prohibit a company from using consumer reports or other information received from an affiliate to market products or services to a consumer unless the consumer first has been given notice and an opportunity to opt out of receiving such solicitations. If a company has a pre-existing business relationship with the consumer, it would not be subject to this proposed regulation. Nothing in the new affiliate marketing opt out supercedes or replaces the affiliate sharing opt out contained in section 603 of the FCRA, although there is some overlap between the two opt out requirements.

## II. Summary Comments

The Roundtable applauds the Agencies for proposing regulations that give financial institutions flexibility in providing notice to consumers and an opportunity to opt out. In particular, we support allowing the notice to be provided either in the name of the company the consumer does (or has done) business with or in one or more common corporate names shared by the affiliated group, if it includes the common corporate name of the company. We also support the notion that financial institutions may combine these notices with other required disclosures, including Gramm-Leach-Bliley privacy notices ("GLB Notices").

However, we believe that certain aspects of the proposed rules are not consistent with section 214 of the FACT Act. The Roundtable respectfully offers several recommendations that we believe would improve the proposed rules and benefit consumers and the industry.

## III. Recommendations

### A. Definition of Affiliate

The proposed rules define "affiliate" as "any person that is related by common ownership or common corporate control with another person." The Roundtable believes

[2] It should be noted that the joint interagency proposed rule on section 214 of the FACT Act does not include the Federal Trade Commission which issued their rule separately. However, since the proposed rules are substantially similar, this letter will respond in general to both proposals. We urge each agency to take note of specific recommendations as they relate to institutions under their jurisdiction.

that the definition of affiliate is important for large, diversified institutions because it affects how information flows between related entities offering products and services to consumers. In diversified financial institutions, multiple entities are often involved in customer transactions. The customer is often unaware of the different entities involved in the transaction. We believe that the definition of affiliate in the proposed rule should focus on information sharing between unrelated entities and not affect the sharing of account information between common corporate entities.

This approach would be similar to that taken under California's Financial Information Privacy Act. California's law states that there are no restrictions on information sharing between affiliates as long as: (1) they are regulated by the same or similar functional regulators; (2) they are involved in the same broad line of business, i.e. insurance, banking, or securities; and (3) they share a common brand identity.[3] We urge the Agencies to consider this approach in their rulemaking. Allowing movement of information within a corporate family would lower costs and benefit consumers. We also request that the Agencies' definition of "affiliate" in the final rule be consistent with the definition of the term in the Gramm-Leach-Bliley Act ("GLBA") and other parts of FCRA.

### B. Eligibility Information

Under the proposed rule, the term "eligibility information" refers to information that would be a consumer report if the exclusions from the definition of "consumer report" in §603(d)(2)(A) of the FCRA did not apply. Therefore, disclosure to an affiliate of information that is experience and transaction information, or certain other information that relates to the consumer's personal characteristics, would trigger compliance with §214 if the affiliate wanted to use the information to market to the consumer.

We believe that the definition of "eligibility information" does not give meaningful guidance as to what types of information are covered by this law. We request that the Agencies provide a clearer definition and additional examples. In particular, there should be some examples relevant to the securities industry, where customer information is largely non-credit related. Also, we request additional clarification for the terms "transaction and experience information". We believe that the rule should specifically state that name and address lists are not covered by the definition of eligibility information.

### C. Solicitation

Section ___.3(j) of the proposed rule defines "solicitation" as marketing initiated by a person to a particular consumer based upon eligibility information and intended to encourage the consumer to purchase such product or service. Section 624(d)(2), however, defines "solicitation" as the "marketing of a *product or service* initiated by a

[3] California Financial Code §4053 (c)

person to a particular consumer that is based on an exchange of information… and is intended to encourage the purchase of a product or service….(emphasis added) The Roundtable believes that the failure to include the phrase "product or service" in the proposed rule raises the possibility that the term "solicitation" in the proposed rule could be misinterpreted. In addition, the proposed rule does not include the phrase "based upon an exchange of information". The Roundtable recommends that Agencies make these adjustments to the proposed rule to mirror the language of the statute.

