

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 247

[Release Nos. 34-49985, IC-26494, IA-2259; File No. S7-29-04]

RIN 3235-AJ24

Limitations on Affiliate Marketing (Regulation S-AM)

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is publishing for comment proposed rules to implement the affiliate marketing provisions in Section 214 of the Fair and Accurate Credit Transactions Act of 2003, which amends the Fair Credit Reporting Act. Section 214 requires the Commission and other Federal agencies to adopt rules implementing limitations on a person's use of certain information received from an affiliate to solicit a consumer for marketing purposes, unless the consumer has been given notice and an opportunity to opt out of having the information used for those purposes.

DATES: Comments should be received on or before August 13, 2004.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-29-04 on the subject line; or

- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number S7-29-04. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room,

450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: For information regarding the proposed rules as they relate to brokers, dealers, or transfer agents contact Catherine McGuire, Chief Counsel, Brian Bussey, Assistant Chief Counsel, or Tara Prigge, Attorney, Office of Chief Counsel, at the Division of Market Regulation, (202) 942-0073, or regarding the proposed rules as they relate to investment companies or investment advisers, contact Penelope W. Saltzman, Branch Chief, or Hugh Lutz, Attorney, Office of Regulatory Policy, at the Division of Investment Management, (202) 942-0690, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing for public comment Regulation S-AM, 17 CFR 247.1 through 247.27, under Section 214 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act").¹

Table of Contents

- I. Background
- II. Explanation of the Proposed Rules
- III. Section-by-Section Analysis
- IV. General Request for Comment
- V. Costs and Benefits of the Proposed Rule
- VI. Paperwork Reduction Act
- VII. Initial Regulatory Flexibility Analysis
- VIII. Analysis of Effects on Efficiency, Competition, and Capital Formation
- IX. Statutory Authority and Text of Proposed Rules

I. Background

The FACT Act was signed into law on December 4, 2003.² Section 214 of the FACT Act adds a new Section 624 to the Fair Credit Reporting Act ("FCRA").³ This new provision gives consumers the right to restrict a person from making marketing solicitations to them using

¹ Pub. L. 108-159, section 214, 117 Stat. 1952 (2003).

² *Id.*

³ 15 U.S.C. 1681-1681x. The FCRA sets standards for the collection, communication, and use of information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.

A portion of Section 214 of the FACT Act amends the FCRA to add a new Section 624, while other provisions of Section 214 are not incorporated into the FCRA. Throughout this release, references to "Section 214 of the FACT Act" or "Section 624 of the FCRA" are used depending on the portion of Section 214 to which the reference relates.

certain information about them obtained from the person's affiliate.

Section 214 requires the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision (collectively, the "Banking Agencies"), the National Credit Union Administration, the Federal Trade Commission (collectively with the Banking Agencies, the "Agencies"), and the Commission, in consultation and coordination with one another, to issue implementing rules. These rules must be issued in final form not later than nine months after the date of enactment,⁴ and must become effective not later than six months after issuance.⁵

Commission staff worked with staff from the Agencies in developing proposed rules to implement Section 214. As required by Section 214, proposed Regulation S-AM is, to the extent possible, consistent with and comparable to the regulations proposed by the Agencies.⁶ While the provisions in proposed Regulation S-AM, in general, are substantially similar to those proposed by the Agencies, some definitions and examples differ in order to provide more meaningful guidance to the persons subject to the Commission's jurisdiction.

II. Explanation of the Proposed Rules

New Section 624 of the FCRA generally establishes conditions that must be met before a person may use certain information for marketing purposes if the information is obtained from an affiliate. Before a person may make marketing solicitations to a consumer using certain information about that consumer, the consumer must be given notice and a reasonable opportunity to opt out of having the information used for this purpose. Thus, Section 624 governs the use of certain information by an affiliate, and not the sharing of information with or among affiliates.⁷

⁴ See FACT Act sections 214(b)(2) and (3), 15 U.S.C. 1681s-3 note.

⁵ See FACT Act section 214(b)(4), 15 U.S.C. 1681s-3 note.

⁶ The Banking Agencies and the National Credit Union Administration are publishing a joint release proposing rules to implement Section 214 of the FACT Act (the "Joint Proposal"). Citations to particular provisions of the "Joint Proposal" refer to the numbering system used in the proposal of the Board of Governors of the Federal Reserve System. The Federal Trade Commission has already published proposed rules to implement Section 214 (the "FTC Proposal"). See Affiliate Marketing Rule, 69 FR 33324 (June 15, 2004). The Agencies' releases will be available at www.regulations.gov.

⁷ In general, Section 603(d)(2)(A) of the FCRA governs the sharing of information with and among

Responsibility for Providing Notice and an Opportunity To Opt Out

Section 624(a)(1) of the FCRA directs that a person that receives “eligibility information”⁸ about a consumer from its affiliate (the “receiving affiliate”) may not use the information to make a marketing solicitation to that consumer unless the consumer has been provided with notice of the information-sharing and given a reasonable opportunity to opt out of having the information used for marketing. The statute does not specify whether the receiving affiliate or the affiliate that communicates the eligibility information (the “communicating affiliate”) must provide the consumer with notice and the opportunity to opt out.

Arguments can be made for imposing this responsibility on either affiliate. Because Section 624 is drafted as a prohibition on the use of information by the receiving affiliate, and does not explicitly impose any affirmative duty on the communicating affiliate, the receiving affiliate could be required to take responsibility for giving the notice. However, the language in Section 624(a)(1)(A), which provides that the notice to the consumer must state that information “may be communicated” among affiliates for the purpose of making marketing solicitations,⁹ suggests the communicating affiliate

affiliates. As discussed in note 3 above, the FCRA sets standards for the collection, communication, and use of information bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. The FCRA provides that a person who communicates these forms of information to others could become a “consumer reporting agency,” which is subject to substantial statutory obligations. However, a person may communicate information about its own “transactions or experiences” with a consumer without becoming a consumer reporting agency. This transaction or experience information may be communicated among affiliated persons without any of them becoming a consumer reporting agency. See FCRA sections 603(d)(2)(A)(i) and (ii), 15 U.S.C. 1681a(d)(2)(A)(i) and (ii).

The FCRA also allows that a person may communicate to its affiliates information other than transaction or experience information without becoming a consumer reporting agency if the person first gives the consumer a clear and conspicuous notice that such information may be communicated to its affiliates and an opportunity to “opt out,” or block the person from sharing the information. See FCRA section 603(d)(2)(A)(iii), 15 U.S.C. 1681a(d)(2)(A)(iii). There is some overlap between this “affiliate sharing” provision of the FCRA and the “affiliate marketing” rules that we currently propose. The two provisions are distinct, however, and they serve different purposes. Nothing in these proposed rules regarding the limitations on affiliate marketing under Section 624 of the FCRA would supersede or replace the affiliate sharing notice and opt-out requirement contained in Section 603(d)(2)(A)(iii) of the FCRA.

⁸ “Eligibility information” is defined in proposed paragraph (i) of § 247.3. See the discussion below.

⁹ 15 U.S.C. 1681s–3(a)(1)(A).

would provide the notice before sharing the information. This latter view gains support from other statutory provisions. For example, Section 624(b)¹⁰ allows for the combination of affiliate marketing opt-out notices with other notices required by law, which may include privacy notices that must be sent by communicating affiliates under the Gramm-Leach-Bliley Act (“GLB Act”).¹¹ Similarly, Section 214(b)(3) of the FACT Act directs the Agencies and the Commission to consider existing affiliate sharing notification practices under Section 603(d)(2)(A)(iii) of the FCRA¹²—which are provided by the affiliate that already has a relationship with the consumer—and to allow for coordination and consolidation of the affiliate sharing and affiliate marketing notices.¹³ These provisions, taken together, suggest that the communicating affiliate should give the notice.

We, therefore, propose that the communicating affiliate would be responsible for satisfying the notice requirement where applicable. Under the proposed rule, the communicating affiliate would have the flexibility either to give the notice directly or through an agent, or to provide a joint notice in conjunction with one or more other affiliates. This approach should facilitate the use of a single notice among affiliates. At the same time, it would ensure that the notice is not provided solely by the receiving affiliate, from which the consumer may not expect to receive important notices regarding the consumer’s opt-out rights. We request comment on this approach generally, and whether it would provide consumers with reasonable notice. We also invite comment on whether the receiving affiliate should be permitted to give the notice solely on its own behalf. Commenters are also invited to discuss whether a notice solely from the receiving affiliate would effectively be a marketing solicitation because it constitutes that affiliate’s first contact with the consumer. In addition, we invite comment on whether a notice from the receiving affiliate would be as effective as a notice from the communicating affiliate.

Scope of Coverage

In defining the circumstances in which the notice and opt-out requirements apply, the proposal focuses on the communication of

“eligibility information” among affiliates. The proposed definition of “eligibility information” would encompass any information that, if communicated, would be a “consumer report,” but for the FCRA’s statutory exclusions for the sharing of transaction or experience information and for the sharing of information among affiliates.¹⁴ Section 603(d)(1) of the FCRA defines a “consumer report” as any written, oral, or other communication by a consumer reporting agency of any information 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 in Section 604 of the FCRA.¹⁵ We invite comment on whether the proposed definition of “eligibility information” appropriately reflects the scope of coverage of the FACT Act and provides meaningful guidance to affected persons.¹⁶

Section 624(a)(4) of the FCRA also limits the scope of the notice and opt-out requirements by specifying that they do not apply when: (1) The affiliate receiving the information has a pre-existing business relationship with the consumer; (2) the information is used to perform services for another affiliate (subject to certain conditions); (3) the information is used in response to a communication initiated by the consumer; or (4) the information is used to make a solicitation that has been authorized or requested by the consumer.¹⁷ We have incorporated each of these statutory exceptions into the proposed rules. The terms “solicitation” and “pre-existing business relationship” are defined in Section 624(d) of the FCRA and are discussed in detail in Section III below. Section 624(d) of the FCRA authorizes the Commission to prescribe additional circumstances that would constitute a “pre-existing business relationship” or would not constitute a “solicitation.”¹⁸ We seek

¹⁴ See note 7 above, discussing 15 U.S.C. 1681a(d)(2)(A).

¹⁵ 15 U.S.C. 1681a(d)(1).

¹⁶ Section 624(a)(1) refers to a “communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A)” of the FCRA.

¹⁷ 15 U.S.C. 1681s–3(a)(4).

¹⁸ 15 U.S.C. 1681s–3(d).

¹⁰ 15 U.S.C. 1681s–3(b).

¹¹ Pub. L. 106–102, 113 Stat. 1338 (1999).

¹² See note 7 above for a discussion of this section of the FCRA.

¹³ See 15 U.S.C. 1681s–3 note.

comment on any additional circumstances that the Commission should consider.

Duration of Opt-Out

Section 624(a)(3) of the FCRA provides that a consumer's affiliate marketing opt-out election shall be effective for at least five years.¹⁹ Accordingly, the proposal provides that a consumer's opt-out election would be valid for a period of at least five years (the "opt-out period"), beginning as soon as reasonably practicable after the consumer's opt-out election is received, unless the consumer revokes the election before the opt-out period has expired. When a consumer opts out, unless a statutory exception applies, a receiving affiliate would be unable to make or send marketing solicitations to that consumer based on his or her eligibility information during the opt-out period.

As described below, an extension notice would be provided to the consumer at the end of the opt-out period if the receiving affiliate wishes to make marketing solicitations. Affiliated persons may wish to avoid the cost and burden of tracking five-year consumer opt-out periods with varying start and end dates, and delivering extension notices to each consumer at the appropriate time, by choosing to treat a consumer's opt-out election as effective for a period longer than five years, including indefinitely.²⁰ A person that chooses to honor a consumer's opt-out election for more than five years would not violate the proposed rules.

III. Section-by-Section Analysis

Section 247.1 Purpose and Scope

Proposed paragraph (a) of § 247.1 of Regulation S-AM specifically sets forth that the purpose of the proposed rules is to implement the affiliate marketing provisions of the FACT Act. Proposed paragraph (b) of § 247.1 lists the entities to which proposed Regulation S-AM would apply.

The FACT Act does not specifically identify which entities would be subject to the rules prescribed by the Commission.²¹ Congress' inclusion of

the Commission as one of the agencies required to adopt implementing regulations suggests that Congress intended that our rules apply to brokers, dealers, and investment companies, as well as to investment advisers and transfer agents that are registered with the Commission (respectively, "registered investment advisers" and "registered transfer agents," and, collectively with brokers, dealers, and investment companies, "Covered Persons"). These entities are referred to as "you" throughout the proposed rules. However, broker-dealers required to register by notice with the Commission under Section 15(b)(11) of the Securities Exchange Act of 1934 ("Exchange Act") for the purpose of conducting business in security futures products ("notice-registered broker-dealers") would be excluded from the scope of the rules.²²

Section 247.2 Examples

Given the wide range of possible situations covered by Section 624 of the FCRA, the proposal includes general rules and provides more specific examples. These examples are intended to provide guidance about how the rules are likely to apply in specific situations, and to assist persons subject to the rules in understanding and complying with them. Proposed § 247.2 describes how examples are used in the proposed rules, and explains that the examples are not exclusive.²³ Rather, examples in a paragraph illustrate only the issue described in the paragraph and do not

FCRA grants enforcement authority to the Federal Trade Commission for all persons subject to FCRA "except to the extent that enforcement * * * is specifically committed to some other government agency under subsection (b)" of Section 621. 15 U.S.C. 1681s. The Commission is not one of the agencies included under subsection (b). 15 U.S.C. 1681s(b). The Commission was added to the list of federal agencies required to adopt implementing regulations under Section 214 of the FACT Act in conference committee. There is no legislative history on this issue.

²² See the proposed definitions of "broker" and "dealer" below. Notice-registered broker-dealers are subject to primary oversight by the Commodity Futures Trading Commission ("CFTC") and are exempted from all but the core provisions of the laws administered by the Commission. We interpret Congress' exclusion of the CFTC from the list of financial regulators required to adopt implementing regulations under Section 214(b) of the FACT Act to mean that Congress did not intend for the Commission's rules under the FACT Act to apply to entities subject to primary oversight by the CFTC.

²³ The Joint Proposal provides that, to the extent applicable, compliance with an example would constitute compliance with the rule. See, e.g., Joint Proposal, § 222.2. The examples in our proposed rules, however, would not provide the same safe harbor. The examples are intended to describe the broad outlines of ordinary situations that would constitute compliance with the applicable rule. However, the specific facts and circumstances relating to each particular situation would determine whether compliance with an example constitutes compliance with the rule.

illustrate any other issue that may arise. We request comment on proposed § 247.2.

Section 247.3 Definitions

Proposed § 247.3 defines the following key terms used in proposed Regulation S-AM:

Affiliate

Proposed paragraph (a) of § 247.3 defines an "affiliate" of a Covered Person as any person that is related by common ownership or common corporate control with the Covered Person. The proposed rules also provide that a Covered Person would be considered an affiliate of another person for purposes of these rules if: (1) The other person is regulated under Section 214 of the FACT Act by one of the Agencies and (2) the rules adopted by that Agency treat the Covered Person as an affiliate of the other person.²⁴

The proposed definition of affiliate follows the definition of "affiliates" in Section 2 of the FACT Act: "persons that are related by common ownership or affiliated by corporate control."²⁵ A portion of the proposed definition incorporates the defined term "control," which applies exclusively to control of a "company." We invite comment on this proposed definition of "affiliate."

*Broker*²⁶

Proposed paragraph (b) of § 247.3 defines "broker" to have the same meaning as in Section 3(a)(4) of the Exchange Act,²⁷ regardless of whether the person is registered under Section 15(b) of the Exchange Act.²⁸ The term would include a municipal securities broker as defined in Section 3(a)(31) of the Exchange Act,²⁹ regardless of

²⁴ Proposed § 247.3(a)(1)–(2). This provision is designed to prevent the disparate treatment of affiliates within a holding company structure. Without this provision, a broker-dealer in a bank holding company structure might not be considered affiliated with another entity in that organization under the Commission's proposed rules, even though the two entities would be considered affiliated under the Joint Proposal.

²⁵ The FACT Act and the FCRA contain slightly varied definitions of "affiliate." "Affiliate" is not a defined term in the FCRA, but various provisions of the FCRA refer to persons "related by common ownership or affiliated by common corporate control," "related by common ownership or affiliated by common corporate control," or "affiliated by common ownership or control." See, e.g., sections 603(d)(2), 615(b)(2), and 625(b). In contrast, the GLB Act defines "affiliate" to mean "any company that controls, is controlled by, or is under common control with" another. The proposed definition is intended to harmonize the various definitions of "affiliate" in the FACT Act and the FCRA.

²⁶ The Joint Proposal does not include a definition of "broker."

²⁷ 15 U.S.C. 78(c)(4).

²⁸ 15 U.S.C. 78o(b).

²⁹ 15 U.S.C. 78c(a)(31).

¹⁹ 15 U.S.C. 1681s–3(a)(3).

²⁰ Of course, a consumer who wishes to receive marketing materials may revoke his or her opt-out election at any time before the opt-out period expires.

²¹ Section 214 of the FACT Act directs that implementing regulations must be prescribed by the "Federal banking agencies, the National Credit Union Administration, and the [Federal Trade] Commission, with respect to the entities that are subject to their respective enforcement authority under Section 621 of the Fair Credit Reporting Act and the Securities and Exchange Commission * * *" 15 U.S.C. 1681s–3 note. Section 621 of

whether it is registered under Section 15(b) of the Exchange Act.³⁰ In addition, the term would include a government securities broker as defined in Section 3(a)(43) of the Exchange Act³¹ (other than a bank as defined in Section 3(a)(6) of the Exchange Act),³² regardless of whether it is registered under Section 15(b) or 15C(a)(2) of the Exchange Act.³³ The proposed definition specifically excludes a broker registered by notice with the Commission under Section 15(b)(11) of the Exchange Act³⁴ for the purpose of conducting business in security futures products.³⁵

Clear and Conspicuous

Proposed paragraph (c) of § 247.3 defines “clear and conspicuous” to mean reasonably understandable and designed to call attention to the nature and significance of the information presented. While persons subject to proposed Regulation S-AM would have flexibility in determining how best to meet the clear and conspicuous standard, they may wish to consider a number of methods to make their notices clear and conspicuous.

A notice or disclosure could be made reasonably understandable through methods that include but are not limited to:

- Using clear and concise sentences, paragraphs, and sections;
- Using short explanatory sentences;
- Using bullet lists;
- Using definite, concrete, everyday words;
- Using active voice;
- Avoiding multiple negatives;
- Avoiding legal and highly technical business terminology; and
- Avoiding explanations that are imprecise and are readily subject to different interpretations.

A notice or disclosure could also use various design methods to call attention to the nature and significance of the information in it, including but not limited to:

- Using a plain-language heading;
- Using a typeface and type size that are easy to read;

- Using wide margins and ample line spacing; and
- Using boldface or italics for key words.

Under the proposal, persons that choose to provide the notice or disclosure by using a Web page³⁶ could use text or visual cues to encourage the reader to scroll down the page if necessary to view the entire notice. They also could take steps to ensure that other elements on the Web site (such as text, graphics, hyperlinks, or sound) do not distract attention from the notice. Persons that would be subject to proposed Regulation S-AM would be encouraged to use readability testing or similar measures to ensure that their notices and disclosures are understandable to consumers.

To be “clear and conspicuous,” a notice would need to be designed to call attention to the nature and significance of the information in it. When a notice or disclosure is combined with other information, design techniques to accomplish this could include the use of distinctive type sizes, styles, fonts, paragraphs, headings, graphic devices, groupings, or other devices. It would be unnecessary, however, to use distinctive features to differentiate an affiliate marketing opt-out notice from other components of a required disclosure (such as a privacy notice under the GLB Act that includes several opt-out disclosures in a single notice).³⁷

We recognize that it might not be feasible to employ all of the methods described above all of the time. For example, a person might need to use legal terminology, rather than everyday words, in some circumstances in order to provide a precise explanation. Although persons subject to proposed Regulation S-AM would not be required to consider the practices described above in designing their notices or disclosures, we encourage them to do so. We request comment on the proposed definition of “clear and conspicuous.”

Commission³⁸

Proposed paragraph (d) of § 247.3 defines “Commission” to mean the Securities and Exchange Commission.

³⁶ See the discussion of § 247.24 below for a description of requirements for the electronic delivery of notices.

³⁷ Nothing in the clear and conspicuous standard requires an affiliate marketing opt-out notice to be segregated when combined with a privacy notice under the GLB Act or with other required disclosures.

³⁸ The Joint Proposal does not define the term “Commission.”

Company

Proposed paragraph (e) of § 247.3 defines “company,” as used in the definition of “affiliate,” as any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

Consumer

Proposed paragraph (f) of § 247.3 defines “consumer” to mean an individual, which follows the statutory definition in Section 603(c) of the FCRA.³⁹ For purposes of this proposed definition, an individual acting through a legal representative would qualify as a consumer.

Control

Proposed paragraph (g) of § 247.3 defines “control” for purposes of Covered Persons to mean the power to exercise a controlling influence over the management or policies of a company, whether through ownership of securities, by contract, or otherwise.⁴⁰ Ownership of more than 25 percent of a company’s voting securities would create a presumption of control of the company.⁴¹ This definition would be used to determine when companies are affiliated,⁴² and would result in financial institutions being considered affiliates regardless of whether the control is exercised by a company or an individual.⁴³ We request comment on this proposed definition.

Dealer⁴⁴

Proposed paragraph (h) of § 247.3 defines “dealer” to have the same meaning as in Section 3(a)(5) of the Exchange Act,⁴⁵ regardless of whether the dealer is registered under Section

³⁹ 15 U.S.C. 1681a(c). The definition of “consumer” in the FCRA differs from the narrower definition used in the privacy regulations enacted under Title V of the GLB Act. See, e.g., 17 CFR 247.3(g).

⁴⁰ See, e.g., 17 CFR 240.19g2-1(b)(2).

⁴¹ This presumption may be rebutted by evidence, but, in the case of an investment company, will continue until the Commission makes a decision to the contrary according to the procedures described in Section 2(a)(9) of the Investment Company Act, 15 U.S.C. 80a-2(a)(9).

⁴² See the discussion of proposed § 247.3(a) above.

⁴³ This proposed definition of “control” differs from the definition proposed by the Agencies. The Joint Proposal, for example, would define control as ownership of 25 percent of a company’s voting securities, control over the election of a majority of the directors, trustees or general partners of the company, or the power to exercise a controlling influence over management or policies of a company, as determined by the particular agency. See Joint Proposal, § 222.3(i).

⁴⁴ The Joint Proposal does not define the term “dealer.”

⁴⁵ 15 U.S.C. 78c(a)(5).

³⁰ 15 U.S.C. 78o(b).

³¹ 15 U.S.C. 78c(a)(43).

³² 15 U.S.C. 78c(a)(6). For purposes of this definition and the definition of “dealer” (see proposed § 247.3(h)), the term “bank” would not include a foreign bank (as that term is defined in Section 1(b)(7) the International Banking Act of 1978, 12 U.S.C. 3101(7)) or a savings association (as defined in Section 3(b) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)) the deposits of which are insured by the Federal Deposit Insurance Corporation.

³³ 15 U.S.C. 78o(b), 78o-5(a)(2).

³⁴ 15 U.S.C. 78o(b)(11).

³⁵ See note 22 above, discussing the applicability of the proposed rules to notice-registered broker-dealers.

15(b) of the Exchange Act.⁴⁶ The term would include a municipal securities dealer as defined in Section 3(a)(30) of the Exchange Act,⁴⁷ other than a bank (as defined in Section 3(a)(6) of the Exchange Act),⁴⁸ regardless of whether it is registered under Section 15(b) or 15B(a)(2) of the Exchange Act.⁴⁹ In addition, the term would include a government securities dealer as defined in Section 3(a)(44) of the Exchange Act,⁵⁰ regardless of whether it is registered under Section 15(b) or 15C(a)(2) of the Exchange Act.⁵¹ The proposed definition specifically would exclude a dealer registered by notice with the Commission under Section 15(b)(11) of the Exchange Act⁵² for the purpose of conducting business in security futures products.⁵³

Eligibility Information

Proposed paragraph (i) of § 247.3 defines “eligibility information” to mean any information the communication of which would be a consumer report if the exclusions from the definition of “consumer report” in Section 603(d)(2)(A) of the FCRA⁵⁴ did not apply. Eligibility information may include any information bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, whether that information was obtained from a person’s own transactions or experiences with the consumer (*e.g.*, information about a consumer’s account history with that person) or from other sources (*e.g.*, information received from credit bureau reports).

FCRA

Proposed paragraph (j) of § 247.3 defines “FCRA” to mean the Fair Credit Reporting Act.⁵⁵

GLB Act⁵⁶

Proposed paragraph (k) of § 247.3 defines “GLB Act” to mean the Gramm-Leach-Bliley Act.⁵⁷

Investment Adviser⁵⁸

Proposed paragraph (l) of § 247.3 defines “investment adviser” to have the same meaning as in Section 202(a)(11) of the Investment Advisers Act of 1940 (“Investment Advisers Act”).⁵⁹

Investment Company⁶⁰

Proposed paragraph (m) of § 247.3 defines “investment company” to have the same meaning as in Section 3 of the Investment Company Act of 1940 (“Investment Company Act”),⁶¹ regardless of whether the investment company is registered with the Commission.⁶² The proposed definition also clarifies that the term includes a separate series of the investment company.

Marketing Solicitation

Proposed paragraph (n) of § 247.3 defines “marketing solicitation” to mean marketing initiated by a person to a particular consumer that is based on eligibility information communicated to that person by its affiliate, and that is intended to encourage the consumer to purchase a product or service. The proposed definition includes any form of communication, such as a telemarketing call, direct mail, or electronic mail, that is directed to a specific consumer based on that consumer’s eligibility information. The proposed definition does not include communications that are directed at the general public without regard to eligibility information, even if those communications are intended to encourage consumers to purchase products and services. While the proposed definition tracks the definition in Section 624 of the FCRA, it does not follow the statute exactly. Modifications are intended to prevent confusion in the context of the federal securities laws.⁶³

Section 624 also authorizes the Commission to exclude other communications from the definition of “marketing solicitation.”⁶⁴ We do not propose to exercise that authority at this

time. We solicit comment, however, on whether there are other communications that we should exclude from the definition of “solicitation.”

We also request 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. Commenters are invited to discuss whether the Commission should provide persons subject to the rules with further guidance to address Internet marketing.

Person

Proposed paragraph (o) of § 247.3 defines “person” to mean any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity. A person could act through an agent, such as a licensed agent (in the case of an insurance company), a trustee (in the case of a trust), or any other agent. For purposes of this proposed rule, actions taken by an agent on behalf of a person that are within the scope of the agency relationship would be treated as actions of that person.

Pre-Existing Business Relationship

Proposed paragraph (p) of § 247.3 defines “pre-existing business relationship” to mean a relationship between a person and a consumer based on: (1) A financial contract between the person and the consumer that is in force; (2) 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 a marketing solicitation is made or sent to the consumer; or (3) an inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which a marketing solicitation is made or sent to the consumer. While the proposed definition tracks the definition in Section 624 of the FCRA, it does not follow the statute exactly.⁶⁵

Section 624 also authorizes the Commission to recognize any other circumstances that would constitute a pre-existing business relationship.⁶⁶ We do not propose to exercise that authority at this time. We solicit comment,

⁵⁸ The Joint Proposal does not define the term “investment adviser.”

⁵⁹ 15 U.S.C. 80b-2(a)(11).

⁶⁰ The Joint Proposal does not define the term “investment company.”

⁶¹ 15 U.S.C. 80a-3.

⁶² Thus, a business development company, which is an investment company but is not required to register with the Commission, would be subject to this part. *See* 15 U.S.C. 80a-2(a)(48).

⁶³ 15 U.S.C. 1681s-3(d)(2). As noted above, we use the term “marketing solicitation” as opposed to the term “solicitation” (which is the term used in Section 624 of the FACT Act) in the proposed rules to avoid any confusion with the concept of solicitation under the federal securities laws.

⁶⁴ *See* 15 U.S.C. 1681s-3(d)(2).

⁶⁵ *See* 15 U.S.C. 1681s-3(d)(1).

⁶⁶ *See* 15 U.S.C. 1681s-3(d)(1)(D).

⁴⁶ 15 U.S.C. 78o(b).

⁴⁷ 15 U.S.C. 78c(a)(30).

⁴⁸ 15 U.S.C. 78c(a)(6). *See* note 32 above.

⁴⁹ 15 U.S.C. 78o(b), 78o-4(a)(2).

⁵⁰ 15 U.S.C. 78c(a)(44).

⁵¹ 15 U.S.C. 78o(b), 78o-5(a)(2).

⁵² 15 U.S.C. 78o(b)(11).

⁵³ *See* note 22 above, discussing the applicability of the proposed rules to notice-registered broker-dealers.

⁵⁴ 15 U.S.C. 1681a(d)(2)(A).

⁵⁵ 15 U.S.C. 1681 *et seq.*

⁵⁶ The Joint Proposal does not define the term “GLB Act.”

⁵⁷ 15 U.S.C. 6801 *et seq.*

however, on whether there are other circumstances that we should determine to fall within the definition of “pre-existing business relationship.”

Transfer Agent

Proposed paragraph (q) of § 247.3 defines “transfer agent” to have the same meaning as in Section 3(a)(25) of the Exchange Act.⁶⁷

You

Proposed paragraph (r) of § 247.3 defines entities within the scope of the proposed rules—brokers, dealers, investment companies, registered investment advisers, and registered transfer agents—as “you.” The term “you” is intended to make the rules easier to understand and to use.

Section 247.20 Use of Eligibility Information by Affiliates for Marketing

Proposed § 247.20⁶⁸ establishes the parameters of the requirement to provide a consumer with notice and a reasonable opportunity to opt out before a receiving affiliate uses eligibility information to make marketing solicitations to the consumer. As discussed above, the statute does not specify which affiliate must provide an opt-out notice to the consumer. The proposed rules would resolve this ambiguity by imposing certain duties on the communicating affiliate and certain duties on the receiving affiliate. These bifurcated duties are set forth in paragraphs (a) and (b).

Duties of a Communicating Affiliate

Proposed paragraph (a) of § 247.20 would set forth the duty of a communicating affiliate. Under the proposal, before a receiving affiliate could use eligibility information to make or send marketing solicitations to a consumer, the communicating affiliate would have to provide a notice to the consumer stating that this information may be communicated to and used by the receiving affiliate for marketing purposes, and must give the consumer a reasonable opportunity to opt out through some simple method. The requirements of notice and opt-out would only apply if a receiving affiliate uses eligibility information for marketing purposes. Thus, the requirements of proposed paragraph (a) would not apply if no eligibility information is communicated to affiliates, or if no receiving affiliate uses eligibility information to make marketing solicitations.

Proposed paragraph (a) 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. We invite comment on whether, given the policy objectives of Section 214 of the FACT Act, proposed paragraph (a) 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, we request commenters to consider the applicability of paragraph (a) 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, 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 discernable eligibility information, such as a response form that is coded to identify the consumer as an individual who meets the specific eligibility criteria.

Proposed paragraph (a) also includes two “rules of construction” that give further guidance regarding how affiliate marketing notices might be provided to consumers. The first rule of construction would permit the notice to be provided either in the name of a person with which the consumer currently does or previously has done business, or in one or more common corporate names shared by members of an affiliated group of companies that includes the common corporate name used by that person. This rule of construction also would provide three alternatives regarding the manner in which the notice may be given. First, a communicating affiliate could provide the notice to the consumer directly. Second, a communicating affiliate could use an agent to provide the notice, so long as the agent provides the notice in the name of the communicating affiliate or in a common corporate name.⁶⁹

⁶⁹Of course, if the agent is an affiliate of the person that provides the notice, that affiliate could not include any marketing solicitations of its own on or with the notice, unless one of the exceptions in paragraph (c) of this section applies. Even if the agent sending the notice is not an affiliate, the agent would only be permitted to use the information for limited purposes under the GLB Act privacy regulations. See 17 CFR 248.11.

When using an agent, the communicating affiliate would remain responsible for any failure of the agent to fulfill its notice obligations. Third, a communicating affiliate could provide a joint notice with one or more of its affiliates, as provided in § 247.24(c).⁷⁰

This rule of construction is intended to strike a balance by allowing some flexibility regarding which entity or entities within an affiliated group would provide the notice, while ensuring that the notice is meaningful and designed to be effective. An opt-out notice provided to a consumer solely in the name of a receiving affiliate is not likely to be effective because the name of the receiving affiliate would not be recognizable to the consumer as an entity with which the consumer does or has done business. For example, if the consumer has a relationship with “company ABC” but the opt-out notice is provided solely in the name of “company XYZ” (which does not share a common family name with company ABC), the notice is not likely to be effective. Indeed, many consumers might disregard a notice from company XYZ on the assumption that the notice was unsolicited junk mail. If, however, the consumer has a relationship with company ABC and the opt-out notice is provided jointly in the name of all affiliated companies that share the ABC name and the XYZ name, the notice is likely to be effective because the consumer would recognize the name of company ABC. We request comment on this first proposed rule of construction.

As explained above, more than one affiliated company may play the role of communicating affiliate with regard to the same set of eligibility information. Thus, the second rule of construction makes clear that it is not necessary for each affiliate that communicates the same eligibility information to provide an opt-out notice to the consumer, so long as the notice provided by the initial communicating affiliate is broad enough to cover the communication to, and marketing use by, all subsequent affiliates. For example, if affiliate A communicates eligibility information to affiliate B, and affiliate B communicates the same information to affiliate C, affiliate B does not have to provide the consumer with a separate opt-out notice, so long as affiliate A’s notice was broad enough to cover both B’s and C’s use of that information. Proposed Regulation S-AM provides examples to illustrate how these “rules of construction” work. We request comment on this second proposed rule of construction.

⁷⁰Section 247.8(c) is discussed more fully below.

⁶⁷ 15 U.S.C. 78c(a)(25).

⁶⁸ For consistency and ease of reference, proposed Regulation S-AM retains the section numbering used by the Agencies in their proposed rules.

Proposed paragraph (a) of § 247.20 contemplates that the opt-out notice would be provided to a consumer in writing or, if the consumer agrees, electronically. We request comment on whether there are circumstances in which oral notice and opt-out should be permitted. Commenters should indicate how an oral notice could satisfy the statutory “clear and conspicuous” standard.⁷¹

Duties of a Receiving Affiliate

Proposed paragraph (b) of § 247.20 sets forth the general duties of a receiving affiliate. In particular, a receiving affiliate could not use the eligibility information it receives from its affiliate to make marketing solicitations to a consumer unless, prior to such use the consumer has: (1) Been provided an opt-out notice (as described in paragraph (a) of § 247.20) that applies to that affiliate’s use of eligibility information; (2) received a reasonable opportunity to opt out of that use through one or more simple methods; and (3) not opted out. We invite comment regarding the duties of a receiving affiliate.

Duties Predicated on Sharing “Eligibility Information”

The requirements of proposed paragraphs (a) and (b) of § 247.20 would only apply when the information communicated to affiliates meets the definition of “eligibility information,” which, as explained above, would incorporate the concept of a “consumer report,” from Section 603(d) of the FCRA.⁷² In light of the FCRA exceptions to the statutory definition of “consumer report,” we recognize that it might be burdensome to determine and track whether consumer report information is “eligibility information” (to which the notice and opt-out provisions of Section 624 apply) or information that may be shared with affiliates under other exceptions in the FCRA (to which the notice and opt-out provisions of Section 624 do not apply). If the proposal is adopted, persons seeking to minimize their compliance burden could satisfy the requirements of Section 624 by voluntarily offering consumers the ability to opt out of marketing based on information that is shared under any of the exceptions in Section 603(d)(2) of the FCRA.

⁷¹ Certain exceptions to the notice and opt-out requirement may be triggered by an oral communication from or with a consumer. These exceptions are contained in proposed paragraph (c) of § 247.4 and are discussed below.

⁷² 15 U.S.C. 1681s–3(a)(1). See the discussion accompanying notes 14–16 above.

Exceptions

Proposed paragraph (c) of § 247.20 incorporates the statutory exceptions to the affiliate marketing notice and opt-out requirements as set forth in Section 624(a)(4) of the FCRA. In particular, proposed paragraph (c) provides that the receiving affiliate need not comply with these requirements if: (1) It uses the information to make a marketing solicitation to a consumer with whom the affiliate has a pre-existing business relationship; (2) it uses the information to facilitate communications to an individual for whose benefit the affiliate provides employee benefit or other services under a contract with an employer related to and arising out of a current employment relationship or an individual’s status as a participant or beneficiary of an employee benefit plan; (3) it uses the information to perform services for another affiliate, unless the services involve sending marketing solicitations on behalf of the other affiliate and that affiliate is not permitted to send such solicitations itself as a result of the consumer’s decision to opt out; (4) it uses the information to make marketing solicitations in response to a communication initiated by the consumer; (5) it uses the information to make marketing solicitations in response to a consumer’s request or authorization for a marketing solicitation; or (6) compliance with the requirements of proposed Regulation S–AM would prevent the affiliate from complying with any provision of state insurance laws pertaining to unfair discrimination in a state in which the affiliate is lawfully doing business.⁷³ We discuss several of these exceptions below.

Proposed paragraph (c)(1) clarifies that the notice and opt-out requirements of proposed Regulation S–AM would not apply when the receiving affiliate has a pre-existing business relationship with the consumer. As noted above, the term pre-existing business relationship would be defined to include situations in which: (1) The consumer has purchased, rented, or leased the affiliate’s goods or services during the 18 months immediately preceding the date of the solicitation; or (2) the consumer has inquired about or applied for a product or service offered by the affiliate during the three-month period immediately preceding the date of the marketing solicitation.⁷⁴ These

⁷³ See FCRA section 624(a)(4), 15 U.S.C. 1681s–3(a)(4).

⁷⁴ See discussion of proposed paragraph (p) of § 247.3. The proposed definition would also include situations in which (1) there is a financial

contract in force between the affiliate and the consumer; or (2) the consumer and the affiliate have engaged in a financial transaction (including holding an active account or a policy in force or having another continuing relationship) during the 18 months immediately preceding the date of the solicitation.

provisions are substantially similar to the definition of “established business relationship” under the amended Telemarketing Sales Rule (“TSR”).⁷⁵ That definition was informed by Congress’ intent that the “established business relationship” exemption to the “do not call” provisions of the Telephone Consumer Protection Act⁷⁶ should be grounded on the reasonable expectations of the consumer.⁷⁷ Congress’ incorporation of similar language in the definition of “pre-existing business relationship”⁷⁸ suggests that it would be appropriate to consider the reasonable expectations of the consumer in determining the scope of this exception. Thus, for purposes of the proposed rules, an “inquiry” would include 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.⁷⁹ For example, 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. Proposed paragraph (d)(1) of § 247.20 provides examples of the pre-existing business relationship exception.

Proposed paragraph (c)(3) of § 247.20 clarifies that the notice and opt-out requirements do not apply when the information is used to perform services for another affiliate. Of course, the exception would not apply if the other affiliate is not permitted to make or send marketing solicitations on its own behalf, for example as a result of the consumer’s prior decision to opt out. Thus, when the notice has been provided to a consumer and the consumer has opted out, a receiving affiliate subject to the consumer’s opt-out election could not circumvent the opt-out by instructing the communicating affiliate or another affiliate to make or send marketing

contract in force between the affiliate and the consumer; or (2) the consumer and the affiliate have engaged in a financial transaction (including holding an active account or a policy in force or having another continuing relationship) during the 18 months immediately preceding the date of the solicitation.

⁷⁵ 16 CFR 310.2(n). The definition of an “established business relationship” has been incorporated into the telemarketing rule of the National Association of Securities Dealers as well. See NASD Rule 2212.

⁷⁶ 47 U.S.C. 227 *et seq.*

⁷⁷ H.R. Rep. No. 102–317, at 14–15 (1991). See also 68 FR 4580, 4591–4594 (Jan. 29, 2003).

⁷⁸ 149 Cong. Rec. S13,980 (daily ed. Nov. 5, 2003) (statement of Senator Feinstein).

⁷⁹ See 68 FR at 4594.

solicitations to the consumer on its behalf.⁸⁰

Proposed paragraph (c)(4) of § 247.20 provides that the notice and opt-out requirements do not apply when the information is used in response to a communication initiated by the consumer. The proposed rule clarifies that this exception could be triggered by an oral, electronic, or written communication initiated by the consumer. To 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. Conversely, if the consumer calls an affiliate to ask about its products or services, marketing solicitations related to those products or services would be responsive to the communication and thus permitted under the exception. The time period during which marketing solicitations remain responsive to the consumer's communication would depend on the facts and circumstances. The proposal contemplates that a consumer has not initiated a communication if an affiliate makes the initial call and leaves a message for the consumer to call back, and the consumer responds. Proposed paragraph (d)(2) of § 247.20 provides examples of the consumer-initiated communications exception.

Proposed paragraph (c)(5) of § 247.20 provides that the notice and opt-out requirements do not apply when the information is used to make marketing solicitations that have been affirmatively authorized or requested by the consumer. This provision could be triggered by an oral, electronic, or written authorization or request by the consumer. Under the proposal, a pre-selected check box would not constitute an affirmative authorization or request. We also would not consider boilerplate language in a disclosure or contract to constitute affirmative authorization. The exception in proposed paragraph (c)(5) could be triggered, for example, if a consumer opens a securities account with a broker-dealer and authorizes or requests to receive marketing solicitations about insurance from an

insurance affiliate of the broker-dealer. Under this proposed exception, the consumer could provide the authorization or make the request either through the person with whom the consumer has a business relationship or directly to the affiliate that would make the marketing solicitation.⁸¹ The duration of the authorization or request would depend on the facts and circumstances. Proposed paragraph (d)(3) of § 247.20 provides an example of the affirmative authorization or request exception.

The exceptions in proposed paragraphs (c)(1), (4), and (5) described above might overlap in certain situations. For example, if a consumer who has a securities account with a broker-dealer makes a telephone call to the broker-dealer's insurance affiliate and requests information about insurance, the insurance affiliate could use information about the consumer it obtains from the broker-dealer to make or send marketing solicitations in response to the telephone call. This could be done under the proposed exception in paragraph (c)(4) for responding to a communication initiated by the consumer. Because the consumer has made an inquiry to the insurance affiliate about its products and services, that inquiry could also trigger one of the possible proposed definitions of "pre-existing business relationship" as provided in paragraph (c)(1). In addition, the consumer's affirmative request could fit the proposed definition of a marketing solicitation authorized or requested by the consumer as provided in the exception in paragraph (c)(5). We request comment on the exceptions and examples in proposed paragraphs (c) and (d) of § 247.20.

Proposed paragraph (e) of § 247.20 provides that the notice and opt-out requirements of proposed Regulation S-AM do not apply to the use of eligibility information received by the receiving affiliate prior to the compliance date for these rules. The mandatory compliance date will be included in the final rules, if adopted. We request comment on what the mandatory compliance date should be and whether it should be different from the effective date of the final rules in order to permit institutions to incorporate the affiliate marketing notice into their next annual GLB Act privacy notice.

Finally, proposed paragraph (f) of § 247.20 clarifies the relationship

between the affiliate sharing notice and opt-out under Section 603(d)(2)(A)(iii) of the FCRA and the affiliate marketing notice and opt-out required by new Section 624 of the FCRA.⁸² Specifically, proposed paragraph (f) provides that nothing in proposed Regulation S-AM 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 if it wishes to avoid becoming a consumer reporting agency.

Section 247.21 Contents of Opt-Out Notice

Proposed § 247.21 addresses the contents of the opt-out notice. Proposed paragraph (a) of § 247.21 requires the opt-out notice to be clear, conspicuous, and concise, and to accurately disclose: (1) that the consumer may elect to limit a person's affiliate from using eligibility information about the consumer that the affiliate obtains from the person to make marketing solicitations to the consumer; and (2) if applicable, that the consumer's election will apply for a specified period of time and that the consumer will be allowed to extend the election once that period expires. The notice also would have to provide the consumer with a reasonable and simple method to opt out.⁸³ Appendix A of proposed Regulation S-AM provides model forms that, in appropriate circumstances, would comply with paragraph (a). Use of a model form would not be required.

Proposed paragraph (b) of § 247.21 defines the term "concise" to mean a reasonably brief expression or statement. Proposed paragraph (b) also provides that a notice required by proposed Regulation S-AM could be concise even if it is combined with other disclosures required or authorized by federal or state law. Those disclosures include, but are not limited to, a notice under the GLB Act, a notice under Section 603(d)(2)(A)(iii) of the FCRA, and other similar consumer disclosures. In addition, paragraph (b) clarifies that the requirement for a concise notice would be satisfied by the appropriate use of one of the model forms in Appendix A of proposed Regulation S-AM. Use of the model forms, however, would not be required.

⁸² See note 7 above for a discussion of Section 603(d)(2)(A)(iii) of the FCRA.

⁸³ Proposed paragraph (a) of § 247.5 reflects the intent of Congress, as expressed in Section 624(a)(2)(B) of the FCRA, that the notice required by proposed Regulation S-AM must be "clear, conspicuous, and concise," and that the method for opting out must be "simple."

⁸⁰ Similarly, this exception would not permit a service provider to make or send marketing solicitations on its own behalf if eligibility information is communicated and the notice and opt-out provisions otherwise would apply.

⁸¹ Nothing in this exception supersedes the restrictions contained in the TSR, including the operation of the "Do-Not-Call List" established by the Federal Trade Commission and the Federal Communications Commission.

Proposed paragraph (c) of § 247.21 provides that the notice could allow a consumer to choose from a menu of alternatives when opting out, such as opting out of receiving marketing solicitations from certain types of affiliates, or from marketing solicitations that use certain types of information or are delivered using certain methods of communication. If a person provides a menu of alternatives, one alternative would have to allow the consumer to opt out with respect to all affiliates, all eligibility information, and all methods of delivering marketing solicitations.

Proposed paragraph (d) of § 247.21 provides that, if a person chooses to give consumers a broader opt-out right than is required by law, the person could modify the contents of the opt-out notice to reflect accurately the scope of the opt-out right it provides. Appendix A includes Model Form A-3, which might be helpful for persons that wish to allow consumers to prevent all marketing from that person and its affiliates. Use of the model form, however, would not be required. We invite comment on proposed § 247.21.

Section 247.22 Reasonable Opportunity To Opt Out

Proposed paragraph (a) of § 247.22 provides that the communicating affiliate would have to allow the consumer a "reasonable opportunity to opt out" after delivery of the opt-out notice and before the receiving affiliate uses eligibility information to make marketing solicitations to the consumer. Given the variety of circumstances in which opt-out rights are provided, a "reasonable opportunity to opt out" should be construed as a general test that avoids setting a mandatory waiting period. A general standard would provide flexibility to allow receiving affiliates to use eligibility information to make marketing solicitations at an appropriate point in time, while assuring that the consumer is given a realistic opportunity to prevent such use of the information. Examples are given to illustrate what might constitute a reasonable opportunity to opt out in different situations. Although 30 days may be reasonable in most cases, a person could choose to give consumers more than 30 days in which to decide whether to opt out.⁸⁴ Whether a shorter waiting period would be adequate would depend on the circumstances.

⁸⁴ As provided in proposed § 247.9(c), consumers retain a continuing right to opt out at any time. The "reasonable opportunity" standard determines when a receiving affiliate may begin the marketing use of eligibility information if the consumer has not responded within the given period.

Proposed paragraphs (b)(1), (2), and (3) of § 247.22 contain examples of reasonable opportunities to opt out. Proposed paragraphs (b)(1) and (2) contain examples of reasonable opportunities to opt out by mail or by electronic means, which are consistent with examples used in the GLB Act privacy rules.⁸⁵ Proposed paragraph (b)(3) provides an example of a reasonable opportunity to opt out when a consumer is required to decide, as a necessary part of proceeding with an electronic transaction, whether to opt out before completing the transaction. The person subject to proposed Regulation S-AM would need to provide a simple process at the Internet Web site that the consumer could use to opt out at that time. In this example, the opt out notice would automatically be provided to the consumer, such as through a non-bypassable link to an intermediate Web page, or "speedbump." The consumer would be given a choice of either opting out or not opting out at that time through a simple process conducted at the Web site. For example, the consumer could be required to check a box on the Internet Web site in order to opt out or decline to opt out before continuing with the transaction. This example would not cover a situation in which the consumer is required to send a separate e-mail or visit a different Internet Web site in order to opt out. We seek comment on whether additional guidance or examples are needed regarding the reasonable opportunity to opt out.

Proposed paragraph (b)(4) of § 247.22 illustrates that including the affiliate marketing opt-out notice in a notice under the GLB Act could satisfy the reasonable opportunity standard. In this situation, the consumer should be allowed to exercise the opt-out in the same manner and should be given the same amount of time to exercise the opt-out as with respect to the GLB Act privacy notice. This example takes into account the statutory requirement that we consider methods for coordinating and combining notices.⁸⁶

Some persons subject to proposed Regulation S-AM might have a policy of not allowing affiliates to use eligibility information for marketing purposes unless a consumer affirmatively consents, or "opts in," to receiving such marketing solicitations. Proposed paragraph (b)(5) of § 247.22 clarifies that an "opt-in" would meet the requirement to provide a reasonable opportunity to opt out, so long as the consumer's

⁸⁵ See 17 CFR 248.7(a)(2)(ii).

⁸⁶ See FACT Act section 214(b)(3), 15 U.S.C. 1681s-3 note.

affirmative consent is documented. A pre-selected check box on a Web form or boilerplate language in a contract would not be evidence of the consumer's affirmative consent.

The proposed rules do not require persons to disclose in their opt-out notices how long a consumer has to opt out before a receiving affiliate could begin making marketing solicitations based on the consumer's eligibility information. In this respect, the proposed rules are consistent with the GLB Act privacy rules. Persons subject to proposed Regulation S-AM might choose to include such disclosures in their notices, however. We request comment on this approach.

Section 247.23 Reasonable and Simple Methods of Opting Out

Proposed paragraph (a) of § 247.23 sets forth examples of reasonable and simple methods of opting out. These examples generally track the examples of reasonable opt-out means from Section 7(a)(2)(ii) of the GLB Act privacy rules,⁸⁷ with certain modifications to give effect to Congress' mandate in the FACT Act that the method of opting out also must be "simple." Accordingly, the proposed example in paragraph (a)(2) of § 247.23 contemplates including a self-addressed envelope with the reply form and opt-out notice. In addition, if consumers are given the choice of calling a toll-free telephone number to opt out, we contemplate that the system would be adequately designed and staffed to enable consumers to opt out in a single phone call.

Proposed paragraph (b) of § 247.23 provides examples of methods of opting out that would not be reasonable and simple. These methods include requiring the consumer to write a letter or to call or write to obtain an opt-out form that was not included with the notice. In addition, a consumer who agrees to receive the opt-out notice in electronic form only, such as by electronic mail or at a Web site, would have to be allowed to opt out by the same or a substantially similar electronic form and should not be required to opt out solely by telephone or paper mail.

Section 247.24 Delivery of Opt-Out Notices

Proposed paragraph (a) of § 247.24 provides that a person would need to deliver its opt-out notices so that each consumer reasonably can be expected to receive actual notice. Under this proposal, opt-out notices that are

⁸⁷ 17 CFR 248.7(a)(2)(ii).

delivered electronically could be delivered either in accordance with the electronic disclosure provisions in proposed Regulation S-AM or in accordance with the Electronic Signatures in Global and National Commerce Act.⁸⁸ For example, a person could e-mail its notice to consumers who have agreed to the electronic delivery of information and could provide the notice on its Internet Web site for consumers who obtain products or services electronically through that Web site.

As indicated by the examples provided in proposed paragraph (b) of § 247.24, the “reasonable expectation of delivery” standard is a lesser standard than actual notice. For instance, if a communicating affiliate mails a printed copy of its notice to the last known mailing address of a consumer, it has met its obligation even if the consumer has changed addresses and never receives the notice.

Proposed paragraph (c) of § 247.24 permits a person to provide a joint opt-out notice with one or more of its affiliates, so long as the notice is accurate with respect to each affiliate that issues the joint notice. A joint notice would not have to list each affiliate participating in the joint notice by its name. If each affiliate shares a common name, such as “ABC,” then the joint notice could state that it applies to “all institutions with the ABC name” or “all affiliates in the ABC family of companies.” If, however, one or more affiliates does not have ABC in its name, the joint notice would need to separately identify each affiliate or each group of affiliates with a common name. We invite comment regarding this proposed approach to joint notices.

Proposed paragraph (d)(1) of § 247.24 sets out rules that apply when two or more consumers (referred to in the proposed regulation as “joint consumers”) jointly obtain a product or service, such as a joint securities account. In particular, a person could provide a single opt-out notice to joint accountholders. The notice would have to indicate whether the person will treat an opt-out election by one joint accountholder as applying to all of the associated accountholders, or whether each accountholder might opt out separately. The person could not require all accountholders to opt out before honoring an opt-out direction by one of the joint accountholders. Paragraph (d)(2) gives examples of the operation of these rules.

Proposed paragraph (d)(1)(vii) and the example in paragraph (d)(2)(iii) address

the situation in which only one of two joint consumers has opted out. Those paragraphs are patterned after similar provisions in the GLB Act privacy rules.⁸⁹ However, Section 624 of the FCRA deals with the use of information for marketing by affiliates, rather than the sharing of information among affiliates; we request comment on whether, if only one joint consumer opts out, eligibility information about the entire joint account could be used for making marketing solicitations to the joint consumer who has not opted out.

Section 247.25 Duration and Effect of Opt-Out

Proposed § 247.25 addresses the duration and effect of a consumer’s opt-out election. Proposed paragraph (a) of § 247.25 provides that a consumer’s election to opt out is effective for the opt-out period, which is a period of at least five years beginning as soon as reasonably practicable after the consumer’s opt-out election is received. Nothing in this paragraph limits the ability of affiliated persons to set an opt-out period of longer than five years, including an opt-out period that does not expire unless revoked by the consumer. No opt-out period, however, could be shorter than five years. If, for some reason, a consumer elects to opt out again while the opt-out period remains in effect, a new opt-out period of at least five years would begin upon receipt of each successive opt-out election.

Proposed paragraph (b) of § 247.25 provides that a receiving affiliate could not make or send marketing solicitations to a consumer during the opt-out period based on eligibility information it receives from an affiliate, except as provided in the exceptions in § 247.20(c)⁹⁰ or if the consumer has revoked the opt-out. Under this paragraph, 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 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 rules under proposed Regulation S-AM, including any information it received during the period in which no opt-out election was in effect.⁹¹

Proposed paragraph (c) of § 247.25 clarifies that a consumer could opt out at any time. Thus, even if the consumer did not opt out in response to the initial opt-out notice or if the consumer’s election to opt out is not prompted by an opt-out notice, the consumer could still opt out. Regardless of when the consumer opts out, the opt-out would have to be effective for at least five years.

Proposed paragraph (d) of § 247.25 describes how the termination of a consumer relationship affects the consumer’s opt-out. Specifically, if a consumer’s relationship with a person terminates for any reason when the consumer’s opt-out election is in force, the opt-out would continue to apply indefinitely unless revoked by the consumer. We invite comment on proposed § 247.25.

Section 247.26 Extension of Opt-Out

Proposed § 247.26 describes the procedures for extending an opt-out. Proposed paragraph (a) of § 247.26 states that consumers would have to be provided with a new notice and a reasonable opportunity to extend their opt-out before a receiving affiliate could make marketing solicitations based on the consumer’s eligibility information upon expiration of the opt-out period. The person who initially provided the notice, or its successor, would provide the extension notice. If an extension notice is not provided to the consumer, the opt-out period would continue indefinitely. The requirement to provide an extension notice upon expiration of the opt-out period would apply to any opt-out “even, for example, if the consumer failed to opt out initially and informed the communicating affiliate of his or her opt-out at some later time. The consumer could extend the opt-out at the expiration of each successive opt-out period. Proposed paragraph (b) of § 247.26 provides that each opt-out extension would have to comply with § 247.25(a), which means that it would

⁸⁹ See 17 CFR 248.7(d).

⁹⁰ As discussed above, proposed § 247.4(c) provides exceptions from the notice and opt-out requirements in several situations, including when the receiving affiliate has a pre-existing business relationship with the consumer or receives an affirmative request for marketing solicitations from the consumer or when the receiving affiliate provides employee benefits to the consumer or performs certain services on behalf of another affiliate.

⁹¹ Section 624(a)(5) of the FCRA contains a non-retroactivity provision, which provides that nothing shall prohibit the use of information that was received prior to the date on which persons are required to comply with the regulations implementing Section 624. 15 U.S.C. 1681s-3(a)(5).

⁸⁸ 15 U.S.C. 7001 *et seq.*

be effective for a period of at least five years.

Proposed paragraph (c) of § 247.26 addresses the contents of an extension notice.⁹² Like the initial notice, an extension notice would have to be clear, conspicuous, and concise. Paragraph (c) provides some flexibility in the design and contents of the notice. Under one approach, the notice could accurately disclose the same items required to be disclosed in the initial opt-out notice under § 247.21(a), along with a statement explaining that the consumer's prior opt-out has expired or is about to expire, as applicable, and that the consumer must opt out again if he or she wishes to keep the opt-out election in force. Under another approach, the extension notice would provide: (1) That the consumer previously elected to limit affiliates from using eligibility information about the consumer to make marketing solicitations to the consumer; (2) that the consumer's election has expired or is about to expire, as applicable; (3) that the consumer may elect to extend his or her previous election; and (4) a reasonable and simple method for the consumer to extend the opt-out. We propose to give persons the flexibility to decide which of these forms of notice best meets their needs. We request comment regarding whether persons subject to proposed Regulation S-AM would plan to limit the duration of the opt-out, and on the relative burdens and benefits of providing limited or unlimited opt-out periods.

Proposed paragraph (d) of § 247.26 addresses the timing of the extension notice. An extension notice can be delivered to the consumer either a reasonable period of time before the opt-out period expires, or any time after the opt-out period expires, but before covered marketing solicitations are made to the consumer. Providing the extension notice a reasonable period of time before the opt-out period expires would facilitate the smooth transition of consumers who choose to change their elections. An extension notice given too far in advance of the expiration of the opt-out period, however, might confuse consumers. We do not propose to set a fixed time for what would constitute a "reasonable period of time" to send an extension notice before the opt-out period expires. A reasonable period of time could depend upon the amount of time given to the consumer for a reasonable opportunity to opt out, the

amount of time necessary to process opt-outs, and other factors. Nevertheless, providing an extension notice on or with the last annual privacy notice required by the GLB Act privacy provisions to be sent to the consumer before the opt-out period expires would be deemed reasonable in all cases. Proposed paragraph (e) of § 247.26 makes clear that sending an extension notice to the consumer before the expiration of the opt-out period would not shorten the five-year opt-out period.

Opt-out elections under the GLB Act do not expire, and GLB Act notices typically state that the consumer need not opt out again if the consumer previously opted out. Thus, including an affiliate marketing opt out notice or an extension notice on an initial or annual notice under the GLB Act raises special issues. If a person chooses to make the affiliate marketing opt-out effective in perpetuity, the statement in the GLB Act notice would remain correct. However, the GLB Act statement would not be accurate with respect to the extension notice if the affiliate marketing opt-out is limited to a defined period of five or more years. In that case, the extension notice would have to make clear to the consumer the necessity of opting out again in order to extend the opt-out. We request comment on this interaction between FACT Act and GLB notices, including on whether the Commission should provide further guidance regarding how a communicating affiliate might ensure that the difference in opt-out rights is clear to consumers.

Section 247.27 Consolidated and Equivalent Notices

Proposed § 247.27 implements Section 624(b) of the FCRA,⁹³ and provides that a notice required by proposed Regulation S-AM could be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law. These notices might include but are not limited to the notice described in Section 603(d)(2)(A)(iii) of the FCRA⁹⁴ and the notice required by the privacy provisions of the GLB Act. A notice or other disclosure that is equivalent to the notice required by proposed Regulation S-AM, and that is provided to a consumer together with disclosures required by any other provision of law, would satisfy the requirements of proposed Regulation S-AM.

We request comment on whether persons subject to proposed Regulation

S-AM would plan to consolidate their affiliate marketing notices with the GLB Act privacy notice or the affiliate sharing opt-out notice under Section 603(d)(2)(A)(iii) of the FCRA, whether we have provided sufficient guidance on consolidated notices, and whether consolidation would be helpful or confusing to consumers.

Appendix A

As noted above, we are proposing model forms as examples to illustrate how persons could comply with the notice and opt-out requirements of Section 624 of the FCRA and proposed Regulation S-AM. Appendix A includes three proposed model forms. Model Form A-1 is a proposed form of an initial opt-out notice. Model Form A-2 is a proposed form of an extension notice that could be used when the consumer's prior opt-out has expired or is about to expire. Model Form A-3 is a proposed form that persons subject to proposed Regulation S-AM could use if they offer consumers a broader right to opt out of marketing than is required by law.

Use of the model forms would not be mandatory. Persons subject to proposed Regulation S-AM could use the model forms, modify the model forms to suit particular circumstances, or use some other form, so long as the requirements of the proposed rules are met. For example, although Model Forms A-1 and A-2 use five years as the duration of the opt-out period, communicating affiliates could choose an opt-out period longer than five years and to substitute the longer time period in the opt-out notices. Alternatively, communicating affiliates could choose to treat the consumer's opt-out as effective in perpetuity and thereby omit from the initial notice any reference to the limited duration of the opt-out period or the right to extend the opt-out.

Each of the proposed model forms is designed as a stand-alone form. We anticipate that some persons might want to combine the affiliate marketing opt-out notice with a GLB Act privacy notice. If the notices are combined, we expect that persons would integrate the affiliate marketing opt-out notice with other required disclosures and avoid repetition of information such as the methods for opting out. Developing a model form that combines various opt-out notices, however, is beyond the scope of this rulemaking.

IV. Request for Comment

We request comment on all provisions of proposed Regulation S-AM described above, including suggestions for additional provisions or changes, and

⁹² Persons subject to Regulation S-AM do not need to provide extension notices if they treat the consumer's opt-out election as valid in perpetuity unless revoked by the consumer.

⁹³ 15 U.S.C. 1681s-3 note.

⁹⁴ See note 7 above for a discussion of Section 603(d)(2)(A)(iii) of the FCRA.

comments on other matters that might have an effect on the proposal. Commenters are particularly invited to share suggestions on each of the proposed model forms and for how the opt-out notices can be made clear for consumers. Commenters are also urged to submit suggestions for additional model forms that might be helpful. We also encourage comment on the proposed examples and on any additional examples that commenters would find helpful.

V. Costs and Benefits of the Proposed Rule

The Commission is sensitive to the costs and benefits of its rules. Proposed Regulation S-AM would minimize compliance costs while enabling consumers to limit certain marketing solicitations from affiliated companies. The proposed rules would implement Section 214 of the FACT Act and would impose no significant costs beyond those required under the FACT Act. The Commission encourages comment to identify, discuss, analyze, and supply relevant data regarding the costs and benefits stemming from compliance with the proposed rules.

The proposed rules would require that consumers be provided with notice and an opportunity to opt out of receiving marketing solicitations that are based on the communication of the consumer's eligibility information⁹⁵ between a person and its affiliates. The notice and opt-out requirements are designed to benefit consumers by enabling them to limit certain marketing solicitations from affiliated companies. In addition, the proposed notice requirement should enhance the transparency of each company's affiliate marketing and information sharing practices.

The proposed rules would impose costs upon Covered Persons⁹⁶ that wish to engage in affiliate marketing based on the communication of eligibility information. Absent an exception, communicating affiliates⁹⁷ would be required to provide consumers with notice and an opportunity to opt out

before a receiving affiliate could use the consumer's eligibility information for marketing purposes. The communicating affiliate would need to design and send notices and opt-out forms, design and implement systems for receiving consumer opt-outs, maintain accurate records of opt-outs, and provide extension notices upon expiration of the initial opt-out period. Receiving affiliates⁹⁸ would be required to ensure that they do not make marketing solicitations to a consumer based on the communication of eligibility information unless that consumer has been provided notice and an opportunity to opt out and has not opted out.

The proposed rules include several considerations that would minimize compliance costs for affected persons. First, as required by the FACT Act, the proposed rules would allow Covered Persons to combine their affiliate marketing opt-out notices with any other notice required by law, including the privacy notices required under the GLB Act.⁹⁹ Covered Persons are already required to provide privacy notices and to accept consumer opt-out elections related to information sharing. Second, the proposed rules would allow Covered Persons some flexibility to develop, distribute, and record the opt-out notices in the manner best suited to their business and needs. Third, the proposed rules are consistent and comparable with the rules proposed by the Agencies,¹⁰⁰ which would provide greater certainty to Covered Persons that are part of a family of affiliated companies because all affiliated companies would be subject to consistent requirements. Finally, the proposed rules include examples that would provide specific guidance regarding what type of policies and procedures could be developed.

According to Commission filings, there are approximately 6,768 broker-dealers, 5,182 investment companies, 7,977 registered investment advisers, and 443 registered transfer agents that could be subject to the proposed rules. However, whether a Covered Person actually would be required to provide notice and opt-out would depend on the

information sharing policies of that person and the marketing policies of its affiliates.¹⁰¹ Any Covered Person that does not have affiliates or that does not communicate eligibility information to its affiliates would not be required to comply with the notice and opt-out requirements. Even if a communicating affiliate shares eligibility information, notice and opt-out would not be required if the receiving affiliate does not use the information as a basis for marketing solicitations. Because the proposed rules allow for a single, joint notice on behalf of a common corporate family, Covered Persons would not be required independently to provide notices and opt-outs if they are included in an affiliate's notice. The proposed rules also incorporate a number of statutory exceptions that would further reduce the number of persons required to provide affiliate marketing notices. In light of these factors, for purposes of the Paperwork Reduction Act we have estimated that approximately 10% of Covered Persons, or 2,037 respondents, would be required to provide consumers with notice and an opt-out opportunity under the proposed rules.

If an institution is required to provide consumers notice and an opportunity to opt out, the notice could be combined with GLB Act privacy notices or with any other document, including other disclosure documents or account statements. We expect that most institutions that would be required to provide an affiliate marketing notice would combine that notice with some other form of communication.

For purposes of the Paperwork Reduction Act, we have estimated that 14,259 affiliated persons each would require 1 hour on average to review its information sharing and affiliate marketing policies and practices to determine whether notice and opt-out would be necessary. Assuming a cost of \$125 per hour for managerial staff time, the total one-time cost of review would be approximately \$1,782,375 (14,259 × \$125). Once the review is complete, we have estimated that 2,037 Covered Persons actually would be required to provide notice and opt-out, and that those persons would need an average of 6 hours to provide initial notice and opt-out and 2 hours to design notices for new customers to receive on an ongoing

⁹⁵ The proposed definition of "eligibility information" would encompass any information that, if communicated, would be a "consumer report," but for the FCRA's statutory exclusions for the sharing of transaction or experience information and for the sharing of information among affiliates. See note 7, above, for a discussion of the definition of "consumer report."

⁹⁶ "Covered Persons" include brokers, dealers, and investment companies, as well as investment advisers and transfer agents that are registered with the Commission.

⁹⁷ A "communicating affiliate" is a person that communicates eligibility information to one or more affiliated persons.

⁹⁸ A "receiving affiliate" is a person that receives eligibility information from an affiliated person.

⁹⁹ Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338 (1999).

¹⁰⁰ As described above, the FACT Act requires the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Trade Commission, in addition to the Commission, to propose regulations implementing Section 214. These other entities are referred to collectively as the Agencies.

¹⁰¹ For purposes of the Paperwork Reduction Act, we have estimated that approximately 70% of Covered Persons have affiliates. Statistics reported in registration forms filed by investment advisers show that approximately 70% of registered investment advisers have a corporate affiliate, and we estimate that other Covered Persons would report a rate of affiliation similar to that reported by registered investment advisers. See note 102 and accompanying text, below.

basis (a total of 8 hours per affected person, or 16,296 hours). We assume this time would be divided between senior staff, computer professionals, and secretarial staff, with review by legal professionals. Assuming an average per-hour staff cost of \$95, the total cost would be \$1,548,120 (16,296 × \$95) in the first year. We have estimated that each of the 2,037 affected persons would spend approximately 2 hours per year (or 4,074 hours) delivering notices to new consumers and recording any opt-outs that are received on an ongoing basis. These tasks would not require managerial or professional involvement; thus, we estimate an average staff cost of \$40 per hour, for a total annual cost of \$162,960 (4,074 × \$40).

We request comment that may assist in quantifying the costs and the benefits identified in this analysis. With regard to costs, please delineate start-up costs (including costs to update existing systems) as well as ongoing annual costs. We also request comment on any costs and benefits of proposed Regulation S-AM not identified here. We specifically invite comment on and data regarding the Commission's estimates that 70% of Covered Persons have affiliates and 10% of Covered Persons would be required to provide consumers with notice and opt-out under the proposed rules. We further request comment on and data regarding the anticipated costs of drafting affiliate marketing privacy notices and of implementing systems for tracking opt-outs and providing extension notices upon expiration of the opt-out period. We invite comment on and data regarding the likelihood of including affiliate marketing notices in other mailings, on the cost of combined versus stand-alone mailings, and on any anticipated savings due to the electronic transmission of affiliate marketing notices and opt-outs.

VI. Paperwork Reduction Act

Certain provisions of the proposed rules may constitute a "collection of information" within the meaning of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The Commission has submitted the proposed regulation to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for the collection of information is "Regulation S-AM: Limitations on Affiliate Marketing." An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Summary of Collection of Information

Before a receiving affiliate could make marketing solicitations based on the communication of eligibility information from a communicating affiliate, the communicating affiliate would be required to provide a notice to each affected individual informing the individual of his or her right to prohibit such marketing. In addition, as a practical matter in order for the opt-outs to be effective, one or both affiliates would need to keep records of any opt-out elections. If the receiving affiliate intends to resume making marketing solicitations based on eligibility information upon expiration of the opt-out period, the communicating affiliate also would need to send an expiration notice and enable the consumer to extend the opt-out election if desired.

In drafting the proposed rules, we have attempted to retain procedural flexibility and to minimize compliance burdens except as required by the terms of the FACT Act. We believe that the proposed rules do not impose significant burdens in excess of the statutory requirements.

Proposed Use of Information

New Section 624 of the FCRA Act is intended to enhance the protection of consumer financial information in the affiliate marketing context and to enable consumers to limit marketing solicitations from affiliated companies that are based on eligibility information. Proposed Regulation S-AM is necessary to fulfill Congress' mandate in Section 214 of the FACT Act that the Commission must prescribe regulations to implement Section 624.

Respondents

According to Commission filings, there are approximately 6,768 broker-dealers, 5,182 investment companies, 7,977 registered investment advisers, and 443 registered transfer agents that could be subject to the proposed rules. However, we expect that only a fraction of all Covered Persons would be required to provide notice and opt-out to consumers. First, the proposed rules only apply to Covered Persons that have affiliates, and then only if receiving affiliates make marketing solicitations based on the communication of eligibility information. Based on a review of forms filed with the Commission, we estimate that approximately 70% of Covered Persons have a corporate affiliate.¹⁰² However,

¹⁰² This estimate is based upon statistics reported on Form ADV, the Universal Application for Investment Adviser Registration, which contains specific questions regarding affiliations between

we assume that many of those Covered Persons would not communicate eligibility information to their affiliates for marketing purposes and thus would not be subject to the notice and opt-out requirements of the proposed rules.¹⁰³ The proposed rules also incorporate a number of statutory exceptions that would further reduce the number of Covered Persons required to provide affiliate marketing notices. Moreover, even if notice is required, the proposed rules allow all affiliates within a common corporate family to provide a single, joint notice. Accordingly, Covered Persons that are required to provide affiliate marketing notices could be covered by the notice sent by one or more affiliates and would not be required to provide the notice independently. In light of these factors, we estimate that approximately 10% of Covered Persons, or 2,037 respondents, would be required to provide consumers with notice and an opt-out opportunity under the proposed rules.

Total Annual Reporting and Recordkeeping Burdens

Every Covered Person that has one or more affiliates likely would incur a one-time burden in reviewing its policies and business practices to determine the extent to which it communicates eligibility information to affiliates for marketing purposes and whether those affiliates make marketing solicitations based on the communication of that eligibility information. This determination should be straightforward for most entities, in part because the GLB Act privacy regulations already require Covered Persons to review their information sharing practices and disclose whether they share information with affiliates.¹⁰⁴ We have estimated that approximately 70% of all Covered Persons, or approximately 14,259 persons, have an affiliate. The amount of time required to review their policies would vary widely, from a few minutes for those that do not share eligibility information with affiliates to 4 hours or more for affiliated persons with more complex information sharing arrangements. We estimate that each

investment advisers and other persons in the financial industry. We estimate that other Covered Persons would report a rate of affiliation similar to that reported by registered investment advisers.

¹⁰³ For example, professional standards require investment advisers to preserve the confidentiality of information communicated by clients or prospects. See Association for Investment Management and Research, *Standards of Practice Handbook* 123, 125 (1996).

¹⁰⁴ See 17 CFR 248.6(a)(3) (initial, annual, and revised GLB Act privacy notices must include "the categories of affiliates * * * to whom you disclose nonpublic personal information").

affected person would require 1 hour on average to review its policies and practices, for a total one-time burden of 14,259 hours.

We have estimated that 2,037 Covered Persons would be required to provide notice and opt-out under the proposed rules. This process would consist of several steps. First, the affiliated person would need to create an affiliate marketing notice. The amount of time required to develop a notice should be reduced significantly by the inclusion of model forms in the proposed rules. Second, the notices would need to be delivered. The proposed rules allow that affiliate marketing notices could be combined with any other notice or disclosure required by law. We expect that most persons subject to proposed Regulation S-AM would combine their affiliate marketing notices with some other form of communication, such as an account statement or an annual notice under the GLB Act. Because those communications are already delivered to consumers, adding a brief affiliate marketing notice should not result in added costs for processing or for postage and materials.¹⁰⁵ Notices may be delivered electronically to consumers who have agreed to electronic communications, which would further reduce the costs of delivery. Third, as a practical matter, persons subject to proposed Regulation S-AM would need to keep accurate records in order to honor any opt-out elections and to track the expiration of the opt-out period. We cannot estimate with precision the number of actual notice mailings in any given year because that total would depend on the number of consumers who do business with each affected person. For purposes of the Paperwork Reduction Act, we estimate that the hour burden for developing, sending, and tracking the opt-out notices would range from 2–20 hours, with an average of 6 hours for each of the affected entities (12,222 hours total). We estimate that postage and materials costs for the notices would be negligible because the notices normally would be combined with other required mailings.

Because the notice and opt-out requirements represent a prerequisite to covered forms of affiliate marketing, most affected persons would provide notice within the first year after compliance with the proposed

regulations would be required. However, additional notices may be required on a smaller scale as new customer relationships are formed. We anticipate that many affected persons would ensure delivery to new consumers with a minimum of additional effort by integrating the notices as a permanent part of account opening documents, initial privacy notices under the GLB Act, or some other form of regular communication. Accordingly, we estimate a one-time average burden of 2 hours for affected entities to create the notices (4,074 hours total) and an ongoing annual burden of 2 hours per year (4,074 hours total) to deliver the notices to new consumers and to record any opt-outs.

A consumer opt-out may expire at the end of five years, as long as the person that provided the initial notice provides the consumer with renewed notice and an opportunity to extend his or her opt-out election before any affiliate marketing may begin.¹⁰⁶ Designing, sending, and recording opt-out extensions notices would require additional hours and costs. However, because the initial opt-out period must last for at least five years, any burden related to extension notices would not arise within the first five years of the collection of information.

In sum, we estimate that each of 14,259 affiliated persons would require an average one-time burden of 1 hour to review affiliate marketing practices (14,259 hours total). We estimate that the approximately 2,037 persons required to provide notice and opt-out would incur an average first-year burden of 6 hours to provide notice and allow for consumer opt-outs, for a total estimated first-year burden of 12,222 hours. With regard to continuing notice burdens, we estimate that each of the approximately 2,037 persons required to provide notice and opt-out would incur a one-time burden of 2 hours to develop notices for new consumers (4,074 hours total) and an annual burden of 2 hours to deliver the notices and record any opt-outs (4,074 hours total). These estimates would represent a total one-time burden of 18,333 hours (14,259 plus 4,074), a total first-year burden of 12,222 hours, and an ongoing annual burden of 4,074 hours. Averaged across the first three years for which compliance would be required, the total average yearly burden would be 11,543 hours. We do not expect that Covered Persons will incur start-up or materials

costs in addition to the staff time discussed above.

In addition to the general request for comment reflected below, we request comment on these estimates of the annual reporting and recordkeeping burdens. How many Covered Persons share eligibility information with affiliates that the affiliates use to send marketing solicitations? Are there exceptions to the notice requirements under proposed Regulation S-AM on which many Covered Persons are likely to rely? Are affiliated families of companies likely to review the sharing and marketing policies of their affiliates on an organizational basis, or is each affiliate likely to review its own policies? Are affiliated families of companies likely to provide a single joint notice covering all affiliates? Are Covered Persons likely to consolidate notices required under proposed Regulation S-AM with GLB Act privacy notices or with other customer communications? Are Covered Persons likely to extend the opt-out period for more than five years?

Retention Period for Recordkeeping Requirements

The proposed rules do not contain express provisions governing the retention of records related to opt-outs. However, the example discussing consumer “opt-ins” in § 247.22(b)(5) of the proposed rules would state that any opt-in must be documented. Moreover, as noted above, a person subject to proposed Regulation S-AM would need to keep some record of consumer opt-outs in order to know which consumers should not receive marketing solicitations based on eligibility information. These records would need to be retained for at least as long as the opt-out period of five or more years, so that the person responsible for providing the extension notice would know when that notice is required.

Collection of Information Is Mandatory

As noted, only Covered Persons that communicate eligibility information to their affiliates for marketing purposes would be required to comply with the notice and opt-out provisions of the proposed rules. However, assuming that no other exception applies, the disclosure and recordkeeping requirements are mandatory with respect to those persons.

Responses to Collection of Information Will Not Be Kept Confidential

The affiliate marketing notices and opt-out records would not be filed with or otherwise submitted to the Commission. Accordingly, we make no

¹⁰⁵ Because we assume that most affiliate marketing notices would be combined with other required mailings, we base our estimates on the resources required to integrate an affiliate marketing notice into another mailing, rather than on the resources required to create and send a separate mailing.

¹⁰⁶ In order to ease the burden of tracking each opt-out period, many affiliated persons may decide to implement an opt-out period of longer than five years, including a period that never expires.

assurance of confidentiality with respect to the collections of information.

Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comment to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;

(2) Evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information;

(3) Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Determine whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements should direct them to the following persons: (1) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503; and (2) Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Any comments should make reference to File Number S7-29-04. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be made in writing, should refer to File Number S7-29-04, and should be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street, NW., Washington, DC 20549.

VII. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act¹⁰⁷ requires an agency to provide an Initial Regulatory Flexibility Analysis ("IRFA") with proposed rules and a Final Regulatory Flexibility Analysis ("FRFA") with any final rules, unless the agency certifies that the rules would not have a significant economic impact

on a substantial number of small entities.¹⁰⁸ The Commission has determined that it is appropriate to publish an IRFA in order to inquire into the impact of the proposed rules on small entities. Therefore, the Commission has prepared the following analysis and requests public comment in the following areas.

A. Reasons for the Proposed Rules

Section 214 of the FACT Act (which adds new Section 624 to the FCRA) generally prohibits a person from using certain information received from an affiliate to make marketing solicitations to a consumer, unless the consumer is given notice, as well as an opportunity and a simple method to opt out, of the possibility of receiving such solicitations. Section 214 also requires the Agencies and the Commission, in consultation and coordination with one another, to issue implementing regulations that are consistent and comparable to the extent possible. Proposed Regulation S-AM is comparable in all substantive respects to the proposed rules published by the Agencies. The Background and Explanation of the Proposed Rules at Sections I-II above further describe the reasons why the regulation is being proposed.

B. Statement of Objectives and Legal Basis

The proposed rules would implement Section 214 of the FACT ACT, which protects the privacy of consumer financial information by providing that consumers must receive notice and an opportunity to opt out before affiliated companies engage in marketing based on the sharing of certain consumer information. The objectives of the proposed rules are discussed in detail in the Background, Explanation of the Proposed Rules, and Section-by-Section Analysis at Sections I-III above. The legal basis for the proposed rules is Section 214 of the FACT Act,¹⁰⁹ as well as Sections 17, 23, and 36 of the Exchange Act,¹¹⁰ Sections 31 and 38 of the Investment Company Act,¹¹¹ and Sections 204 and 211 of the Investment Advisers Act.¹¹²

C. Description of Small Entities to Which the Proposed Rules Would Apply

The proposed rules would apply to any Covered Person that communicates eligibility information to an affiliate or

receives eligibility information from an affiliate for the purpose of using the information to make marketing solicitations. Of the entities registered with the Commission, 808 broker-dealers, 233 investment companies, 579 registered investment advisers, and 170 registered transfer agents are considered small entities.¹¹³ Only affiliated entities would be subject to the proposed rules. Although we estimate that 70% of all Covered Persons have affiliates, we have no means to predict how whether small entities differ significantly from larger entities in their rates of corporate affiliation. We invite comment from small entities that would be subject to the proposed rules. We invite comment generally regarding information that would help us to quantify the number of small entities that may be affected by the proposed rules.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed rules require entities subject to Section 624 of the FCRA to provide consumers with notice and an opportunity to opt out of affiliated persons' use of eligibility information for marketing purposes. The proposed rules require specific duties on the part of two groups of covered persons: communicating affiliates and receiving affiliates. The communicating affiliate would be responsible for providing the opt-out notice to consumers, as specified in the proposed rules. The receiving affiliate must not make marketing solicitations to consumers

¹¹³ For purposes of the Regulatory Flexibility Act, under the Exchange Act a small entity is a broker or dealer that had total capital of less than \$500,000 on the date of its prior fiscal year and is not affiliated with any person that is not a small entity. 17 CFR 240.0-10. Under the Investment Company Act a "small entity" is an investment company that, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year. 17 CFR 270.0-10. Under the Investment Advisers Act, a small entity is an investment adviser that "(i) manages less than \$25 million in assets, (ii) has total assets of less than \$5 million on the last day of its most recent fiscal year, and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that manages \$25 million or more in assets, or any person that had total assets of \$5 million or more on the last day of the most recent fiscal year." 17 CFR 275.0-7. A small entity in the transfer agent context is defined to be any transfer agent that (i) received less than 500 items for transfer and less than 500 items for processing during the preceding six months; (ii) transferred only items of issuers that would be deemed "small businesses" or "small organizations" under Rule 0-10 under the Exchange Act; (iii) maintained master shareholder files that in the aggregate contained less than 1,000 shareholder accounts at all times during the preceding fiscal year; and (iv) is not affiliated with any person (other than a natural person) that is not a small business or small organization under Rule 0-10. 17 CFR 240.0-10.

¹⁰⁸ See 5 U.S.C. 603-605.

¹⁰⁹ Pub. L. 108-159, 117 Stat. 1952 (2003).

¹¹⁰ 15 U.S.C. 78q, 78w, and 78mm.

¹¹¹ 15 U.S.C. 80a-30(a) and 80a-37.

¹¹² 15 U.S.C. 80b-4 and 80b-11.

¹⁰⁷ 5 U.S.C. 601 *et seq.*

who have opted out, as specified in the proposed rules.

For those entities that provide the Section 624 notice in consolidation with notices under the GLB Act or other federally mandated disclosures, the proposed rules impose very limited additional reporting or recordkeeping requirements. However, for persons that choose to send the notices separately, the reporting and recordkeeping requirements may be more substantial. Although the proposed rules do not include specific recordkeeping requirements, in practice some system of recordkeeping must exist to ensure that any consumer opt-outs are honored.

Any analysis of the impact of the FACT Act and the proposed implementing regulations must take into consideration that the law is limited in scope. First, the new law only applies to the use of eligibility information by affiliates for the purpose of making marketing solicitations. Thus, affiliates that market based solely upon their own information or without regard to eligibility information are not affected by this law. Second, the law provides a number of exceptions, including by permitting affiliated persons to market to consumers with whom they have a "pre-existing business relationship" or from whom they have received a request for information.

A number of alternatives exist that could reduce the costs associated with compliance with the proposed rule. First, significant cost savings may be obtained by consolidating affiliate marketing notices with GLB Act privacy notices or with some other form of communication, such as account statements. In addition, we have included model forms for opt-out notices that would comply with the requirements of the proposed rules and that each person could customize to suit its needs if necessary. Furthermore, the proposed rules would permit affected persons to reduce recordkeeping requirements by offering a permanent opt-out from both the sharing of information between affiliates and from receiving marketing based on such sharing, which would be consistent with both the GLB Act and FCRA opt-outs as well as the affiliate marketing opt-out. Small entities may wish to consider whether consolidation of their notices and opt-outs can reduce their compliance costs. Similar considerations can reduce the burden of providing notice to new consumers. For example, small entities can combine affiliate marketing notices with account opening documents or initial privacy notices under the GLB Act in order to ensure that notices are delivered to new

consumers without substantial additional efforts on the part of the affected person.

The Commission is concerned about the potential impact of the proposed rules on small entities. We request comment on the potential impact of any or all of the provisions in the proposed rules, including any benefits and costs, that the Commission should consider, as well as the costs and benefits of any alternatives, paying special attention to the effect of the proposed rules on small entities in light of the above analysis. Costs to implement and to comply with the proposed rules could include any expenditure of time or money for, for example, employee training, legal counsel, or other professional time; for preparing and processing the notices; and for recording and tracking consumers' elections to opt out.

E. Identification of Other Duplicative, Overlapping, or Conflicting Federal Rules

With the exception of the opt-out for affiliate sharing under Section 603(d)(2)(A)(iii) of the FCRA, we have been unable to identify any federal statutes or regulations that would duplicate, overlap, or conflict with the proposed rules. The overlap of the proposed rules with the affiliate sharing provisions of the FCRA is discussed in the Explanation of the Proposed Rules and the Section-by-Section Analysis at Sections II–III above. We seek comment regarding any other statute or regulation, including state or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed rules.

F. Discussion of Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objectives while minimizing any significant adverse impact on small businesses. In connection with the proposed rules, the Commission considered the following alternatives: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed rules for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposed rules, or any part thereof, for small entities.

The Commission does not presently believe that an exemption from coverage or special compliance or reporting requirements for small entities would be

consistent with the mandates of the FACT Act. Section 214 of the FACT Act addresses the protection of consumer privacy, and consumer privacy concerns do not depend on the size of the entity involved. However, we have endeavored throughout the proposed rules to minimize the regulatory burden on all Covered Persons, including small entities, while meeting the statutory requirements. Small entities should benefit from the existing emphasis on performance rather than design standards throughout the proposed rules and the use of examples, including model forms for affiliate marketing notices. The Commission welcomes comment on any alternative system that would be consistent with the FACT Act but would minimize the impact on small entities. Comments should describe the nature of any impact on small entities and provide empirical data to support the existence of the impact.

VIII. Analysis of Effects on Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act and Section 2(c) of the Investment Company Act require the Commission, whenever it engages in rulemaking and must consider or determine if an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when proposing rules under the Exchange Act, to consider the impact the proposed rules may have upon competition. Section 23(a)(2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

We do not believe the proposed rules would result in anti-competitive effects. The proposed rules, which implement Section 214 of the FACT Act, would apply to all brokers, dealers, investment companies, registered investment advisers, and registered transfer agents. All other affiliated persons that make marketing solicitations based on the communication of eligibility information between affiliates would be subject to the substantially similar rules proposed by the Agencies. Therefore, all persons that engage in affiliate marketing based on eligibility information would be required to bear the costs of implementing the proposed rules or substantially similar rules. Although these costs would vary among

persons subject to proposed Regulation S-AM, we do not believe that the costs would be significantly greater for any particular entity or entities when calculated as a percentage of overall costs.

Moreover, we believe the proposed rules would have little effect on efficiency and capital formation. We have estimated that the proposed rules would result in some additional costs for persons that make marketing solicitations based on the communication of eligibility information by affiliates and on the affiliates that communicate that information. Nevertheless, we believe the additional costs are small enough that they would not affect the efficiency of these entities.

The Commission seeks comment regarding the impact of the proposed rules on efficiency, competition, and capital formation. For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, the Commission also requests information regarding the potential effect of the proposed rules on the U.S. economy on an annual basis. Commentators are requested to provide empirical data to support their views.

IX. Statutory Authority and Text of Proposed Rules

The Commission is proposing Regulation S-AM under the authority set forth in Section 214 of the FACT Act,¹¹⁴ Sections 17, 23, and 36 of the Exchange Act,¹¹⁵ Sections 31 and 38 of the Investment Company Act,¹¹⁶ and Sections 204 and 211 of the Investment Advisers Act.¹¹⁷

List of Subjects in 17 CFR Part 247

Affiliate marketing, Brokers, Dealers, Investment advisers, Investment companies, Transfer agents, Reporting and recordkeeping requirements.

Text of Proposed Rules

For the reasons set out in the preamble, the Commission proposes to amend Title 17, Chapter II of the Code of Federal Regulations by adding part 247 to read as follows:

PART 247—REGULATION S-AM: LIMITATIONS ON AFFILIATE MARKETING

Sec.

- 247.1 Purpose and scope.
- 247.2 Examples.
- 247.3 Definitions.

- 247.4 through 247.19 [Reserved]
- 247.20 Affiliate use of eligibility information for marketing.
- 247.21 Contents of opt-out notice.
- 247.22 Reasonable opportunity to opt out.
- 247.23 Reasonable and simple methods of opting out.
- 247.24 Delivery of opt-out notices.
- 247.25 Duration and effect of opt-out.
- 247.26 Extension of opt-out.
- 247.27 Consolidated and equivalent notices.

Appendix A to Part 247—Model Forms for Opt-Out Notices

Authority: 15 U.S.C. 1681s-3 and note; 15 U.S.C. 78q, 78w, 78mm, 80a-30(a), 80a-37, 80b-4, and 80b-11.

§ 247.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to implement the affiliate marketing provisions in section 214 of the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003) (“FACT Act”), which amends the Fair Credit Reporting Act.

(b) *Scope.* This part applies to brokers, dealers, and investment companies and to investment advisers and transfer agents that are registered with the Commission. These entities are referred to in this part as “you.”

§ 247.2 Examples.

The examples in this part are not exclusive. The examples in this part provide guidance concerning the rule’s application in ordinary circumstances. The facts and circumstances of each individual situation, however, will determine whether compliance with an example constitutes compliance with the applicable rule. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise.

§ 247.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Affiliate* of a broker, dealer, or investment company, or an investment adviser or transfer agent registered with the Commission means any person that is related by common ownership or common corporate control with the broker, dealer, or investment company, or the investment adviser or transfer agent registered with the Commission. In addition, a broker, dealer, or investment company, or an investment adviser or transfer agent registered with the Commission will be deemed an affiliate of a company for purposes of this part if:

(1) That company is regulated under section 214 of the FACT Act, Pub. L. No. 108-159, 117 Stat. 1952 (2003), by a government regulator other than the Commission; and

(2) Rules adopted by the other government regulator under section 214 of the FACT Act treat the broker, dealer, or investment company, or investment adviser or transfer agent registered with the Commission as an affiliate of that company.

(b) *Broker* has the same meaning as in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)). A “broker” does not include a broker registered by notice with the Commission under section 15(b)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(11)).

(c) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(d) *Commission* means the Securities and Exchange Commission.

(e) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(f) *Consumer* means an individual.

(g) *Control* of a company means the power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of any company is presumed to control the company. Any person who does not own more than 25 percent of the voting securities of any company will be presumed not to control the company. Any presumption regarding control may be rebutted by evidence, but, in the case of an investment company, will continue until the Commission makes a decision to the contrary according to the procedures described in section 2(a)(9) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(9)).

(h) *Dealer* has the same meaning as in section 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(5)). A “dealer” does not include a broker registered by notice with the Commission under section 15(b)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(11)).

(i) *Eligibility information* means any information the communication of which would be a consumer report if the exclusions from the definition of “consumer report” in section 603(d)(2)(A) of the FCRA did not apply.

(j) *FCRA* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(k) *GLB Act* means the Gramm-Leach-Bliley Act (15 U.S.C. 6801 *et seq.*).

(l) *Investment adviser* has the same meaning as in section 202(a)(11) of the

¹¹⁴ Pub. L. 108-159, section 214, 117 Stat. 1952 (2003).

¹¹⁵ 15 U.S.C. 78q, 78w, and 78mm.

¹¹⁶ 15 U.S.C. 80a-30(a) and 80a-37.

¹¹⁷ 15 U.S.C. 80b-4 and 80b-11.

Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)).

(m) *Investment company* has the same meaning as in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3), and includes a separate series of the investment company.

(n) *Marketing solicitation*—(1) *In general.* Marketing solicitation means 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.

(2) *Exclusion of marketing directed at the general public.* A marketing solicitation does not include communications that are directed at the general public and distributed without the use of eligibility information communicated by an affiliate. For example, television, magazine, and billboard advertisements do not constitute marketing solicitations, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications.

(3) *Examples of marketing solicitations.* A marketing solicitation would include, for example, a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a specific consumer that is based on eligibility information communicated by an affiliate.

(o) *Person* means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(p) *Pre-existing business relationship* means a relationship between a person and a consumer based on:

(1) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a marketing solicitation covered by this part;

(2) The purchase, rental, or lease by the consumer of the 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 the person, during the 18-month period immediately preceding the date on which a marketing solicitation covered by this part is made or sent to the consumer; or

(3) 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 a marketing

solicitation covered by this part is made or sent to the consumer.

(q) *Transfer agent* has the same meaning as in section 3(a)(25) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(25)).

(r) *You* means:

(1) Any broker or dealer;

(2) Any investment company;

(3) Any investment adviser registered with the Commission under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 *et seq.*); and

(4) Any transfer agent registered with the Commission under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1).

§§ 247.4 through 247.19 [Reserved]

§ 247.20 Affiliate use of eligibility information for marketing.

(a) *General duties of a person communicating eligibility information to an affiliate*—(1) *Notice and opt-out.* If you communicate eligibility information about a consumer to your affiliate, your affiliate may not use the information to make or send marketing solicitations to the consumer, unless prior to such use by the affiliate:

(i) You provide a clear and conspicuous notice to the consumer stating that the information may be communicated to and used by your affiliate to make or send marketing solicitations to the consumer about its products and services;

(ii) You provide the consumer a reasonable opportunity and a simple method to “opt out” of such use of that information by your affiliate; and

(iii) The consumer has not chosen to opt out.

(2) *Rules of construction*—(i) *In general.* The notice required by this paragraph may be provided either in the name of a person with which the consumer currently does or previously has done business or in one or more common corporate names shared by members of an affiliated group of companies that includes the common corporate name used by that person, and may be provided in the following manner:

(A) You may provide the notice directly to the consumer;

(B) Your agent may provide the notice on your behalf, so long as:

(1) Your agent, if your affiliate, does not include any marketing solicitation other than yours on or with the notice, unless it falls within one of the exceptions in paragraph (c) of this section; and

(2) Your agent gives the notice in your name or a common corporate name or names used by the family of companies; or

(C) You may provide a joint notice with one or more of your affiliates or under a common corporate name or names used by the family of companies as provided in § 247.24(c).

(ii) *Avoiding duplicate notices.* If Affiliate A communicates eligibility information about a consumer to Affiliate B, and Affiliate B communicates that same information to Affiliate C, Affiliate B does not have to give an opt-out notice to the consumer when it provides eligibility information to Affiliate C, so long as Affiliate A's notice is broad enough to cover Affiliate C's use of the eligibility information to make marketing solicitations to the consumer.

(iii) *Examples of rules of construction.* A, B, and C are affiliates. The consumer currently has a business relationship with Affiliate A, but has never done business with Affiliates B or C. Affiliate A communicates eligibility information about the consumer to B for purposes of making marketing solicitations. B communicates the information it received from A to C for purposes of making marketing solicitations. In this circumstance, the rules of construction would:

(A) Permit B to use the information to make marketing solicitations if:

(1) A has provided the opt-out notice directly to the consumer; or

(2) B or C has provided the opt-out notice on behalf of A.

(B) Permit B or C to use the information to make marketing solicitations if:

(1) A's notice is broad enough to cover both B's and C's use of the eligibility information; or

(2) A, B, or C has provided a joint opt-out notice on behalf of the entire affiliated group of companies.

(C) Not permit B or C to use the information to make marketing solicitations if B has provided the opt-out notice only in B's own name, because no notice would have been provided by or on behalf of A.

(b) *General duties of an affiliate receiving eligibility information.* If 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.

(c) *Exceptions.* The provisions of this part do not apply if you use eligibility information you receive from an affiliate:

(1) To make or send a marketing solicitation to a consumer with whom

you have a pre-existing business relationship as defined in § 247.3(p);

(2) To facilitate communications to an individual for whose benefit you provide 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;

(3) To perform services on behalf of an affiliate, except that this shall not be construed as permitting you to make or send marketing 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 marketing solicitation as a result of the election of the consumer to opt out under this part;

(4) In response to a communication initiated by the consumer orally, electronically, or in writing;

(5) In response to an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a marketing solicitation; or

(6) If your compliance with this part would prevent you from complying with any provision of state insurance laws pertaining to unfair discrimination in any state in which you are lawfully doing business.

(d) *Examples of exceptions—(1) Examples of pre-existing business relationships.*

(i) If a consumer has an insurance policy with your insurance affiliate that is currently in force, your insurance affiliate has a pre-existing business relationship with the consumer and can therefore use eligibility information it has received from you to make marketing solicitations.

(ii) If a consumer has an insurance policy with your insurance affiliate that has lapsed, your insurance affiliate has a pre-existing business relationship with the consumer for 18 months after the date on which the policy ceases to be in force and can therefore use eligibility information it has received from you to make marketing solicitations for 18 months after the date on which the policy ceases to be in force.

(iii) If a consumer applies to your affiliate for a product or service, or inquires about your affiliate's products or services and provides contact information to your affiliate for receipt of that information, your affiliate has a pre-existing business relationship with the consumer for 3 months after the date of the inquiry or application and can therefore use eligibility information it has received from you to make marketing solicitations for 3 months

after the date of the inquiry or application.

(iv) If a consumer makes a telephone call to a centralized call center for an affiliated group of companies to inquire about the consumer's securities account, the call does not constitute an inquiry with any affiliate other than the broker-dealer that holds the consumer's securities account and does not establish a pre-existing business relationship between the consumer and any affiliate of the broker-dealer.

(2) *Examples of consumer-initiated communications.* (i) If a consumer who has an account with you initiates a telephone call to your insurance affiliate to request information about insurance and provides contact information for receiving that information, your insurance affiliate may use eligibility information about the consumer it obtains from you to make marketing solicitations in response to the consumer-initiated call.

(ii) If your affiliate makes the initial marketing call, leaves a message for the consumer to call back, and the consumer responds, the communication is not initiated by the consumer, but by your affiliate.

(iii) If the consumer calls your affiliate to ask about retail locations and hours, but does not request information about your affiliate's products or services, marketing solicitations by your affiliate using eligibility information about the consumer it obtains from you would not be responsive to the consumer-initiated communication.

(3) *Example of consumer affirmative authorization or request.* If a consumer who obtains brokerage services from you requests or affirmatively authorizes information about life insurance from your insurance affiliate, such authorization or request, whether given to you or to your insurance affiliate, would permit your insurance affiliate to use eligibility information about the consumer it obtains from you to make marketing solicitations about life insurance to the consumer. A pre-selected check box would not satisfy the requirement for an affirmative authorization or request.

(e) *Prospective application.* The provisions of this part 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 [MANDATORY COMPLIANCE DATE PURSUANT TO THE FINAL RULE].

(f) *Relation to affiliate-sharing notice and opt-out.* Nothing in this part 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.

§ 247.21 Contents of opt-out notice.

(a) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) That the consumer may elect to limit your affiliate from using eligibility information about the consumer that it obtains from you to make or send marketing solicitations to the consumer;

(2) If applicable, that the consumer's election will apply for a specified period of time and that the consumer will be allowed to extend the election once that period expires; and

(3) A reasonable and simple method for the consumer to opt out.

(b) *Concise—(1) In general.* For purposes of this part, the term "concise" means a reasonably brief expression or statement.

(2) *Combination with other required disclosures.* A notice required by this part may be concise even if it is combined with other disclosures required or authorized by federal or state law.

(3) *Use of model form.* The requirement for a concise notice is satisfied by use of a model form contained in Appendix A of this part, although use of the model form is not required.

(c) *Providing a menu of opt-out choices.* With respect to the opt-out election, you may allow a consumer to choose from a menu of alternatives when opting out of affiliate use of eligibility information for marketing, such as by selecting certain types of affiliates, certain types of information, or certain methods of delivery from which to opt out, so long as you offer as one of the alternatives the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery.

(d) *Alternative contents.* If you provide the consumer with a broader right to opt out of marketing than is required by law, you satisfy the requirements of this section by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights. A model notice is provided in Appendix A of this part for guidance, although use of the model notice is not required.

§ 247.22 Reasonable opportunity to opt out.

(a) *In general.* Before your affiliate uses eligibility information

communicated by you to make or send marketing solicitations to a consumer, you must provide the consumer with a reasonable opportunity, following the delivery of the opt-out notice, to opt out of such use by your affiliate.

(b) *Examples of a reasonable opportunity to opt out.* You provide a consumer with a reasonable opportunity to opt out if:

(1) *By mail.* You mail the opt-out notice to a consumer and give the consumer 30 days from the date you mailed the notice to elect to opt out by any reasonable means.

(2) *By electronic means.* You notify the consumer electronically and give the consumer 30 days after the date that the consumer acknowledges receipt of the electronic notice to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* You provide the opt-out notice to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site, and request that the consumer decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, so long as you provide a simple process at the Internet Web site that the consumer may use at that time to opt out.

(4) *By including in a privacy notice.* You include the opt-out notice in a GLB Act privacy notice and allow the consumer to exercise the opt-out within a reasonable period of time and in the same manner as the opt-out under the GLB Act, 15 U.S.C. 6801 *et seq.*

(5) *By providing an "opt-in".* If you have a policy of not allowing an affiliate to use eligibility information to make or send marketing solicitations to the consumer unless the consumer affirmatively consents, you give the consumer the opportunity to "opt in" by affirmative consent to such use by your affiliate. You must document the consumer's affirmative consent. A pre-selected check box does not constitute evidence of the consumer's affirmative consent.

§ 247.23 Reasonable and simple methods of opting out.

(a) *Reasonable and simple methods of opting out.* You provide a reasonable and simple method for a consumer to exercise a right to opt out if you:

(1) Designate check-off boxes in a prominent position on the relevant forms included with the opt-out notice required by this part;

(2) Include a reply form and a self-addressed envelope together with the opt-out notice required by this part;

(3) Provide an electronic means to opt out, such as a form that can be electronically mailed or processed at your Web site, if the consumer agrees to the electronic delivery of information; or

(4) Provide a toll-free telephone number that consumers may call to opt out.

(b) *Methods of opting out that are not reasonable or simple.* You do not provide a reasonable and simple method for exercising an opt-out right if you:

(1) Require the consumer to write his or her own letter to you;

(2) Require the consumer to call or write to you to obtain a form for opting out, rather than including the form with the notice; or

(3) Require the consumer who agrees to receive the opt-out notice in electronic form only, such as by electronic mail or at your Web site, to opt out solely by telephone or by paper mail.

§ 247.24 Delivery of opt-out notices.

(a) *In general.* You must provide an opt-out notice so that each consumer can reasonably be expected to receive actual notice. For opt-out notices you provide electronically, you may either comply with the electronic disclosure provisions in this part or with the provisions in Section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.*

(b) *Examples of expectation of actual notice—*(1) You may reasonably expect that a consumer will receive actual notice if you:

(i) Hand-deliver a printed copy of the notice to the consumer;

(ii) Mail a printed copy of the notice to the last known mailing address of the consumer; or

(iii) For the consumer who obtains a product or service from you electronically, such as on an Internet Web site, post the notice on your electronic site and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular product or service.

(2) You may not reasonably expect that a consumer will receive actual notice if you:

(i) Only post a sign in your branch or office or generally publish advertisements presenting your notice; or

(ii) Send the notice via electronic mail to a consumer who has not agreed to the electronic delivery of information.

(c) *Joint notice with affiliates—*(1) *In general.* You may provide a joint notice from you and one or more of your affiliates, as identified in the notice, so

long as the notice is accurate with respect to you and each affiliate.

(2) *Identification of affiliates.* You do not have to list each affiliate providing the joint notice by its name. If each affiliate shares a common name, such as "ABC," then the joint notice may state that it applies to "all institutions with the ABC name" or "all affiliates in the ABC family of companies." If, however, an affiliate does not have ABC in its name, then the joint notice must separately identify each family of companies with a common name or the institution.

(d) *Joint relationships—*(1) *In general.* If two or more consumers jointly obtain a product or service from you (joint consumers), the following rules apply:

(i) You may provide a single opt-out notice.

(ii) Any of the joint consumers may exercise the right to opt out.

(iii) You may either:

(A) Treat an opt-out direction by a joint consumer as applying to all of the associated joint consumers; or

(B) Permit each joint consumer to opt out separately.

(iv) If you permit each joint consumer to opt out separately, you must permit:

(A) One of the joint consumers to opt out on behalf of all of the joint consumers; and

(B) One or more joint consumers to notify you of their opt-out directions in a single response.

(v) You must explain in your opt-out notice which of the policies in paragraph (d)(1)(iii) of this section you will follow, as well as the information required by paragraph (d)(1)(iv) of this section.

(vi) You may not require *all* joint consumers to opt out before you implement *any* opt-out direction.

(vii) If you receive an opt-out by a particular joint consumer that does not apply to the others, you may use eligibility information about the others as long as no eligibility information is used about the consumer who opted out.

(2) *Example.* If consumers A and B, who have different addresses, have a joint checking account with you and arrange for you to send statements to A's address, you may do any of the following, but you must explain in your opt-out notice which opt-out policy you will follow. You may send a single opt-out notice to A's address and:

(i) Treat an opt-out direction by A as applying to the entire account. If you do so and A opts out, you may not require B to opt out as well before implementing A's opt-out direction.

(ii) Treat A's opt-out direction as applying to A only. If you do so, you must also permit:

(A) A and B to opt out for each other; and

(B) A and B to notify you of their opt-out directions in a single response (such as on a single form) if they choose to give separate opt-out directions.

(iii) If A opts out only for A, and B does not opt out, your affiliate may use information only about B to send marketing solicitations to B, but may not use information about A and B jointly to send marketing solicitations to B.

§ 247.25 Duration and effect of opt-out.

(a) *Duration of opt-out.* The election of a consumer to opt out shall be effective for the opt-out period, which is a period of at least 5 years beginning as soon as reasonably practicable after the consumer's opt-out election is received. You may establish an opt-out period of more than 5 years, including an opt-out period that does not expire unless the consumer revokes it in writing, or if the consumer agrees, electronically.

(b) *Effect of opt-out.* A receiving affiliate may not make or send marketing solicitations to a consumer during the opt-out period based on eligibility information it receives from an affiliate, except as provided in the exceptions in § 247.20(c) or if the opt-out is revoked by the consumer.

(c) *Time of opt-out.* A consumer may opt out at any time.

(d) *Termination of relationship.* If the consumer's relationship with you terminates when a consumer's opt-out election is in force, the opt-out will continue to apply indefinitely, unless revoked by the consumer.

§ 247.26 Extension of opt-out.

(a) *In general.* For a consumer who has opted out, a receiving affiliate may not make or send marketing solicitations to the consumer after the expiration of the opt-out period based on eligibility information it receives or has received from an affiliate, unless the person responsible for providing the initial opt-out notice, or its successor, has given the consumer an extension notice and a reasonable opportunity to extend the opt-out, and the consumer does not extend the opt-out.

(b) *Duration of extension.* Each opt-out extension shall comply with § 247.25.

(c) *Contents of extension notice.* The notice provided at extension must be clear, conspicuous, and concise, and must accurately disclose either:

(1) The same contents specified in § 247.21(a) for the initial notice, along with a statement explaining that the consumer's previous opt-out has expired or is about to expire, as applicable, and that the consumer must

opt out again if the consumer wishes to keep the opt-out election in force; or

(2) Each of the following items:

(i) That the consumer previously elected to limit your affiliate from using information about the consumer that it obtains from you to make or send marketing solicitations to the consumer;

(ii) That the consumer's election has expired or is about to expire, as applicable;

(iii) That the consumer may elect to extend the consumer's previous election; and

(iv) A reasonable and simple method for the consumer to opt out.

(d) *Timing of the extension notice—*

(1) *In general.* An extension notice may be provided to the consumer either:

(i) A reasonable period of time before the expiration of the opt-out period; or

(ii) Any time after the expiration of the opt-out period but before any affiliate makes or sends marketing solicitations to the consumer that would have been prohibited by the expired opt-out.

(2) *Reasonable period of time before expiration.* Providing an extension notice on or with the last annual privacy notice required by the GLB Act that is provided to the consumer before expiration of the opt-out period shall be deemed reasonable in all cases.

(e) *No effect on opt-out period.* The opt-out period may not be shortened to a period of less than 5 years by sending an extension notice to the consumer before expiration of the opt-out period.

§ 247.27 Consolidated and equivalent notices.

(a) *Coordinated and consolidated notices.* A notice required by this part may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the FCRA and the GLB Act privacy notice.

(b) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this part, and that you provide to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of this part.

Appendix A to Part 247—Model Forms for Opt-Out Notices

A-1 Model Form for Initial Opt-Out Notice

A-2 Model Form for Extension Notice

A-3 Model Form for Voluntary “No Marketing” Notice

A-1—Model Form for Initial Opt-Out Notice

Your Choice To Limit Marketing

• You may limit our affiliates from marketing their products or services to you

based on information that we share with them, such as your income, your account history with us, and your credit score.

• [Include if applicable.] Your decision to limit marketing offers from our affiliates will apply for 5 years. Once that period expires, you will be allowed to extend your decision.

• [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To limit marketing offers [include all that apply]:

• Call us toll-free at 877-###-####; or

• Visit our Web site at <http://www.websiteaddress.com>; or

• Check the box below and mail it to:

[Company name]

[Company address]

__ I do not want your affiliates to market their products or services to me based on information that you share with them.

A-2—Model Form for Extension Notice

Extending Your Choice To Limit Marketing

• You previously chose to limit our affiliates from marketing their products or services to you based on information that we share with them, such as your income, your account history with us, and your credit score.

• Your choice has expired or is about to expire.

• [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To extend your choice for another 5 years [include all that apply]:

• Call us toll-free at 877-###-####; or

• Visit our Web site at <http://www.websiteaddress.com>; or

• Check the box below and mail it to:

[Company name]

[Company address]

__ I want to extend my choice for another 5 years.

A-3—Model Form for Voluntary “No Marketing” Notice

Your Choice To Stop Marketing

• You may choose to stop all marketing offers from us and our affiliates.

To stop all marketing offers [include all that apply]:

• Call us toll-free at 877-###-####; or

• Visit our Web site at www.websiteaddress.com; or

• Check the box on the form below and mail it to:

[Company name]

[Company address]

__ I do not want you or your affiliates to send me marketing offers.

Dated: July 8, 2004.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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