Securities Industry Association
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August 13, 2004

Via Electronic Mail

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: File Number S7-29-04; Limitations on Affiliate Marketing (Regulation S-AM)

Ladies and Gentlemen:

The Securities Industry Association ("SIA")[1] appreciates the opportunity to comment to the Securities and Exchange Commission (the "Commission") on the Proposed Rule (the "Proposed Rule") to implement the affiliate marketing provisions of § 214 of the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act"). 69 *Fed. Reg.* 42302 (July 14, 2004). Section 214 provides consumers with the opportunity to restrict firms from making marketing solicitations to them based on "eligibility" information obtained from affiliates.

SIA has long recognized the importance of respecting consumer privacy and our member firms are highly supportive of the goals to be accomplished by § 214. Our member firms are committed to protecting customer personal information and providing customers with information that enables them to make choices that are in their best interests.

[1] The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker's Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs 780,000 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2003, the industry generated an estimated $209 billion in domestic revenue and $278 billion in global revenues. (More information about SIA is available on its home page: www.sia.com.)

SIA's comments on the Proposed Rule are as follows:

1) SIA is concerned that in many instances the Proposed Rule digresses from the language found in § 214, and in doing so creates additional restrictions that could have adverse consequences for the securities industry. These arise primarily under the Proposed Rule's definition of terms under "Pre-existing Business Relationships" and "Marketing Solicitations." SIA believes that it is important for the Commission, when it adopts the final rule, to use the statutory language that Congress chose in enacting § 214.

2) The Commission also asks for comment on the concept of "constructive sharing" of eligibility information to conduct marketing. *See* 69 *Fed. Reg.* at 42307. SIA does not believe the Proposed Rule's opt-out should cover a consumer's affirmative response to a solicitation sent by a firm with which it does business simply because the consumer has been selected to receive the solicitation based upon specific eligibility criteria, and whose response has been shared with an affiliate. SIA believes that such solicitations are permitted under § 214 and are not subject to the notice and opt-out provisions of the statute.

3) We also provide suggestions to make the Proposed Rule's notice and opt-out procedures more flexible and useful to consumers.

These comments are more fully discussed below.

I. THE RULE'S DEFINITIONS DIGRESS FROM THE STATUTORY TERMS

PRE-EXISTING BUSINESS RELATIONSHIP

LICENSED AGENTS

"Pre-existing business relationships" are not subject to the Proposed Rule's notice and opt-out provisions. The definition of "pre-existing business relationship" in the Proposed Rule differs in several significant respects from § 214. Under the statute, an existing business relationship is a relationship between a person, or a person's licensed agent, and a consumer based upon certain types of transactions set forth in the statute. The definition of pre-existing business relationship contained in § 247.3(p) of the Proposed Rule, however, does not include the words "or a person's licensed agent." As the Commission is aware, broker-dealers and their registered representatives may be considered "licensed agents." The failure to include "licensed agents" in the Proposed Rule could adversely affect the ability of securities firms to utilize the pre-existing customer relationship exception based upon a relationship between the consumer and a firm or a firm's licensed registered representative.

We see no basis for excluding a firm's licensed agents in the definition of pre-existing business relationship in the Proposed Rule. It is in the consumer's interest to

receive from a securities firm and the firm's licensed agent information about products and services that may be of value to the consumer. Accordingly, we urge the Commission to include the term "or a person's licensed agent" within the definition of "pre-existing business relationship" in the final rule as provided for in § 214.

CONTRACTS IN FORCE

The Proposed Rule also narrows the definition of the term "pre-existing business relationship" by requiring that such a relationship be between a firm and a consumer based on a financial contract between the parties which is in force "on the date which the consumer is sent a marketing solicitation covered by this [rule]." Section 214, however, does not require that the contract be in force on the date on which the consumer is sent a marketing solicitation. 15 U.S.C. § 1681s-3(d)(1)(A). Rather, the provision simply requires that the contract between the person and the consumer be in force at the time the person uses the information. Section 214 states that "[It] shall not apply to a person – (A) using information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship." Requiring firms to ensure that contracts are in force at the time solicitations are made imposes an undue burden on them. Moreover, such a requirement is not provided for in § 214. Delays between the time information is processed and the time a solicitation is sent to consumers are unavoidable. Accordingly, SIA urges the Commission to conform the language of the final rule to that of § 214 by not including a requirement that a contract must be in force between the consumer and the firm at the time the solicitation is made.