The Agencies have requested comment on whether, and to what extent, various tools used in Internet marketing, such as "pop-up" ads, may constitute "solicitations", as opposed to constituting communications directed at the general public that are specifically excluded from the definition. We believe that it would be inappropriate for the Agencies to address Internet marketing in the context of the proposed rule. We suggest that regulation of Internet marketing be handled in a separate comment process.

We believe that any solicitation which is not clearly based on the receipt by a person from an affiliate of eligibility information is beyond the scope of FCRA §624. "Pop-up" ads, and other information that may be considered "solicitations", automatically appear whenever a visitor logs on to a web site, or on to a portal within a given web site. These ads are not communications based on the receipt of eligibility information by one affiliate from another.

### D. Pre-Existing Business Relationship Exception

Roundtable member companies are concerned about the limited definition of pre-existing business relationship. The amended §624 of FCRA provides an exception from the affiliate marketing restrictions for those entities that have a pre-existing business relationship with consumers.

Section 624(d)(1) states that "pre-existing business relationship" means 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 this section;
(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 regulation implementing this section (emphasis added).

The Agencies' proposed rules omit a crucial phrase from the statutory definition of pre-existing relationship. The proposed definition in section ___.3(i) should mirror the statute's language by providing that the term "pre-existing business relationship" means a relationship between a person, ***or a person's licensed agent,*** and a consumer based on the types of relationships outlined in the statute.

This omission could cause significant issues for financial services organizations that we believe were not intended by Congress. For example, companies are commonly represented by licensed agents in the insurance industry. States require that any person soliciting consumers on behalf of an insurance company be licensed. These licensed agents are often not company employees. These agents are typically licensed to represent multiple affiliates in a multi-company group. Each agent has their own customers who may have "financial contracts" or other "pre-existing business relationships" with more than one affiliate. Each agent services the customers that he or she brought into the companies he or she is licensed with and may also service other customers of those companies.

We urge the Agencies to revise the definition of "pre-existing business relationship" to conform to statute by inserting the reference to "licensed agents" in the same place as it appears in FCRA §624(d)(1). In addition, we request that the Agencies add the term licensed agents to the examples in the proposed rules where appropriate. Failure to make these changes would overlook a very important provision that Congress inserted and could adversely affect the ability of the insurance industry to help its customers meet their financial needs. Had §624 not recognized that licensed agents have a pre-existing business relationship with their insurance companies' customers, the licensed agents might be prevented from contacting those customers in order to update their policies or provide information about new products and services that could be to their benefit.

We also urge the Agencies to consider the "pre-existing business relationship" exception in the context of the sale and financing of new automobiles. There is a unique relationship among product manufacturers, their affiliated finance companies and the retailers who sell the products to the public and perform services for the manufacturer and the finance company. In most states, an automobile manufacturer is prohibited by law from selling motor vehicles directly to consumers. This has led to the development of an established network of manufacturer authorized or "franchised" dealers who, pursuant to agreements with manufacturers, sell motor vehicles to the general public and provide warranty and other servicing of the vehicles sold. Often, the manufacturer's affiliated or "captive" finance company acquires the financing for the vehicles from the originating dealerships by purchasing from the dealers the installment contracts between the dealers and the customers. 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. This 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.

During the consumer's possession of the vehicle, the manufacturer often sends the consumer marketing materials about its products and services, as well as information relating to product use and safety such as recalls and other information. To provide information that is meaningful and relevant to the consumer, those marketing plans are often supplemented by information obtained from the manufacturer's captive finance company. This information may include experience or transactional information such as the amount of the customer's monthly payment and present status of the consumer's finance contract, allowing the manufacturer to tailor marketing offers that best meet the consumer's needs, including special plans or incentives through the captive finance company available to existing customers of the manufacturer.

The requirements of the proposed rule would considerably complicate the ability of manufacturers to provide such advantageous marketing offers to consumers with whom it has on ongoing business relationship. We request that the Agencies clarify that the relationship between the manufacturer and the consumer as described herein meets the definition of "existing business relationship" or, alternatively, that the relationship be recognized as an "existing business relationship" pursuant to authority granted in §624(d)(1)(D).

In the Supplementary Information of the proposed rules, the Agencies state that based on the apparent Congressional intent, it would appropriate to consider the "reasonable expectations of the consumer" in determining the scope of the "pre-existing business relationship". We believe that a consumer who purchases insurance from a licensed agent or who acquires a new automobile from a franchised dealer and finances that vehicle through a captive finance company can reasonably expect additional information from these related companies about new products and services.

