August 12, 2004

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: FACT Act Affiliate Marketing Rule
File Number S-7-29-04, Regulation S-AM

Dear Mr. Katz:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to comment on the Securities and Exchange Commission's (SEC) proposal to implement the affiliate marketing provisions included in Section 624 of the Fair Credit Reporting Act ("FCRA") as amended by the Fair and Accurate Credit Transactions Act ("FACT Act").

Background. The FACT Act added a new Section 624 to the FCRA. In general, section 624 prohibits any person that receives information from an affiliate that otherwise be a "consumer report" from using that information to market its products and services to the consumer unless the consumer first receives a clear and conspicuous disclosure that the information may be shared for marketing purposes and the consumer is given an opportunity and simple method to opt out of receiving such solicitations. If the consumer elects to opt out, the opt-out must be effective for at least five years, although the consumer can extend it. The statute also provides several exceptions to this requirement and permits the notice to be combined with any other notices that must be provided to the consumer by law, such as the privacy notice required by the Gramm-Leach-Bliley Act ("GLBA").

The statutory language is relatively specific and precise. While the SEC's proposal includes many provisions that reflect the statutory requirements and

[1] The Independent Community Bankers of America represents the largest constituency of community banks of all sizes and charter types in the nation, and is dedicated exclusively to protecting the interests of the community banking industry. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace.

Congressional intent, the ICBA suggests several changes be made to the final rule to more accurately reflect the plain language of the statute.

Overview

The ICBA believes several adjustments should be made to the definitions to simplify understanding and application of the rule:

- The definition of "affiliate" should be adjusted to be more compatible with that term as used in other applications
- The definition of "eligibility information" should be streamlined and simplified
- The definition of "pre-existing business relationship" should reflect statutory language that includes agency relationships.

The ICBA also recommends that the statutory flexibility for providing notices be restored to the final rule by allowing the notice to come from *either* the company that discloses the information *or* the affiliate that receives it. To avoid confusion and other problems, the ICBA urges the SEC not to adopt the concept of "constructive sharing." And, the final rule should eliminate other restrictions or qualifications not included in the statute, as more fully explained below.

Including examples and model forms in the final rule is a helpful step, especially for community banks, and will help alleviate the compliance burden. However, the ICBA strongly encourages the SEC and the other agencies to allow sufficient time for companies to comply with the requirements, especially since there are a great many regulatory changes involved that will affect computer programming, employee training and other changes to policies and procedures.

Scope and Examples

As noted above, section 624 of the FCRA limits the permissible activities of an affiliate that receives "eligibility information." Specifically, an affiliate that receives eligibility information cannot use that information to make a solicitation for marketing purposes unless the consumer receives a notice and opportunity to opt out of receiving such solicitations. The proposal would apply to any entity that shares information with affiliated persons that is used to make or send marketing solicitations.

The SEC has proposed to apply certain responsibilities to both the "communicating affiliate," i.e., the company that shares information about a consumer, and the "receiving affiliate," i.e., the company that receives the information and that would then use that information to market to consumers. According to the proposal, it would be the responsibility of the communicating affiliate to provide the notice to consumers, although an agent, including the

receiving affiliate, could provide the notice. The ICBA believes that it would be simpler and less confusing to revise this approach slightly. Instead of requiring the communicating affiliate to provide the notice, the ICBA recommends that the final rule allow either affiliate to provide the notice. As a practical matter, it will most likely be the communicating affiliate that does furnish the notice. However, by not creating a restriction and allowing companies flexibility for providing the notice will not detract from consumer protection. Eliminating the requirement that the communicating affiliate be responsible for providing the notice will help alleviate regulatory burden. The critical element is that the consumer receives the notice, not which company provides it.

The proposal also offers examples of how the rule applies. While these examples are not exclusive, the FTC and the five banking regulatory agencies provide that compliance with one of the examples to the extent applicable will constitute compliance with the rule, but the SEC qualifies this safe harbor by suggesting that compliance will depend on the surrounding facts and circumstances. The ICBA believes that the agencies should all be consistent and specify that compliance with one of the examples should constitute compliance with the rule. We also encourage the agencies to include the examples in the final rule.

