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MEMBER
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August 16, 2004

Via Electronic Filing

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

Re: Fair Credit Reporting Affiliate Marketing Regulations
Proposed Regulation Reference No. 2004-31

Ladies and Gentlemen:

T. Rowe Price Savings Bank ("**Bank**") appreciates the opportunity to comment on the above-referenced proposed regulation[1] (**"Proposed Regulation"** or **"Affiliate Marketing Regulation"**) implementing certain limitations on affiliate marketing, as mandated by the Fair and Accurate Credit Transactions Act of 2003 (**"FACT Act"**).[2] The T. Rowe Price family of companies (**"T. Rowe Price"**) provides mutual fund, investment, brokerage, and banking services, in addition to related administrative services including transfer agent and recordkeeping services. Therefore, T. Rowe Price has a keen interest in regulatory issues for a wide variety of financial service companies. T. Rowe Price Associates, Inc. and certain other affiliates are registered investment advisers with assets under management of approximately $206 billion as of June 30, 2004, from more than eight million individual and institutional accounts. Given its multiple lines of business, T. Rowe Price also has an interest in achieving uniformity to the greatest degree possible among the final Affiliate Marketing Regulations issued by the various agencies.[3]

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[1] *Proposed Rule: Fair Credit Reporting Affiliate Marketing Regulations*; Reference No. 2004-31; as published in 69 FR 42502 (July 15, 2004) . As used in this letter, the term **"financial institution"** refers to the entity sharing eligibility information with an affiliate; the term **"affiliate"** refers to the entity receiving eligibility information from an affiliated financial institution.

[2] Pub. L. No. 108-159, § 214, 117 Stat. 1952 (2003). The FACT Act amended the Fair Credit Reporting Act (**"FCRA"**), 15 U.S.C. 1681-1681x.

[3] Other T. Rowe Price affiliates are submitting a similar comment letter to the Securities and Exchange Commission under its proposed regulation for mutual funds, broker-dealers, and transfer agents.

The protection and appropriate use of customer information are issues we take seriously. We support the goals of Section 214 of the FACT Act in creating a national standard that permits consumers to control an affiliate's use of information about them for marketing purposes. Section 214 seeks to strike an appropriate balance between two important interests: giving consumers control over certain marketing solicitations, while ensuring that companies can continue to make consumers aware of financial products and services in a cost-efficient and effective manner.

We have the following general observations and some technical comments on the Proposed Regulation.

DEFINITIONS.

"Affiliate" and "Control": We believe that the definitions of "affiliate" and "control" in the Affiliate Marketing Regulation should be consistent with the definitions of these terms in 12 CFR Part 573, which implemented Title V of the Gramm-Leach-Bliley Act of 1999[4] ("**GLB Regulation**"). Even though there are slight variations in the exact statutory language used in the FACT Act, FCRA and the GLB Act in references to "affiliates" and "control," the differences are not substantive, nor is there any evidence that Congress intended for there to be substantive differences. Therefore, to avoid unintended gaps, it is appropriate that the definitions of "affiliate" and "control" in the Affiliate Marketing and GLB Regulations be consistent. While there is consistency in the proposed definition of "control," the proposed definition of "affiliate" in Section 571.3(b) should be changed to mirror that in the GLB Regulation at Section 573.3(a).[5] We also recommend that the adopting release confirm the OTS's intent to provide for consistency between the Affiliate Marketing and GLB Regulations in this area.

"Consumer": We request that the OTS clarify the definition of "consumer" so that it more closely tracks the definition in the GLB Regulation.[6] Under the Proposed Regulation, consumer means simply an individual.[7] However, the OTS could adopt a definition of consumer such as,

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[4] 15 U.S.C. 6801-6831 ("**GLB Act**").

[5] While we believe complete consistency with the GLB Regulation is preferable, as an alternative the proposed definition could be changed as follows: "Affiliate means any person that is related by common ownership or common ~~corporate~~ control with another person." This would more clearly tie to the defined word "control."

[6] Under the GLB Regulation, "consumer means an individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family, or household purposes, or that individual's legal representative." 12 CFR 573.3(e)(1).

[7] This language was originally proposed as part of the OTS's April 2004 release concerning another provision of the FACT Act and was not changed in the Proposed Regulation.