### E. Constructive Sharing Exception

The Agencies have requested comment on whether section 214 of the FACT Act 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. The Agencies describe a constructive sharing scenario as one in which the company that has a relationship with a customer sends a solicitation to the customer on behalf of its affiliate(based on eligibility criteria specified by the affiliate) and the customers' responses to the affiliate reveal certain eligibility information (*i.e.*, a coded response form).

Roundtable member companies do not believe that "constructive sharing" falls within the scope of the section 214. There are no restrictions on soliciting existing customers for marketing purposes. In addition, a consumer who requests information about products and services is initiating communications to the company and therefore falls into that specific exception in section 214. Therefore, we believe that institutions

should be able to send these type of targeted solicitations without being required to provide notice and opt out.

### F. Employee Benefit Plan Exception

Notice and opt out is not required when a company uses eligibility information received from another affiliate to facilitate communications to an individual for whose benefit the company provides employee benefits or other services arising out of a current employee relationship.

The employee benefit plan exception appears to address the flow of information about an individual from an affiliated entity to the entity that already provides employee benefits or other services for that individual as a participant in an employer-sponsored benefit plan. The receiving entity could use the information to facilitate communications to that individual. We believe that this was not the intent of this exception, and is not likely how the term "facilitates" was meant to be used.

An individual participating in an employee benefit plan is a customer of the entity receiving the information. The sharing of this information is already permitted under the pre-existing business relationship exception. In contrast, an employer or plan sponsor may wish to extend other financial services to its employees who participate in benefit plans or other employer services administered by a financial institution. Communications about other financial services, such as brokerage accounts or IRAs, could be facilitated by sharing the information about the plan participant with the affiliate offering these other services. Often, plan sponsors or employers direct benefits plan administrators to share this information and have an expectation that plan participants approve of this sharing as a feature of their benefit plan.

Therefore, we believe that the language in proposed §__.20 (c)(2) should read:

> "To enable communications to an affiliate about an individual for whose benefit an entity provides employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan."

We request clarification on whether this exception applies only if related to products offered as an employee benefit. In addition, we request that the Agencies consider striking the words "*you receive from an affiliate*" in proposed §__.20 (c) in order to mirror the language in the statute and to avoid broadening the scope of the employee benefit plan and other exceptions.

### G. Solicitations on Behalf of a Person by its Servicing Affiliate

FCRA §624(a)(4)(C) creates an exception for the use of eligibility information received by a person to perform services on behalf of its affiliate, other than a service that would constitute a solicitation that the affiliate would not be permitted to send on its own behalf as the result of a consumer's opt-out. The proposed exception listed in §___.20(c)(3) does not conform to the FCRA §624(a)(4)(C) in that it adds that performing services on behalf of the affiliate will not be construed as permitting "you to make or send solicitations *on your behalf* or on behalf of an affiliate *if you* or the affiliate, as applicable, would not be permitted to make or send the solicitation as a result of the election of the consumer to opt out…"(emphasis added). The italicized words do not appear in FCRA §624(a)(4)(C). In fact, that paragraph expressly refers to "solicitations on behalf of another person." We urge the Agencies to remove references to "on your behalf" and "if you" in order to avoid confusion.

Many companies use a single affiliate to provide administrative or personnel services to other affiliate in a multi-company group. We believe the language in proposed §__.20(c)(3) may unfairly impose additional burdens and costs on companies in which a single affiliate provides these services to other affiliates in the group. In addition, the discrepancy between the proposed rule and the statute would make it difficult for financial institutions to send consumers general educational materials about financial products which enhance financial literacy and education.

We recommend that the Agencies remove the references to "on your behalf" and "if you" from §___.20(c)(3). Moreover, the Agencies should make it clear that a servicing affiliate may provide to another affiliate's customers, at that affiliate's request, newsletters and other communications informing the public in general terms about the benefits of the types of products that any of the affiliates offer.

## H. Reasonable Opportunity to Opt Out

### *Time period*

The Agencies have requested comments on whether the proposed rule provides for an adequate amount of time for a consumer to opt out, and whether it is necessary for the notice given to the consumer to include the period of time they have to opt out.