Definitions

Affiliate. The proposal would define an "affiliate" as "any person that is related by common ownership or common corporate control with another person." Existing banking regulations define an affiliate as another company that controls, is controlled, or is under common control with a member bank,[2] and the banking agencies have applied this same definition to the information sharing provisions under the GLBA privacy rules.[3] Since GLBA privacy notices and FCRA information sharing notices may be combined, it would be less confusing, simpler and less burdensome to use one consistent definition, and the ICBA recommends the SEC adopt the existing definition used by the banking agencies since that definition is already widely accepted.

Clear and Conspicuous. When providing consumers with notice about information sharing and the right to opt out, the proposal requires the notice to be "clear and conspicuous." This would be defined as "reasonably understandable and designed to call attention to the nature and significance of the information presented." Supplemental guidance would outline what would be considered "clear and conspicuous."

At the outset, it is worth noting that this approach is virtually identical to the definition that the Federal Reserve recently proposed for use in five separate

[2] See, e.g., Federal Reserve Regulation W at 12 CFR 223.2.
[3] See, e.g., 12 CFR 216.3.

consumer protection regulations under its purview, e.g., Truth-in-Lending (Regulation Z), Truth-in-Savings (Regulation DD), and Equal Credit Opportunity (Regulation B). The Federal Reserve approach was modeled on existing language in its Regulation P, the regulation that implements the GLBA privacy provisions. The ICBA expressed a number of concerns about the Federal Reserve's proposal. Primarily, our concerns were prompted by the potential that courts might construe the Federal Reserve's "clarification" as a distinct and new approach that imposed new requirements to disclosures. We raised concerns that the change would mandate extensive review of procedures, forms and training manuals to ensure that existing operations complied with the new definition. At that time, the ICBA urged the Federal Reserve to review definitions on a case-by-case basis as it reviewed individual regulations. Subsequently, the Federal Reserve withdrew its proposal.

While the ICBA is a firm proponent of consistent regulatory definitions where possible, we also recognize that there may be situations where factors other than consistency and simplicity come into play. This is one of those times. One of the key distinctions between the FCRA and GLBA is that the FCRA contains expanded enforcement provisions, including the right of private action, and therefore expands potential liability beyond what is covered by GLBA. It is not unrealistic to anticipate that consumer representatives may try to take advantage of the differences in what reasonable minds believe constitutes "clear and conspicuous" to bring suit. Therefore, the ICBA urges the agencies to issue a Q&A or non-exclusive examples to provide guidance on what constitutes "clear and conspicuous" and making it clear that compliance with one of these examples constitutes compliance with the rule.

Eligibility Information. The proposed rule would create the concept of "eligibility information." Generally, as defined by the proposal, eligibility information would be any information that would be considered a "consumer report"[4] absent one of the exceptions in FCRA section 603(d)(2)(A). While the ICBA agrees with this approach, we are concerned that the definition proposed for the affiliate marketing rule may be unnecessarily complex and difficult to apply due to the cross-references. To simplify the application of the definition and to facilitate compliance without the need for cross-references, the ICBA recommends that the final rule take one additional step and define "eligibility information" using the existing statutory elements as follows: "eligibility information is any information that bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal

[4] As defined by section 603 of the FCRA, a consumer report is "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes; employment purposes; or any other purpose authorized under section 604."

characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to market products and services for personal, family or household purposes to that person."

Pre-Existing Business Relationship. A critical definition in the proposed rule is "pre-existing business relationship." If the consumer has a pre-existing business relationship with the "receiving affiliate," the statute creates an exception from the restrictions on marketing and solicitation. The proposal, tracking the statutory definition, would define a pre-existing business relationship as one where there is (a) a financial contract between the company and a consumer which is in force; (b) the purchase, rental, or lease by the consumer of the company's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the company during the 18-month period immediately preceding the date on which the consumer is sent a solicitation; (c) an inquiry or application by the consumer regarding a product or service offered by the company during the 3-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section.[5] The ICBA agrees that it is appropriate to incorporate the statutory language in the final rule. However, the proposal omits the statutory language that applies the pre-existing business relationship to a company *or the company's agent*. The ICBA believes that this omission should be corrected in the final rule, and that Congressional language that applies to agents should be restored.

In the preamble discussion of pre-existing business relationship, it is stated that an inquiry from a consumer must logically indicate that the consumer anticipates receiving information about products or services from the affiliate and therefore would not include instances where the consumer does not provide contact information. The ICBA believes that this language should be eliminated as an unnecessary and possibly confusing qualification. More important is the guidance in the preamble that the consumer should "reasonably expect to receive information from the affiliate about its products or services." The ICBA recommends that the final rule follow the statutory language.