"an individual whose eligibility information derives from accounts, products or services used for personal, family or household purposes, or that person's legal representative." This definition would more clearly exclude, for example, sole proprietorship accounts.[8] The obligations for financial institutions to provide privacy notices and affiliate marketing opt-out notices should not differ based upon the definition of consumer between the two Regulations. In order to further standardize the definition, we recommend the OTS include the same examples that accompany the definition of consumer in the GLB Regulation in its definition of consumer for the Affiliate Marketing Regulation.[9]

"Eligibility Information": The OTS has proposed to define the term "eligibility information" as used in the Regulation by reference to the exclusions from the definition of "consumer report" specified in Section 603(d)(2)(A) of the FCRA. This is the approach used in Section 214 of the FACT Act itself. We appreciate the difficulties of providing a separate definition within the Affiliate Marketing Regulation due to the interlocking definitions and concepts as reflected in the FCRA. However, we believe that it would be useful if the OTS provided examples in its adopting release to illustrate common types of information that would, and would not, constitute "eligibility information."[10]

RESPONSIBILITY FOR PROVIDING NOTICE AND OPT-OUT ELECTION; JOINT NOTICES.

Generally: Section 214 of the FACT Act gives certain rights to consumers of a financial institution before receiving certain targeted marketing solicitations from an affiliate of that financial institution. The affiliate is prohibited from using eligibility information it receives concerning the consumer for marketing purposes unless the consumer has first been provided notice of the sharing and the ability to block the affiliate's use of the information for this purpose. However, Section 214 does not specify which entity – the financial institution or its affiliate – has the responsibility for providing the requisite notice and opt out to the consumer. As proposed by the OTS and as reflected in Section 571.20, this responsibility would be placed

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[8] Such a definition would be consistent with past interpretations of the FCRA generally as not applying to business-purpose relationships. See, e.g., Boothe v. TRW Credit Data, 523 F. Supp., 631, 633 (D.C.N.Y. 1981).

[9] See, 12 CFR 573.3(e)(2). For example, under the GLB Regulation, an individual is not a consumer solely because he or she is a beneficiary of a trust for which a bank is a trustee. 12 CFR 573.3(e)(2)(vii). Use of the examples from the GLB Regulation would also serve to clarify that an individual is not a consumer solely because he or she is a participant in an employee benefit plan. In such cases, the financial institution typically has a contract with the employer as plan sponsor *or with the plan itself*, and under that relationship provides services for the underlying participants. Proposed Section 571.20(c)(2) provides a similar type of exclusion, but it appears to be linked to a contract with the employer only.

[10] One example of information that would not constitute "eligibility information" would be aggregate or blind data that is not linked to identified consumers.

on the financial institution sharing the information, not on the affiliate using the information for marketing solicitation purposes.

We agree that the responsibility should be placed on the financial institution sharing the information. The consumer would more likely expect to receive important notices from the financial institution as opposed to the affiliate. In addition, proposed Sections 571.24(c) (allowing for joint notices with affiliates) and 571.20(a) (2) (regarding the use of agents and means for avoiding duplicative notices) provide the financial institution with useful methods to carry out these duties.

Joint Notices: The provisions of proposed Section 571.24(c)(2) allow a family of companies that share a common name to provide a joint notice that lists the common family name instead of the specific name of each company. However, we find the proposed language somewhat confusing concerning the approach that may be taken if one or more companies do not share the family name. We support the ability to identify affiliates sharing a common name as a group, with separate identification of only those affiliates that do not share the common name. We also recommend slight changes to the example of how to identify a family of companies to simplify the language. Accordingly, we recommend that proposed Section 571.24(c) (2) be revised to read:

- 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~~ affiliate, provided, however, that those affiliates that share a common name may be identified by the common name as specified in this subsection.

AFFILIATE'S USE OF ELIGIBILITY INFORMATION FOR MARKETING AND RELATED CONCEPTS.

Generally: The Proposed Regulation makes clear that the triggering event for the notice and opt-out requirements is the affiliate's planned use of the eligibility information of the financial institution's consumer to make or send marketing solicitations to the consumer. The FACT Act and the Proposed Regulation do not establish or suggest, nor should the final Affiliate Marketing Regulation establish or suggest, that the notice and opt-out requirements are triggered merely when a financial institution shares eligibility information with its affiliates. However, language in the Proposed Regulation is not always clear on this point. Accordingly, we request the OTS adopt clarifying language in the following areas as shown:

- Proposed Section 571.20(a)(2)(ii): "If Affiliate A communicates eligibility information about a consumer to Affiliate B, and Affiliate B communicates that same information to Affiliate C who plans to make marketing solicitations, Affiliate B does not have to give an opt-out notice to the consumer ~~when it provides eligibility information to Affiliate C~~ prior to Affiliate C's use, 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."[11]

- Proposed Section 571.21(c): "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, marketing based on 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 marketing based on eligibility information, and all methods of delivery."