MARKETING SOLICITATION

The Proposed Rule provides that a person may not use eligibility information about a consumer to make or send "marketing solicitations" to the consumer unless a notice and opportunity to opt out have been provided to the consumer. § 247.20(a)(1). Section 214 does not use the term "marketing solicitation," but instead uses the phrase "solicitation for marketing purposes," and defines the term "solicitation." 15 U.S.C. §§ 1681s-3(a)(1), (d)(2). The Proposed Rule defines the term "marketing solicitation" in § 247.3(n) in a manner that differs from the definition of the term "solicitation" in § 214.[2]

The Proposed Rule raises the concern that it could include solicitations that do not promote a company's specific products and services. Unlike the definition of "solicitation" in § 214, the Proposed Rule does not include the phrase "product or service" after the term "marketing." In this regard, the definition of "marketing solicitation" in the Proposed Rule implies that the firm's marketing must relate to specific

[2] The statute defines "solicitation" as: the marketing of a product or service initiated by a person to a particular consumer that is based on an exchange of information described in subsection (a), 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 under this section. The Proposed Rule defines the term "marketing solicitation" as: marketing initiated by a person to a particular consumer that is: (i) Based on eligibility information communicated to that person by its affiliate as described in this part; and (ii) Intended to encourage the consumer to purchase or obtain such product or service.

products and services because the term states that the marketing is "intended to encourage the consumer to purchase or obtain such product or service." In order to make the reference meaningful, and to conform the definition in the Proposed Rule to the statute, we suggest the Commission adopt the definition of "solicitation" provided in § 214 rather than create the new term "marketing solicitation."

We are also concerned that the Proposed Rule limits those categories of communications that are excluded from the definition of marketing solicitation. Communications are excluded if they are directed to the general public and distributed without the use of eligibility information communicated by an affiliate. SIA objects to the addition of the underscored words because they are not included in § 214. In practice, it may be unclear as to whether communications directed to the general public may make use of eligibility information communicated by an affiliate. Regarding such solicitations as within the scope of the rule is not appropriate because they are not included in § 214. Accordingly, SIA requests that the Commission delete the underscored words presented above and conform the definition of solicitation to that in the statute.

SIA also believes that the Commission's preamble to the Proposed Rule does not accurately indicate when solicitations may be sent on behalf of a firm. The preamble provides that if a consumer has opted out, a company that has received information from an affiliate may not ask an affiliate with a pre-existing customer relationship to make or send solicitations to the consumer on behalf of the firm. 69 *Fed. Reg*. at 42308. Nothing in § 214 prevents a firm from asking an affiliate that has a pre-existing business relationship with a customer to send information to the customer as long as the firm is not using the information it received from the affiliate in connection with such a solicitation. Accordingly, we urge the Commission to delete such a statement in the preamble to the final rule.

II. CONSTRUCTIVE SHARING

The Commission has requested comment on whether the Proposed Rule should apply if affiliated companies engage in the "constructive sharing" of eligibility information to conduct marketing. This constructive sharing could occur where a broker-dealer makes solicitations on behalf of an affiliate to consumers that meet certain criteria and the consumer replies in a manner that reveals eligibility information to the firm. 69 *Fed. Reg.* at 42307. SIA strongly objects to such solicitation being subject to the Proposed Rule because § 214 expressly authorizes such solicitations and does not subject them to the notice and opt-out provisions.

The statute permits affiliates to freely share eligibility information and criteria with each other without having to provide consumers with notice or opportunity to opt out. Section 214 also expressly permits companies to use eligibility information and criteria received from affiliates to make or send marketing solicitations to consumers when they have a pre-existing business relationship with the consumers without providing notice or opportunity to opt out. Because sharing eligibility information among affiliates either preceding or following a marketing solicitation to a consumer by

the entity that has the pre-existing business relationship would not trigger the notice and opt-out requirement under § 214, "constructive sharing" of this information should also not trigger the notice or opt-out provisions.