Solicitation. As revised by the FACT Act, the FCRA prohibits an affiliate from using "eligibility Information" to solicit a consumer for marketing purposes unless the consumer receives a notice and opportunity to opt out. The proposed definition of a "solicitation" generally restates the statutory definition, including the exclusion for marketing aimed at the general public. The ICBA agrees it is appropriate to exclude marketing and advertising aimed at the general public that is not made using "eligibility information," and urges this be included in the final rule.

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[5] As noted in the preamble to the proposed rule, the language is also substantially similar to the definition of an "established business relationship" under the amended Telemarketing Sales Rule at 16 CFR 310.2(n).

Affiliate Use of Eligibility Information for Marketing

As noted, the FACT Act prohibits the use of eligibility information for consumer solicitation unless the consumer has received a notice and an opportunity to opt out. However, the statute does not specify which party must furnish the notice. As a result, the statute allows either the affiliate disclosing the information or the affiliate receiving the information to provide the notice. This flexibility permits companies and their affiliates to communicate with consumers in the most logical and effective way given the particular circumstances.

The proposal, on the other hand, would require the company *disclosing* the information to provide the notice and opportunity to opt out. While many companies will chose to provide notice this way, the ICBA recommends that the final rule eliminate this requirement since it was not included in the statute. Rather, companies should be permitted to make their own assessment about how best to communicate with consumers based on existing customer relationships.[6]

Constructive Sharing. The SEC is considering creating the concept of "constructive sharing" to further outline application of the restrictions on affiliate marketing. As proposed, constructive sharing would take place if Affiliate A asks Affiliate B to market Affiliate A's product or service to Affiliate B's customers based on certain criteria. It is important to recognize that Affiliate B does not share any eligibility information about any customers with Affiliate A. However, if a consumer responds to the solicitation, then Affiliate A may be aware that the customer met the defined eligibility criteria. The proposal would characterize this as "constructive sharing."

The ICBA believes that this interpretation goes beyond the plain meaning of the statute, has the capacity to create confusion and unnecessary regulatory burden, and places an unnecessary restriction on working relationships between affiliated companies. The ICBA strongly recommends the concept of "constructive sharing" not be included in the final rule. First, no information about consumers is actually shared between the companies. It is only when the consumer responds to the solicitation that the first company would have any knowledge about the eligibility of the consumer. Second, and more important, it is the consumer who voluntarily initiates communication, and consumer initiated communications are otherwise exempt from the affiliate marketing restrictions by the statute.

Form of Notice. The statute merely requires that a consumer be given notice and an opportunity to opt out before information shared

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[6] It is also worth noting that the preamble to the proposal includes a rule of construction that would allow the affiliate that receives the information to provide the notice as the *agent* of the company that disseminates the information. The ICBA believes that this rule of construction, which may create confusion, would be eliminated if the restrictions on which affiliate must provide the notice were eliminated from the final rule.

among affiliates is used for marketing purposes. There is nothing in the statute that specifies the notice must be in writing. While it is logical that most companies will furnish a written notice to demonstrate compliance, especially community banks that are subject to regular supervision and examination, the ICBA does not believe it is necessary to include a written notice requirement in the final rule. Moreover, there may very well be circumstances, e.g., instances of telephone communication, when an oral notice is in the best interests of the consumer. Creating a restriction that is not included in the statute places an unnecessary restriction on customer service and may work to the detriment of consumers. Moreover, since technology is rapidly evolving and changing, this restriction may become a barrier to improved customer service in the future absent a revision to the rule.

General Duties of an Affiliate Receiving Eligibility Information

The proposal provides that an affiliate that receives eligibility information may not use the information to solicit or market to a consumer unless the consumer has received the requisite notice and opportunity to opt out. The ICBA agrees, but also recommends that the final rule adds language that allows the affiliate that receives the information to rely on a statement by the affiliate communicating the information that the consumer was given the notice and opportunity to opt out.

Exceptions and Examples of Exceptions

Pre-Existing Business Relationship. As noted above, the proposal would not apply if the affiliate that receives the eligibility information about a consumer has a pre-existing business relationship with the consumer. Subject to our comments above about the definition of "pre-existing business relationship," the ICBA believes that this exception is appropriate and should be retained in the final rule.