Financial Institution Providing an Affiliate's Marketing Information: As discussed above, the FACT Act does not prohibit or place restrictions on the sharing of eligibility information among affiliates. The statute by its terms covers only direct marketing communications by an affiliate based on eligibility information it received concerning the consumer. Accordingly, we do not believe the proposed notice and opt-out requirements should apply if a financial institution includes an affiliate's marketing material along with the financial institution's periodic statements or other communications (e.g., web sites, newsletters, etc.). The OTS appears to agree with this concept by its statement in the supplementary information that the notice and opt-out requirements "would not apply if, for example, an insurance company asks its affiliated bank to include insurance company marketing material in periodic statements sent to consumers by the bank without regard to eligibility information."[12] However, the OTS then invited comment on whether the notice and opt-out requirements should apply in "constructive sharing" situations when, for example, the materials are sent by the financial institution only to consumers meeting certain criteria specified by the affiliate (e.g., high balances or other characteristics).

As discussed above, the triggering event for the Affiliate Marketing Regulation requirements, as mandated by the FACT Act, is an *affiliate's* making or sending marketing solicitations on the basis of consumer-specific eligibility information *that the affiliate received.* On the other hand, the financial institution can choose whether or not to include its affiliate's marketing materials to all of its consumers or to some portion of its consumers that reflects criteria requested by the affiliate. The consumer then chooses whether or not to respond to the solicitation. However, in making such marketing solicitations, there has been no receipt and use by the affiliate of consumer-specific eligibility information.[13]

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[11] This language also would more closely align to rules of construction contained immediately below in proposed Section 571.20(a)(2)(iii).

[12] 69 FR at 42507, first column.

[13] While the OTS noted concerns that eligibility information may be revealed when the consumer responds, this ignores the fact that affiliates are free under the FCRA to share such information at any time, and, in any event, the consumer's voluntary response would appear to trigger other exceptions under
(Footnote continued)

To implement a rule otherwise would introduce restrictions on what a financial institution can market to its own consumers, a concept inconsistent with the FACT Act and the intent of Congress.[14] It would also appear to greatly increase the number of companies that would be subject to the notice and opt-out provisions of the Affiliate Marketing Regulation.[15] We are strongly opposed to such an expansion and request that the adopting release clarify that "constructive sharing" is not subject to the notice and opt-out requirements.[16]

ORAL NOTICES AND OPT-OUTS.

The OTS requested comment on whether oral notices and opt-outs should be permitted under the Proposed Regulation. We believe the use of oral notices and opt outs would facilitate the ability of consumers to exercise their rights under the Proposed Regulation. For example, if oral notices and opt-outs are permitted, a consumer who transacts business with a financial institution by phone may be able to exercise her rights under the Proposed Regulation by phone immediately without having to follow-up such conversation with a written or electronic election. Because the Bank does not have branches, the vast majority of our business with consumers is conducted by telephone, and we believe this would provide a convenient option for our consumers. Accordingly, we strongly support permitting the use of oral notices because such notices would both facilitate the consumer's ability to transact business with the financial institution by phone

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Section 214 of the FACT Act (e.g., responding to communications initiated by consumer to receive further information, pre-existing business relationship with the affiliate due to the response, etc.).

[14] Such an expansion would also lead to a curious result in relation to the GLB Regulation: a financial institution could send marketing materials of non-affiliated third parties to segments of its consumers without triggering the notice and opt-out requirements of the GLB Regulation, but could not do the same regarding its own affiliates under the Affiliate Marketing Regulation. See "Frequently Asked Questions for the Privacy Regulations" at Q&A J.3; provided as attachment to OTS CEO Memo No. 155 (Feb. 11, 2002).

[15] We also note that it would be difficult to draw a clear line between what would be covered versus excluded under such an expansion. For example, accounts commonly have a minimum balance requirement. Is a request by an affiliate to include its materials in all of the financial institution's statements being sent to consumers with "gold accounts" (which require a $10,000 minimum balance) a type of "constructive sharing?" It is also common for certain categories of consumers to receive enhanced or different web services or newsletters. Is including the marketing materials of an affiliate in one newsletter, but not all newsletters, a type of "constructive sharing?"

[16] This should be the result regardless of the medium at issue. For example, an advertisement for the products or services of an affiliate that the financial institution chooses to include on its web site alongside the display of the consumer's account information is an advertisement being provided by the financial institution, much in the same manner that it could have been provided by the financial institution via a traditional "statement stuffer."

and reduce the likelihood of such a consumer disregarding an opt-out notice received in the mail after conducting business with the financial institution by phone.[17]

The OTS seeks comment on how an oral notice could satisfy the statutory "clear and conspicuous" standard. In our view, it actually may be easier to comply with a "clear and conspicuous" standard in an oral notice than in a written notice. This is because (1) the information required to be communicated is likely neither lengthy nor complicated (as demonstrated by Model Form A-1 in Appendix A to the Proposed Regulation) and (2) oral notices avoid concerns present with written or electronic notices such as the use of headings, the size and style of type, the use of margins and spacing, the use of boldfaced or italicized type, etc. The use of standardized scripts is one method a financial institution can use to help it achieve a "clear and conspicuous" standard for oral notices. Regardless of how the notice is delivered to the consumer, compliance with the "clear and conspicuous" disclosure requirement would ultimately be a question of fact. To the extent a financial institution determines that it can satisfy the requirements of the Proposed Regulation through oral notices, we strongly support its opportunity to do so.

EXERCISE OF OPT-OUT RIGHTS IN JOINT ACCOUNT RELATIONSHIPS.

Proposed Section 571.24(d)(1)(vii) and the accompanying example in Section 571.24(d)(2)(iii) indicate that if a financial institution does not treat the opt-out election of "A" in a joint account relationship as applying to joint owner "B" as well, continued use of eligibility information for B (who did not opt-out) cannot include information about A and B jointly. The OTS requested comment. We believe that this approach is overly restrictive and can be especially challenging to implement. For example, the need to exclude the joint account information may, from a systems point of view, lead to a total block of both owners based on their social security numbers. So, if B had other individual accounts or other joint accounts with "C" (who did not opt-out either), there may be no way to block data from the joint A&B account without blocking all of B's accounts. Since the sharing of eligibility information with the affiliate is not restricted under the FACT Act, we do not believe that there is a compelling reason to prohibit the affiliate from using eligibility information concerning the joint account to continue to market to B alone. We request that these provisions be changed accordingly.

CONSUMER-INITIATED INQUIRIES.

In some of the examples provided relating to consumer-initiated inquiries, the language appears to cover only those inquiries made directly to the affiliate for information concerning the affiliate's products or services, instead of inquiries made either to the financial institution or the affiliate. In our experience, it is common for the consumer to make the inquiry to the financial

[17] We recommend that appropriate provisions and examples be added to Proposed Sections 571.22(b), .23(a), and .24(b).

institution with the understanding that the request will be passed on to the affiliate. Accordingly, we recommend the following changes:

- Section 571.20(d)(1)(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 you or your affiliate for receipt of that information, ..."

- Section 571.20(d)(2)(i): "If a consumer who has an account with you initiates a telephone call to you or your securities affiliate to request information about brokerage services or mutual funds and provides contact information for receiving that information, ..."

EFFECTIVE DATE AND MANDATORY COMPLIANCE DATE.

The OTS seeks comment what the mandatory compliance date for the Proposed Regulation should be, including whether it should be different from the effective date in order to permit a financial institution to incorporate the notice that would be required by the Affiliate Marketing Regulation into the next required annual GLB Act privacy notice. While T. Rowe Price has not made a final determination as to whether it would use combined vs. separate notices, to the extent we would be subject to providing notice and opt-out rights under the Affiliate Marketing Regulation, we would like the opportunity to be able to send a combined notice. Accordingly, we recommend that the OTS establish a mandatory compliance date of December 31, 2005, and an effective date that is soon after the time the final Regulation is published.[18] This would ensure that all financial institutions that are required by the Affiliate Marketing Regulation to deliver a notice are able to take advantage of the potential benefits of either consolidating or coordinating such notice with the notice required under the GLB Regulation.

We appreciate the opportunity to comment on the OTS's Proposed Regulation. If you have any questions concerning our comment letter, or need additional information, please feel free to contact the undersigned.

Sincerely,

Karen Nash-Goetz.

Karen Nash-Goetz
Vice President and Compliance Officer
410-345-2260

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[18] This timetable assumes that the final Regulation is published in September 2004. A roughly 15-month period would allow sufficient time for institutions to evaluate their practices vis-à-vis the final Regulation and to coordinate any Affiliate Marketing Regulation notice with annual GLB Act notices that are mailed throughout 2005.