A response to a solicitation by a consumer, whether to the sender of the solicitation or to an affiliate of the sender, should not trigger the notice and opt-out requirements. Section 214 provides that its requirements do not apply to a person "using information in response to a communication initiated by the consumer." 15 U.S.C. § 1681s- 3(a)(4)(D). A consumer who requests information about a firm's products and services, even if in response to a marketing solicitation, is initiating a communication to the company seeking information about products and services described in the solicitation. In this situation, because the consumer has initiated the request § 214 permits the firm to use information from its affiliate without providing notice or opportunity to opt out. In addition, the consumer's request for information would come within the exception for pre-existing business relationships because it constitutes an inquiry or application by the consumer regarding a product or service offered by that firm during the three-month period immediately preceding the date on which the solicitation is sent. 15 U.S.C. §§ 1681s-3(a)(4)(A); (d)(1)(C). In this case, the relevant solicitation is the affiliate's follow-up contact to the customer.

To treat the disclosure of such eligibility information in the context of a solicitation as coming within the scope of the Proposed Rule is inappropriate and contrary to consumers' interests. Targeted solicitations are sent to consumers that possess certain characteristics. The ability to solicit consumers who possess certain characteristics or meet certain requirements is extremely important to SIA's member firms. When the consumer responds to the solicitation by contacting the firm, the consumer benefits if the firm already knows that the person meets the requirements for the product or service or has characteristics that make the product or service desirable. The consumer does not have to waste time responding to questions that qualify the consumer for the product or service. Consumers expect firms with which they do business and their affiliates to be aware of information they had provided previously. They also expect firms to be aware of other relationships they possess with affiliates.

Because it expressly conflicts with what the FACT Act permits, is directly contrary to the statutory exceptions, and is inconsistent with consumer expectations, we believe that the concept of constructive sharing should not be incorporated into the final rule.

III. NOTICE AND OPPORTUNITY TO OPT OUT REQUIREMENT

"AFFIRMATIVE" AUTHORIZATION

Section 247.20(c)(5) of the Proposed Rule states that it does not apply if a company uses information in response to an "affirmative" authorization or request by the consumer. The statute, however, does not require that the consumer's request be "affirmative." 15 U.S.C. 1681s-3(a)(4)(E). The term "affirmative" creates uncertainty as

to what may constitute an authorization or request by the consumer. We urge that the Proposed Rule adhere to the language of § 214 and that the term "affirmative" be deleted from § 247.20(c)(5).

ORAL OPT-OUT NOTICES

SIA requests that the Commission permit firms to provide required notices and opportunity to opt out orally. Permitting oral disclosures and notices would be consistent with the way in which many consumers expect to do business with securities firms, and would be consistent with the objectives of the Proposed Rule and of the FACT Act.

The Commission's Gramm-Leach-Bliley ("GLB") privacy rule permits oral notices. It is traditional in the securities industry for firms to conduct business with customers over the telephone. In the course of conversations with customers, a firm may discuss product offerings available from their affiliates. It is very beneficial to consumers if during the discussion, the firm is permitted to provide oral disclosures and provide the consumer with the opportunity to opt out from receiving solicitations from affiliates. A record of the telephone conversation can be made to ensure that consumers receive the required disclosures and notices. The requirement that notices be clear and conspicuous can also be met during telephone conversations. Allowing oral notices provides consumers with the ability to respond promptly to the opportunity of a product from an affiliate. Such notice also provides consumers with a convenient way to exercise their opt-out.

CLEAR AND CONSPICUOUS NOTICES

The Proposed Rule provides that the notice to consumers must be clear and conspicuous. The term "clear and conspicuous" is defined as "reasonably understandable and designed to call attention to the nature and significance of the information presented." Proposed Rule § 247.3(c). SIA believes that this requirement can be met by providing notices and the opportunity to opt out as part of account opening documents. Accordingly, SIA requests that the Commission expressly indicate that required notices and opportunity to opt out may be provided as part of the account opening documents so long as the notices and opt-out forms meet the "clear and conspicuous" requirement.

The Proposed Rule states that the model notices in Appendix A are provided as guidance and that use of the model notices is not required. SIA believes that the Commission should also make it clear that firms are not required to use specific terms or any of the language that appears in the model forms.

OPT-OUT CHOICES

The Proposed Rule provides that if a firm provides a consumer with a menu of opt-out choices, it must also provide as an alternative the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery. Proposed Rule § 247.21(c). SIA is concerned that this provision is very broad and does not reflect

the language of § 214. The FACT Act provides that the required notice shall allow a consumer the opportunity to prohibit all solicitations referred to in (a)(1), and may allow the consumer the opportunity to choose from different options when electing to prohibit the sending of such solicitations. 15 U.S.C. § 1681s-3(a)(2). Section (a)(1) applies to marketing solicitations by a company that receives eligibility information from an affiliate. Accordingly, § 214 requires that a company provide a consumer with an opportunity to opt out from receiving marketing solicitations from a company that receives eligibility information from an affiliate. There is nothing in § 214 that requires a company that is the providing a menu of opt-out choices to a consumer to provide an opt-out with respect to all affiliates, all eligibility information and all methods of delivery. Accordingly, SIA requests that the Commission adopt the language of § 214 and delete references in the final rule to opt out with respect to all affiliates, all eligibility information and all methods of delivery.

RESPONSE TIME

SIA strongly encourages the Commission not to include in the final rule a requirement for firms to disclose in their opt-out notices how long a consumer has to respond to the opt-out notice. The Commission's GLB Act rules do not require this disclosure. We believe that such a disclosure may be difficult for consumers to understand and may very well confuse consumers into believing that they only have a limited period of time in which to opt out. Accordingly, we urge that no such requirement be adopted.

CONSUMER'S REVOCATION OF THE OPT-OUT

SIA requests that the Commission permit consumers to revoke their opt-outs orally. Section 247.25(a) of the Proposed Rule provides that a consumer may revoke his or her opt-out in writing or electronically. However, the rule does not permit a consumer to revoke an opt-out orally. Nothing in § 214 of the statute requires that the consumer's revocation be in writing. Section 214 simply provides that consumers may request that their opt-outs be revoked. 15 U.S.C. 1681s-3(a)(3)(A). The Commission's requirement that opt-outs be in writing or in electronic form runs counter to providing consumers the maximum flexibility in exercising their options. For example, consumers who wish to revoke their opt-outs in response to a telephone solicitation would be at a disadvantage under the Proposed Rule and would not be able to do so.

INFORMATION RECEIVED PRIOR TO COMPLIANCE DATE

Section 247.20(e) provides that the disclosure and notice provisions of the Proposed Rule do not apply to eligibility information received by a firm from an affiliate before the compliance date of the regulation. However, the FACT Act provides that § 214's restrictions do not apply to information received prior to the compliance date. 15 U.S.C. § 1681s-3(a)(5). There is nothing in § 214 that indicates that the information must be received by the firm from its affiliate prior to the compliance date. The language of the statute evidences a clear intent of Congress to permit affiliates to continue to share

information without regard to § 214 so long as the information was in possession of any affiliate prior to the compliance date. Tracing the origin of information will be very difficult, if not impossible. To ensure that companies would continue to have access to such information, subject to the requirements of § 603(d) of the Fair Credit Reporting Act ("FCRA"), Congress grandfathered all such information received by any affiliate. The Commission's Proposed Rule would impose on companies a costly effort to engage in data dumps among their affiliates before the date of compliance, just to ensure that they do not violate the Commission's unnecessary requirement. Such a burden is clearly uncalled for in view of the language of § 214.

SELF-ADDRESSED ENVELOPES

Section 247.23(a)(2) of the Proposed Rule indicates a firm may include a reply form and self-addressed envelope with the required opt-out notice in order to satisfy the requirement that a reasonable and simple method of opting-out be provided to consumers. SIA requests that the term "self-addressed envelope" not be adopted as part of the proposal. While the Commission indicates that this is simply an example of a reasonable and simple method for permitting a consumer to opt out rather than a requirement, we believe that many firms will regard the language as a regulatory requirement rather than simply one possible alternative. Most significantly, including self-addressed envelopes with notices creates the risk that consumers will use the envelopes to communicate other information to the firm. Our member firms' experiences indicate that this is often the case, and that consumers use self-addressed envelopes to send all types information, such as change of address notices. When such information is misdirected, unavoidable delays, as well as more serious consequences, can occur to the detriment of customers. In order to avoid undesirable consequences, the Commission should delete reference to including self-addressed envelopes in the final rule.

DEFINITION OF ELIGIBILITY INFORMATION

SIA is concerned that the definition of "eligibility information" in the Proposed Rule does not provide meaningful guidance as to what types of information are covered. We believe that the Commission should provide a clear definition and examples of the types of information covered in a manner that is relevant to the securities industry. For example, it is not clear whether information is regarded as eligibility information if it is not used or expected to be used as a factor in establishing a person's eligibility for credit, insurance, employment or other purpose authorized under § 604 of the FCRA. In addition, SIA requests that the final rule make clear that lists containing only names and addresses would not ordinarily be regarded as eligibility information.

COMPLIANCE DATE

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. The FACT Act provides that a final rule is to be adopted within nine months after enactment, and the final rule is to be effective within six months thereafter. FACT Act § 214(b)(4).

This means that the final rule is to become effective by March 4, 2005. SIA believes that a March 4, 2005 effective date does not provide firms with adequate time to prepare and co-ordinate the distribution of these notices with the annual GLB Act mailings.

In order to avoid the need for multiple mailings to customers, many companies plan on incorporating the required notice under the Proposed Rule with their annual GLB Act notice. Consolidating the two notices will prove more convenient for customers and improve consumer understanding of their options. Because annual GLB Act notices are being sent to customers throughout the year, we believe that it is appropriate to establish a compliance date of January 1, 2006. This approach is consistent with the approach taken by the Commission when it adopted the GLB Act privacy rules. 65 *Fed. Reg.* 40334 (June 29, 2000). At that time, the Commission established a compliance date of July 2001, which was seven months after the November 13, 2000 effective date of the rule. 65 *Fed. Reg.* at 40356. The Commission noted that six months is insufficient in certain instances for an institution to have ensured that its systems, forms and procedures comply with the rule. Similar considerations apply in this instance. Many broker-dealers who plan on integrating their GLB Act and FCRA forms, systems and procedures will have to make significant operational changes. A compliance date of January 1, 2006 is necessary to ensure that these changes are implemented in a seamless and efficient manner.

OPT-OUT DURATION

SIA supports the five-year opt-out duration for existing customers. However, we oppose the provision in the Proposed Rule that continues an opt-out indefinitely, or until it is revoked, for former customers. We do not believe that an opt-out in perpetuity for former customers or until revoked is consistent with the language of the FACT Act. Section 214 provides that a consumer's election to opt out is effective for at least five years. Upon expiration of the opt-out period, the Act requires that a company provide consumers with notice and opportunity to opt out before it may use information obtained from an affiliate to make marketing solicitations. 15 U.S.C. § 1681s-3(a)(3). To require that the opt-out remains in effect indefinitely turns the statute on its head. We believe that the Commission should adopt the language and procedure provided for in the FACT Act and not adopt the Proposed Rule's provision relating to former customers. This will enable companies to make solicitations regarding products and services that may be of interest to former customers of their affiliates.

COMPLIANCE BURDEN

The Commission estimates that it will require each affiliate one hour on average to review its information sharing and affiliate marketing policies and practices to determine whether notice and opt-out would be necessary. If a notice and opt-out are necessary, the Commission estimates that six hours on average will be needed to provide initial notice and opt-out, and two hours to design notices for new customers. The Commission further estimates that a company will expend an additional two hours to deliver notices to customers and to record any opt-outs that are received. Accordingly,

the Commission estimates that the aggregate cost for the securities industry of implementing the requirement is approximately $3.5 million in the first year of implementation.

We believe that the Commission has grossly underestimated the compliance burden associated with implementation of the Proposed Rule. In this regard, the federal banking agencies estimate that it will take an institution approximately 18 hours to prepare and distribute an initial notice to customers, which is approximately twice as long as the Commission's estimate. 69 *Fed. Reg*. 42502, 42513 (July 15, 2004). Resources that will be consumed in reprogramming expenses alone will run into millions of dollars for the securities industry. Based upon our members' compliance and costs incurred in connection with implementation of the GLB Act, we believe that each firm will spend several hundred hours to review their information sharing and affiliate marketing policies and practices to determine whether notice and opt-out will be necessary, to provide initial notice and opt-out, to design notices to be sent to new customers on an ongoing basis, to deliver notices to customers and to record any opt-outs that are received. SIA believes that the Commission should revise its estimates to determine the compliance costs imposed on the securities industry.

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SIA appreciates the Commission's consideration of our views. If we can provide additional information, please contact the undersigned at (202) 216-2000.

Sincerely,

Alan E. Sorcher
Vice President and
Associate General Counsel

CC: Catherine McGuire (via email)
Associate Director/Chief Counsel