Service Providers. A second exception from the application of the rule would apply to service providers as long as the service provider is acting in the shoes of the company that would otherwise be soliciting or marketing to a consumer. However, the service provider could not then turn around and use the eligibility information for other purposes. This is consistent with provisions in the GLBA privacy rule. Since many community banks rely on service providers, this is an important exception that should be retained in the final rule.

Communications Initiated by the Consumer. In accordance with the statutory language, a third exception applies to marketing that is the result of a communication initiated by the consumer. However, the proposal

adds a qualification that the communication from the consumer must be initiated orally, electronically, or in writing. While this will cover virtually all communications, the ICBA believes it would be better to state "*whether*" initiated orally, electronically or in writing since that allows additional flexibility.

In the preamble to the proposed rule, additional language suggests that further qualifications are intended. Specifically, the exception is restricted to a use of eligibility information that is responsive to the consumer's communication. For example, if a consumer calls an affiliate to ask about retail locations and hours, the affiliate may not then use eligibility information to make solicitations to the consumer about specific products. The ICBA believes that, while this restriction may be well intentioned, it creates a vague standard that is difficult to apply and subject to differing interpretations. Therefore, we urge it not be included in the final rule.

Solicitations Authorized or Requested by the Consumer. Another exception applies to solicitations authorized or requested by the consumer, and the ICBA supports this provision. However, the proposed rule adds an additional qualification requiring that these consumer communications be "an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation." The SEC also explains in the preamble that a pre-selected check box or boilerplate language in a disclosure or contract would not be sufficient for an affirmative authorization or request. The ICBA believes that this may unnecessarily restrict customer service and may be contrary consumer interests, especially the provision that bars a consumer from simply checking a box to request additional information. This adds an unnecessary qualification to the exception that we recommend be deleted from the final rule.

Contents of Opt-Out Notice

The FACT Act specifies that the requisite notice must disclose to the consumer that information may be shared among affiliates for the purpose of making solicitations to the consumer and then allow the consumer an opportunity and simple method to opt out of receiving such solicitations. The notice must be "clear, conspicuous, and concise," but it may provide the consumer with a menu of options. Moreover, this notice may be coordinated and consolidated with any other notice that is required under another provision of law. Specifically, Congress intended that companies be allowed to combine this notice with the privacy notices required by GLBA.

The ICBA does not object to the provisions of the proposal regarding the notice. The ICBA also applauds the FTC for creating model notices that companies may use since many community banks rely on such model notices for required disclosures.

Reasonable Opportunity to Opt Out

Generally, consumers must be given a reasonable opportunity to opt out before an affiliate can use eligibility information to market its products or services to that consumer. The examples suggest that 30 days would be an appropriate period of time in many instances. While these examples parallel those in the GLBA privacy rules, past experience has suggested that regulators and others are likely to use the 30 days set forth in the examples as a *presumption* that the 30 days is a *minimum requirement*. Therefore, it is important that the final rule clearly provide that, while 30 days is evidence of a reasonable period, it is *not* intended to establish a *de facto* minimum.

Disclosure of Length of Time the Consumer Has to Opt Out. The SEC asks whether the notice should include a disclosure of how long a consumer has to respond. Since the statute and the proposal allow consumers to opt out at any time, the ICBA does not believe such a disclosure is necessary and would actually be counter-productive by adding unnecessary language. First, the proposal requires the notice to be concise, and since there is no time limit on when consumers may respond to the notice, including superfluous language specifying a time limit only detracts from the brevity of the notice. Second, including a time limit in the notice may serve to confuse consumers who believe that after the time specified has passed they can no longer exercise the right to opt out.

Reasonable and Simple Methods of Opting Out

The FACT Act requires that any method given to consumers to opt out should be "simple." The proposal further qualifies this requirement by specifying that the method be both simple and reasonable and then gives examples of means that meet the regulatory standard, such as designating check-off boxes in a prominent position on relevant forms. The proposal also furnishes examples of mechanisms that do not satisfy the standard, such as requiring the consumer to write his or her own letter opting out.

The ICBA appreciates the use of the examples in the proposal, as they offer guidance for community banks to comply with the requirements. However, we also believe it is important for the final rule to stress that

these are examples and not mandates, nor are the examples exclusive means to comply with the rule's requirements. And, similar to provisions in the GLBA privacy rules, the ICBA recommends that the final rule specify that when a company furnishes customers with a reasonable and simple method to opt out, the company is then not required to honor opt outs through other mechanisms. This will facilitate compliance, reduce costs and burdens, and obviate potential confusion about whether a form of opt out not offered by the company is sufficient.

Duration and Effect of the Opt Out

The FACT Act specifies that once a consumer has opted out, the election must be effective for at least five years beginning on the date on which the election is received unless the consumer revokes the election. The proposal also provides that an opt out is effective for five years, beginning as soon as reasonably practicable after the consumer's opt-out election is received.

However, the proposal elaborates on the effectiveness of an opt out by providing that the opt-out continues indefinitely if the customer relationship terminates while the opt-out is in effect. The ICBA disagrees with this approach and believes it will cause costly and confusing difficulties for administration and compliance. It would be more appropriate and less confusing to all concerned – including consumers – if the final rule specifies that the five-year minimum applies in all instances, even if the company's relationship with the consumer is terminated. That will avoid the need for companies to track opt-out elections indefinitely for consumers with which they no longer have a relationship. Moreover, after five years, information a company has on file is likely to be stale and of minimal use for marketing purposes.

Effect of Opt Out. The SEC explains in the preamble to the proposal that an opt-out is tied to the consumer and not the information. As a result, if a consumer opted out but does not renew the opt-out at the end of the five year period, an affiliate may use eligibility information to market to that consumer, even if the information was received while the opt out was in effect. The ICBA believes this is a logical approach and encourages that it be retained in the final rule.

Time to Implement the Opt Out. The ICBA recommends that the final rule incorporate a provision similar to those in the GLBA privacy rules that allow a company a reasonable period of time to implement a consumer's election to opt out before it becomes effective. Incorporating such a provision in the final rule will help to eliminate confusion.

Extension of an Opt Out

While the FACT Act specifically permits the affiliate marketing notice to be combined with the GLBA privacy notice, the proposal adds an additional provision that would make that difficult if not impossible. While companies may allow an opt-out election to be permanent, if the opt-out expires at the end of the statutory five-year period, then a company would have to provide a consumer with a special extension notice. Unlike the normal notice, an extension notice would have to specifically inform the consumer that his or her existing opt-out is about to expire and disclose that the consumer may extend this notice.

This provision makes it virtually impossible to allow companies to combine the GLBA privacy notice with the affiliate marketing notice, contrary to Congressional intent. And, compliance with the proposed elements of an extension notice would be an expensive proposition where the costs of administration are likely to far outweigh any limited benefits to the consumer. Creating a special notice will demand new procedures for this one notice, including new software, forms, policies and procedures and employee training. The ICBA believes that this unnecessarily complicates the administration of and compliance with the rule. Instead, the ICBA recommends that the final rule not require a special notice for an extension of an opt-out.

Model Forms

As noted above, the proposal includes a number of model forms that community banks *may* use to provide consumers with the necessary notice. While these forms are not mandatory, use of the forms evidences compliance with the notice requirements. Since many community banks rely on model forms to comply with regulatory requirements, the ICBA applauds the agencies for developing them as templates that companies may use. The ICBA also encourages the agencies to include the safe harbor for companies the elect to use the model forms.

Effective Date

The FACT Act requires the agencies to issue a final rule by September 4, 2004 that must take effect no later than six months after it is issued. The SEC asks if there is a need to delay the compliance date to permit financial institutions to incorporate the affiliate marketing notice in their next annual GLBA privacy notice, a consideration that the statute

also requires the agencies to take into account in promulgating the final rule.[7]

The ICBA believes that additional time will be necessary to allow companies to comply with the final rule, especially since it will take time for the all the agencies involved to coordinate comments and issue a final rule. And, because it is likely that companies will have to make extensive changes to policies and procedures to comply, it will be extremely important that the final rule permit ample time for compliance. We recommend that companies be given one year to comply once the final rule has been published.

Conclusion

The ICBA believes that the proposed rule generally reflects the statutory language. However, as noted above, several adjustments should be made in the final rule that better reflect both the statutory language and Congressional intent. The ICBA recommends these changes be incorporated in the final rule to eliminate unnecessary confusion for both consumers and community banks, retain statutory flexibility for communications with customers, and reduce unnecessary regulatory burden.

Thank you for the opportunity to comment. If you have any questions or would like any additional information, please contact me by telephone at 202-659-8111 or by e-mail at robert.rowe@icba.org.

Sincerely,

Robert G. Rowe, III
Regulatory Counsel

[7] FACT Act section 214 (b)(3).