The Roundtable does not believe that actual notice of a specific period of time is necessary. We do support the Agencies' thirty (30) day safe harbor period. We believe thirty days is a reasonable and appropriate period of time for consumers to be given the opportunity to opt out. However, while companies may decide to allow a longer period than thirty days, the safe harbor should not be longer. Thirty days is ample time for the opt out to be received by the company. Consumers can exercise their right to opt out at any time and do not forfeit this right by failing to exercise it within the thirty day period.

Section ___.23(a)(2) suggests that it would be reasonable to include a "self-addressed envelope together with the opt out notice required under the statute. We believe that a self-addressed envelope is unnecessary and inconsistent with Congressional intent. A self-addressed envelope is not required under the statute, nor is it necessary for GLB Notices.

***Oral Communications***

The Roundtable supports the acceptance of oral opt outs as one of the "reasonable and simple" methods of opting out. We believe that oral communications is convenient for customers and allows companies to efficiently provide notice and opportunity to opt out to consumers. We also believe that consumers should be given the opportunity to revoke opt outs orally if they choose to do so. This is especially important for those consumers who rely on the telephone or other oral means to conduct business with companies.

## I. Duration and Effect of Opt Out

The Roundtable supports the five-year opt out duration for existing customers under section 214 of the FACT Act. However, we do not support perpetual extension of an opt out provided by a customer who subsequently terminates the relationship. Section ___.25(d) indicates that a former customer's opt out right continues indefinitely unless revoked by the consumer. We believe this language is inconsistent with the rule for existing customers which states that after the five year period the company may provide the consumer another notice and opportunity to opt out. We urge the Agencies to change section ___.25(d) to be consistent with the rule for existing customers under section 214 of the FACT Act and allow companies to send notices to former customers after the appropriate period of time.

## J. Contents of Opt Out Notice

Under the proposed rules a financial institution's notice could allow a consumer to choose from a menu of opt out alternatives. However, if the financial institution offers a menu, one of the choices must be a "universal opt out" of all affiliate marketing, all types of eligibility information sharing, and all delivery methods. While some groups of affiliated companies may wish to offer universal opt outs, we do not believe that it should be a requirement of the rule.

The proposed rules for this section also mention opting out of all types of eligibility information, suggesting that there are several types of information that constitute eligibility information. This provision needs to be clarified.

Most companies may decide to combine FCRA affiliate sharing notices with GLB Notices. However, it should be pointed out that opt out elections under GLB Notices are

not limited whereas an opt out election under section 214 is valid for only five years. This may affect an institution's decision whether or not to combine these notices.

## IV. Compliance Date Should Be Delayed

We recognize that the FACT Act states section 214 shall become effective no later than six months after the date on which the rules are issued in final form. However, we strongly urge the Agencies to establish March 2006 as the mandatory compliance date. This would give companies six months to complete the systems and procedural work necessary to implement an opt out process on a cost-effective basis and would allow companies to combine the opt out notice with the GLB Notices over the course of a full year's GLB Notice cycle.

Many organizations will require a significant amount of time to comply with the opt out requirements contained in the proposed rule. A number of financial institutions will be providing customers with an opt out election for the first time. For these institutions, giving an opt out notice requires; (1) drafting a new notice for large numbers of customers, (2) establishing systems and personnel responsible for providing the notices; (3) distributing notices within target dates, (4) creating a cost-effective means for receiving and recording opt out elections, and (5) maintaining ongoing compliance with the requirements of section 214 of the FACT Act.

While our members appreciate the flexibility that they have under the proposed rule to include these notices in their GLB Notices, our larger organizations send out these notices on a rolling basis throughout the year. As a result, these companies will not be able to comply with this rule using their GLB Notices until sometime in 2006. We urge the Agencies to consider delaying mandatory compliance due to the limitations that an earlier compliance date would place on our members' ability to incorporate this opt out notice into their GLB Notices.

## V. Conclusion

The Roundtable appreciates the Agencies' efforts in drafting rules that address the affiliate marketing provisions under section 214 of the FACT Act. We would appreciate the opportunity to discuss these recommendations with you in more detail.

If you have any further questions or comments on this matter, please do not hesitate to contact me or John Beccia at (202) 289-4322.

Sincerely,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel