August 16, 2004

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552

Re: No. 2004-31: E*TRADE Bank Comments on Proposed Fair Credit Reporting Affiliate Marketing Regulations

Ladies and Gentlemen:

E*TRADE Bank, Arlington, Virginia (the "Bank") appreciates the opportunity to provide its comments on certain aspects of the July 15, 2004 Notice of Proposed Rulemaking ("Notice") by the Office of Thrift Supervision ("OTS"), the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the National Credit Union Administration ("Federal banking agencies" or "Agencies").[1] The Notice sets forth the Agencies' proposed affiliate marketing regulations to implement Section 214 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), which adds a new Section 624 to the Fair Credit Reporting Act ("FCRA").

Under Section 624 of the FCRA, an entity ("receiving affiliate") that receives certain consumer report-type information from an affiliate ("furnishing affiliate") may not use that information to make a marketing solicitation to the customer unless the

[1] 69 FR 42502 (July 15, 2004).

customer is given notice of the affiliate information sharing and the opportunity to prohibit or "opt out" of such solicitations. This new opt out right is in addition to the existing opt out provision in Section 603(d)(2)(iii) of the FCRA, which excludes from the definition of a "consumer report" customer information other than "transactions and experiences" information that is shared with affiliated companies if the customer is given a similar opt out right.

The Bank commends the Federal banking agencies on having proposed implementing regulations that, in many respects, faithfully track the relevant provisions of Section 624 and resolve a number of practical issues left open by the statute, such as which entity should send the opt out notice. In this regard, we particularly appreciate the flexibility provided by the proposed rules of construction in Sections 571.20(a)(2)(i) and 571.24(c) of the regulations.[2] These rules would permit entities like the Bank, which are affiliated with other commonly branded financial services companies, to send out a joint opt out notice without the need to list each affiliate separately by name. Alternatively, the regulations would allow the Bank's parent company, E*TRADE FINANCIAL Corporation (or some other agent), to provide the opt out notice on behalf of the Bank and its affiliates. By permitting financial services companies such as E*TRADE FINANCIAL to send out a single notice under a common corporate name, the proposed regulations will serve to promote customer brand awareness and will further reinforce our various cross-marketing and product bundling initiatives.

[2] The Bank is a Federal savings bank regulated by the OTS. Accordingly, proposed regulation references in this letter will be to the OTS' proposed regulations.

While we are generally supportive of the proposed affiliate marketing regulations as currently drafted, the Bank does wish to provide comments with respect to one significant issue raised in the Notice and two aspects of the proposed regulations. First, the Bank would like to address the "constructive sharing" issue raised by the Agencies in the Notice. As discussed more fully below, it is the Bank's view that "constructive sharing" is beyond the intended scope of the regulations. Second, the Bank wishes to recommend certain additional examples and other refinements with respect to three key defined terms in the regulations – "**eligibility information**", "**pre-existing business relationship**", and "**solicitation**" – to clarify for financial institutions when the notice and opt out requirements of the regulations are triggered. Third, since many of the Bank's customers conduct their banking transactions online and have agreed to receive notifications and other information electronically, the Bank proposes inclusion of examples in Sections 571.24(b)(1) and 571.22(b)(2) as to (i) when a consumer can reasonably be expected to have received an opt out notice by electronic mail, and (ii) when a consumer is deemed to have been given a reasonable opportunity to opt out after receiving an opt out notice electronically. The Bank's comments with respect to each of these issues are set forth below.

Applicability of the Regulation to "Constructive Sharing"

In the preamble to the proposed affiliate marketing regulations,[3] the Agencies requested comment on whether, "given the policy objectives of [S]ection 214 of the

[3] 69 FR at 42507.

FACT Act," the notice and opt out provisions of the regulations should be made applicable to the practice of an entity sending solicitations, on behalf of an affiliate, to customers of the entity who satisfy eligibility criteria prescribed by such affiliate, but whose identities are not disclosed to the affiliate. The preamble characterizes this practice as "**constructive sharing,**" in that an individual customer's response to such solicitation supplies the affiliate with information about the customer that the affiliate would not, but for the solicitation, have otherwise obtained.

The Bank strongly objects to extending the notice and opt out requirements to "constructive sharing" for several reasons. First, there is no support in the plain language of new Section 624 of the FCRA for imposing a notice and opt out requirement where the affiliated companies are not actually sharing customer information. As noted above, the notice and opt out requirement is triggered only when a furnishing affiliate shares its customer information with a receiving affiliate, and the receiving affiliate then uses that information to make a marketing solicitation to those customers. Neither actual sharing by the furnishing affiliate nor use by the receiving affiliate occur in the "constructive sharing" scenario. Thus, Section 624 does not support inclusion of constructive sharing within the scope of the affiliate marketing regulation.

Second, a review of the affiliates' services exception in new Section 624(a)(4)(C) of the FCRA does not support such an extension. The exception demonstrates that Congress was fully aware when drafting new Section 624 of the possibility that companies might perform marketing services on behalf of their affiliates, but chose not to impose the notice and opt out requirement where no actual sharing occurs.

In Section 624(a)(4)(C), Congress specifically created an affiliate services exception, which provides that the affiliate marketing notice and opt out requirements set forth in Section 624(a)(1) do *not apply* where an entity uses customer eligibility information received from its affiliate to perform services on behalf of that affiliate. Significantly, Congress also created a specific **exclusion** from this affiliate services exception. An entity cannot use the affiliate services exception to avoid the notice and opt out requirements imposed upon the affiliate on whose behalf it is sending marketing solicitations. The exclusion to the exception, however, only applies if the affiliate receiving the services (the sending of the marketing solicitations) (1) had already received eligibility information from the service-provider entity (or from another affiliate), and (2) the affiliate would be barred, as a result of a consumer opt out, from making the same marketing solicitations itself.[4]

The common engine driving each of the notice and opt out requirement, the affiliate services exception, and the exclusion from that exception, is the **actual sharing of customer eligibility information by affiliated entities**. If Congress had wanted to require notice and opt out for "constructive sharing," it could have very easily done so in the statutory language of Section 624. For example, Congress could have drafted the Section 624(a)(4)(C) exclusion to the affiliate services exception to provide that if an

[4] The Federal banking agencies have interpreted the affiliate services exception and the exclusion in Section 624(a)(4)(C) in the same manner as the Bank. In the preamble, the Agencies characterize the effect of the exclusion as follows: "Thus, when . . . the consumer has opted-out, an affiliate subject to the opt out election **that has received eligibility information** from a person that has a relationship with the consumer may not circumvent the opt out by instructing the person with the consumer relationship or another affiliate to make or send solicitations to the consumer on its behalf." 69 FR at 42508 (emphasis supplied).

affiliate on whose behalf the marketing solicitation was sent would have been required under Section 624(a)(1) to provide notice and opt out to use customer eligibility information from an affiliate to conduct the marketing solicitation itself, then **whether or not it had received eligibility information from another affiliate,** the service providing entity (the one sending marketing solicitations on behalf of an affiliate) could not use its own (or another affiliate's) customer eligibility information in connection with the solicitation.

However, Section 624 was not drafted that way. The affiliate marketing notice and opt out requirement in Section 624(a)(1), the exception in Section 624(a)(4)(C), and the exclusion from that exception in subclause (C), only apply where there is **actual information sharing** between the affiliates. Congress specifically chose to address, in the Section 624(a)(4)(C) exception and the exclusion, the situation in which marketing and other services are conducted by affiliates on behalf of each other. At the same time, Congress did not make these important provisions applicable to the "constructive sharing" scenario posited by the Agencies. This fact strongly supports the notion that Congress did not intend for the affiliate marketing notice and opt out right in the statute to apply to "constructive sharing".

A review of the legislative history of the FACT Act, and in particular the Senate floor debates prior to passage and enactment of the legislation, also strongly supports this conclusion. During those discussions, the legislators carefully considered the affiliate information sharing provisions in Section 214 of the FACT Act. A number of Senators, including Sens. Feinstein, Boxer, Corzine, Reed, Nelson, and Durbin, objected to these

provisions on the grounds that they did not go far enough in giving consumers control over the ways that financial services companies share customers' personal financial information with affiliates.[5] Sen. Nelson very pointedly commented that the affiliate marketing provisions of the legislation "[purport] to give consumers the right to opt out of the sharing of transaction and experience information for marketing, but there are loopholes."[6]

In addition, as the Agencies are well aware, Sen. Feinstein proposed an amendment that would have replaced the affiliate marketing provisions contained in Section 214 with broader affiliate information sharing opt out provisions similar to those that had been enacted by California in its SB 1 privacy legislation. Notwithstanding the concerns expressed during the floor debates that the affiliate marketing provisions in Section 214 did not go far enough, Sen. Feinstein's affiliate information sharing amendment was tabled by a 70-24 vote.[7]

Several Senators who voted against the proposed amendment noted the importance of balancing the efficient operation of the country's credit markets with the protection of consumers' privacy rights. As Sen. Sarbanes remarked:

> "So on the solicitation for marketing, we are trying to address much of the concern that has been expressed to us, but we have been trying to do it in a

[5] See, e.g., 149 Cong. Rec. S13858 (daily ed. Nov. 4, 2003)(statement of Sen. Corzine).
[6] 149 Cong. Rec. S13864.
[7] 149 Cong. Rec. S13876.

> very careful way so that the basic purposes of the legislation can be carried forward."[8]

Similarly, Sen. Shelby, the Chair of the Senate Banking Committee also noted:

> The bill [restricts affiliate sharing used for marketing purposes] in the context of the [FCRA] in a straightforward and narrowly tailored way and does not give preferential treatment to certain business models over others.[9]

The above legislative history demonstrates that the provisions of Section 214 of the FACT Act were the product of a carefully crafted compromise. Congress sought to balance the need for a free flow of consumer report-type information in our national credit system with the goal of protecting consumers' privacy rights. The legislative history contains no evidence of any overarching policy objective that would warrant or even permit the Agencies' proposed extension of the statute's notice and opt out requirement to "constructive sharing".[10] Accordingly, the Bank respectfully submits that

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[8] 149 Cong. Rec. S13852 (daily ed. Nov. 4, 2003).

[9] 149 Cong. Rec. S13873. Sen. Shelby's remarks that affiliate marketing was being addressed "in the context" of the FCRA is also instructive as to why affiliate information sharing is a key component of Section 624. The FCRA as a whole regulates the collection, accuracy and dissemination of consumer report information. Accordingly, it is highly likely that Congress viewed the inclusion of the affiliate marketing opt out requirement in the FCRA as appropriate only if the requirement were directly related to an activity regulated by the statute – the dissemination of consumer report information from one party to another.

[10] Even assuming, for the sake of argument, that one of the underlying purposes of the FACT Act was to enable consumers to opt out of affiliate marketing, this policy rationale still would not provide the Federal banking agencies with a legitimate basis for, in effect, "trumping" by regulation the plain language of Section 624. As the U.S. Supreme Court noted in Board of Governors of the Federal Reserve System v. Dimension Financial Corp.: "The 'plain purpose' of legislation . . . is determined in the first instance with reference to the plain language of the statute itself. [citation omitted] Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called

the Agencies lack the requisite statutory authority to extend the coverage of the final affiliate marketing regulations to "constructive sharing".[11]

As a final matter, it should be noted that requiring notice and opt out for affiliate marketing if the affiliate providing the marketing services uses customer eligibility information could produce an anomalous, unintended result. Immediately prior to their discussion of the constructive sharing issue, the Agencies suggest that it would be permissible for financial services companies to send affiliates' marketing materials to their customers so long as no customer eligibility information is used and the materials are sent to all customers.[12] If targeted affiliate marketing without notice and opt out is prohibited, but untargeted affiliate marketing is permitted, then it is possible that consumers could receive much more unwanted mass marketing solicitations from affiliates of companies with which they have customer relationships.

The ability of a company to market selectively to its customer base on behalf of an affiliate using eligibility criteria supplied by the affiliate, i.e., to perform targeted marketing, not only potentially reduces the number of affiliate solicitations customers will receive, but also increases the likelihood that customers receiving the targeted

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upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." 474 U.S. 361, 373-374 (1986).

[11] In addition to the reasons set forth above, the Bank also concurs with the comments on "constructive sharing" made by the American Bankers Association in its August 13, 2004 comment letter to the Federal Trade Commission. Particularly compelling, in the Bank's view, is the ABA's argument that there is nothing in the pre-existing customer provisions of Section 624(a)(4)(C) that limits the exception to marketing solicitations conducted by an entity only on its own behalf. Consequently, "constructive sharing" without notice and opt out appears to be expressly permitted by this exception.

[12] 69 FR at 42507.

solicitations will find them to be of interest and will respond favorably. Extending the regulations' notice and opt out requirements to "constructive sharing" could have the unintended result of consumers being inundated with much more unwanted mass marketing solicitations that are less targeted to their interests or other characteristics. This is yet an additional reason why the Federal banking agencies should refrain from going beyond the notice and opt out requirements prescribed by Section 214.

Proposed Definitions in Section 571.3

"Eligibility Information"

As noted above and as set forth in new Section 624(a)(1) of the FCRA as well as proposed Section 571.20(a)(1), the affiliate marketing notice and opt out requirement is only triggered when both (1) information about a consumer that would normally constitute a "consumer report" for purposes of the FCRA is shared with an affiliate and (2) the affiliate uses that information to make a marketing solicitation to that consumer. The Bank agrees with the Agencies that it is preferable to use a defined term such as "eligibility information" to refer to this consumer report-type of information rather than repeating the somewhat lengthy statutory language used in Section 624(a)(1) each time this concept is mentioned.

As a further refinement, the Bank recommends that the definition of "eligibility information" specify the types of consumer information excluded from the definition. In this regard, the Bank notes that the Federal Trade Commission, the agency that has

primary interpretive authority with respect to the FCRA, has long taken the position that so-called "credit header" information about a consumer – the consumer's name, address, and phone number – does not constitute a "consumer report" for purposes of the FCRA, because such information " 'does not bear on creditworthiness, credit capacity, credit standing, character, general reputation, personal characteristics, or mode of living. . . . '"[13]

Consistent with the FTC's long-standing position that credit header information is not subject to the FCRA, the Federal banking agencies should also exclude this kind of basic consumer information from the definition of "eligibility information" in the final affiliate marketing regulations. This would confirm that if a furnishing affiliate provides a list of its customers' names and addresses (without any additional information about those customers) to a receiving affiliate, the first condition for determining whether there is a notice and opt out requirement – the sharing of eligibility information by affiliated entities – is not met. Alternatively, the Agencies could provide this guidance in the preamble to the final regulations, since they have already stated in the preamble to the proposed regulations that an opt out notice would not be required if eligibility information were shared with receiving affiliates, so long as that information was not then used for marketing purposes.[14] Since the Agencies have already provided guidance

[13] Individual Reference Services Group, Inc. v. Federal Trade Commission, 145 F. Supp. 2d 6, 14-15 (D.D.C. 2001)(quoting Trans Union Index, Ex. F, In the Matter of Trans Union Corp., Dkt. No. 9255, Feb. 10, 2000, at 30).

[14] 69 FR at 42506. Arguably, the mere fact that a consumer is a customer of an affiliate would constitute a "consumer report" under the FCRA or "eligibility information" for purposes of the proposed affiliate marketing regulation. However, the Agencies' statement in the preamble to the proposed regulation that the opt out notice requirements in Section 571.20(a) would not apply if one entity asked its affiliate to send marketing materials to all of the affiliate's customers "without regard to eligibility information" (69 FR at 42507) strongly suggests that the existence of the customer relationship with the entity that would be revealed when the customer responds to the affiliate would not rise to the level of "eligibility information".

as to the applicability of the regulations where eligible information is shared but is not used for solicitation purposes, inclusion of the reverse situation, where non-eligibility information has been shared and is used for solicitation purposes, would provide additional clarity and balance.

"Pre-Existing Business Relationship"

Under new Section 624(a)(4)(A) of the FCRA, and as set forth in proposed Section 571.20(c) of the affiliate marketing regulations, the notice and opt out requirements will not apply if the receiving affiliate has a pre-existing customer relationship with the consumer to whom the marketing solicitation is being sent. The statute prescribes three situations in which an entity is deemed to have such a pre-existing relationship: (1) a financial contract between the entity and a consumer is in force; (2) a consumer's purchase, rental, or lease of a person's goods or services from the entity, or a financial transaction between the consumer and the entity within 18 months of the date on which the consumer is sent a solicitation; and (3) a consumer has made an inquiry or application for a product or service offered by the entity within three months of the solicitation.

Although the existence of a customer relationship by itself does constitute "personally identifiable financial information" for purposes of the privacy provisions of Title V of the Gramm-Leach-Bliley Act of 1999, this characterization in GLBA has no bearing whatsoever on whether such information would be treated as a "consumer report" for purposes of the FCRA. As Section 573.16 of Office of Thrift Supervision's privacy regulations indicates: "Nothing in [the OTS' privacy regulations] shall be construed to modify, limit, or supersede the operation of the [FCRA], and no inference shall be drawn on the basis of the provisions of [the OTS' privacy regulations] regarding whether information is transaction or experience information under [S]ection 603 of [the FCRA]."

As drafted, the proposed affiliate marketing regulations track the exact language of the statutory definition of "pre-existing business relationship". The Bank asks that the Agencies consider revising the wording of the first two situations listed above, to be more "user friendly" and more directly related to the financial products and services offered by financial institutions and their affiliates. The Bank proposes that, for example, instead of reiterating the "financial contract" definition in Section 624, the Agencies draw from the definition of the term "customer relationship" set forth in the Gramm-Leach-Bliley Act ("GLBA") privacy regulations (set forth at Section 573.3(i) in the Office of Thrift Supervision's regulations), and state that a pre-existing relationship exists if "the consumer has a 'customer relationship' (as such term is defined in Section 573.3(i)) with the entity."

Similarly, the Bank suggests defining the second type of a pre-existing relationship to incorporate the terminology of "customer relationship" and a consumer obtaining a "financial product or service" from the privacy context. This relationship could be defined as where the consumer either (i) had a "customer relationship" with the affiliate or (ii) otherwise obtained a financial product or service from the affiliate not resulting in the establishment of a customer relationship, within 18 months of the date on which the consumer is sent a solicitation. It is well established in the privacy context, and financial institutions well understand, what constitutes a "customer relationship" and a consumer obtaining a "financial product or service". Incorporation of this terminology into the definition of "pre-existing business relationship" in the affiliate marketing regulations would provide financial institutions with better guidance as to when this exception is available.

"Solicitations"

The Bank's comment with respect to the proposed definition of "solicitations" in the Agencies' affiliate marketing regulations echoes its comment above regarding the definition of "eligibility information". It should also be stated in the definition that a solicitation will be deemed not to have been made if the marketing is not based on eligibility information that has been shared by affiliates. So, for example, if there has been no affiliate information sharing, or if the information shared among affiliates is not "eligibility information," then the affiliate's marketing efforts will not constitute a "solicitation" within the scope of the regulation.

Internet Marketing

In the Bank's view, the same general principles as outlined above are applicable in the case of Internet marketing, such as banner ads on a website and so-called pop-up ads. In order to enhance the customer experience, the websites of many companies download a "cookie" (or a similar tracking device) onto a visitor's computer that will identify that person either as having previously visited the website or, if the cookie is downloaded from a password-protected webpage, as a customer of the company or one or more of its affiliates. In cases where affiliated companies have a commonly branded single website, rarely, if ever, will a customer cookie indicate the particular affiliate(s) with which the visitor has a pre-existing business or customer relationship.

The fact that a person has visited a particular webpage of a financial services company before certainly does not constitute "eligibility information". For the reasons discussed above in fn. 14, the Bank also takes the view that the existence of a customer relationship with one or more affiliates, by itself, is not "eligibility information". This is especially true if the cookie placed on the person's computer is not "affiliate specific". Consequently, the Bank respectfully submits that any banner or pop-up advertisements on a website operated by a financial institution or one of its affiliates that are customer or previous visitor-based, are not "solicitations". In the absence of a solicitation being made by an affiliate, there would be no notice and opt out requirement.

Not including these types of web advertisements within the scope of the regulation also makes good policy sense when one realizes that, unlike mail, e-mail and phone solicitations, banner and pop-up ads on a webpage are largely passive. In order to be exposed to the ads, a person generally has to take the affirmative step of going to visit the financial institution's or an affiliate's webpage. Also, a consumer visiting a financial services company's website can reasonably expect to see advertisements placed on the website by affiliated entities, just as a brick-and-mortar bank might have advertising displays promoting the availability of affiliates' products and services. Thus, while online ads by their very nature can be somewhat more targeted based on cookies that identify the person viewing a webpage as either a customer or a previous visitor, the Bank respectfully submits that this modest degree of tailoring, which is not based on "eligibility information" about the person obtained from an affiliate, is something that most people would find neither objectionable nor unexpected. Under the circumstances,

therefore, we do not believe that making most types of Internet advertising subject to the notice and opt out requirements is warranted.[15]

Delivery of Opt Out Notices By Electronic Mail; Reasonable Opportunity to Opt Out

Proposed Section 571.24(a) of the affiliate marketing regulations requires that entities sending opt out notices to consumers so do in such a manner that each consumer "can reasonably be expected" to receive actual notice. Section 571.24(b) provides examples of methods of delivery that would and would not satisfy this reasonable expectation requirement.

As an example of an electronic delivery of an opt out notice that could be reasonably expected to be received by a consumer, the Agencies cite a notice that is automatically provided to a consumer as a non-bypassable link to an intermediate webpage or "speed bump," where the consumer must acknowledge receipt of the notice before continuing with a transaction. The example of an electronic delivery that would not be reasonably expected to be received by a consumer is a notice sent via e-mail to a consumer who has not consented to electronic delivery of information.

Conspicuously missing from the list of examples, however, is an e-mail opt out notice sent to a consumer who has agreed to electronic delivery of information. The

[15] Even if the Federal banking agencies did not fully agree with the Bank's position on this issue, at a minimum they should refrain from making Internet advertising subject to the final affiliate marketing regulation at this time and until they gain much greater familiarity with how such online advertising is conducted and whether consumers prefer or object to receiving targeted Internet ads of this nature.

Bank submits that it can be reasonably expected that the addressee will receive the notice, unless the sender of the e-mail receives a return notification that the intended recipient's e-mail address was not valid or that the e-mail was not received. The Bank believes that it would be preferable to include in the final affiliate marketing regulations an affirmative example confirming that e-mail is an acceptable means of delivering opt out notices to consumers who have consented to receiving information in this manner.

Similarly, proposed Section 571.22(b)(2), which provides that a consumer receiving an opt out notice by electronic means is deemed to have a reasonable opportunity to opt out if he/she is given 30 days after the date that receipt of the notice is acknowledged, could be read as precluding delivery of an opt out notice via e-mail. Recipients of e-mails typically do not acknowledge receipt either automatically or by manually responding to the e-mail. The Bank believes that a consumer should be deemed to have had a reasonable opportunity to opt out of affiliate marketing if the entity that sends the e-mail waits at least 30 days before an affiliate marketing solicitation is sent to the consumer, provided that in the interim the sender does not receive a notification that the e-mail address to which the notice has been sent is no longer valid or that the e-mail has not been received. Therefore, the Bank also respectfully proposes that the electronic delivery example in Section 571.22(b)(2) be expanded to include a situation where an e-mail notice is sent and there is no customer acknowledgment of receipt.

Conclusion

In summary, E*TRADE Bank believes that the Federal banking agencies have proposed affiliate marketing regulations that are generally consistent with the underlying statute, new Section 624 of the FCRA, and are relatively easy to follow and understand, However, the Bank is firmly of the view that the Agencies should not attempt to extend the notice and opt out requirement in the final regulations to "constructive sharing," where no consumer eligibility information is actually shared among affiliates. In addition, the regulations could be made even more clear if:

(1) the definition of "eligibility information" in Section 571.3 confirmed that customer credit header information falls outside of the scope of the definition;

(2) the definition of "pre-existing relationship" in the regulation incorporated the concept of "customer relationship" in the Agencies' GLBA privacy regulations;

(3) the definition of "solicitations" included an example indicating that, in order to constitute a "solicitation" for purposes of the rule, the marketing at issue must be based upon "eligibility information" that has been shared by an affiliate;

(4) the definition of "solicitation" provided that Internet advertising will not be deemed to be a "solicitation" subject to notice and opt out, unless the ads on a webpage are specifically tailored to a consumer based on eligibility information received from an affiliate;

(5) Section 571.24(b)(1) included an example to confirm that a consumer who has consented to electronic delivery of information can be reasonably expected to receive an opt out notice sent by electronic mail; and

(6) Section 571.22(b)(2) included an example to confirm that a consumer who has consented to electronic delivery of information is given a reasonable opportunity to opt out if he/she is given 30 days after the date on which the e-mail notice is sent to the consumer, without there being any need for the consumer to acknowledge receipt of the e-mail.

On behalf of E*TRADE Bank, thank you again for your consideration of our comments on the Agencies' proposed affiliate marketing regulations.

Sincerely,

/S/ JOHN A. BUCHMAN

John A. Buchman
General Counsel
E*TRADE Bank