September 18, 2007

MEMORANDUM TO: The Board of Directors

FROM: Sandra L. Thompson
Director
Division of Supervision and
Consumer Protection

Sara A. Kelsey
General Counsel

SUBJECT: Interagency Final Rule Regarding Affiliate Marketing Section 214 of the Fair and Accurate Credit Transactions Act of 2003

RECOMMENDATION:

We recommend that the Board of Directors (Board) of the Federal Deposit Insurance Corporation authorize the Executive Secretary to publish in the *Federal Register* a joint final rule with the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Administration (collectively, the Agencies) to implement Section 214 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act).[1] The attached final rule contains regulations, required by section 214, to provide consumers with notice and the opportunity to opt out of certain marketing conducted by affiliated financial institutions.

We also recommend that the Board authorize the Executive Secretary and the General Counsel to make technical, nonsubstantive, or conforming changes to the text of the rule where necessary to ensure that the Agencies can jointly publish the rule, and to take such other actions and issue such other documents as they deem necessary or appropriate to fulfill the Board's objectives.

DISCUSSION:

1. ***Background.***

Section 214, which created Section 624 of the Fair Credit Reporting Act (FCRA), provides a consumer with the ability to limit the circumstances under which an affiliated institution may use certain information received from another affiliate to market to the consumer. Defined as "eligibility information" in the rule, this information includes a person's own transaction and experience information, such as account history, and other information, such as data gathered from consumer reports or applications. An affiliate that receives eligibility information may not use it to market to the consumer until the consumer has been

- provided with a notice that explains that the information may be transferred among affiliates for marketing purposes;
- provided with a reasonable opportunity and a simple method by which to opt out; and
- has not opted out within the time period provided in the notice.

[1] The Securities and Exchange Commission and the Federal Trade Commission also are required to publish rules under section 214 and will do so in separate notices in the Federal Register.

The notice described in section 214 is not required in certain circumstances, such as when an affiliate never uses the information it receives to market to consumers, or when the receiving affiliate has a pre-existing business relationship with consumers.

Pursuant to Section 214, the notice is to be clear, conspicuous, and concise. The method by which a consumer may opt out must be simple. In addition, the opt out must be effective for a period of at least five years. A consumer who elects to opt out is entitled to a subsequent notice and opportunity to extend the opt out for at least an additional five years before any receiving affiliate may use information about the consumer for marketing purposes following the expiration of any opt out period.

The disclosures required by this section may be combined with any other disclosures required by law, including the privacy disclosures required by title V of the Gramm-Leach-Bliley Act (GLBA).

*2. **Proposal.*** On July 15, 2004, the Agencies published a joint notice of proposed rulemaking (NPR) in the Federal Register, at 69 FR 42502.

Section 214 does not specify which institution is required to provide the opt out notice. However, the Agencies stated in the preamble to the proposal that the notice would be meaningful only if it came from an institution with which the consumer has an existing relationship. Consequently, the proposed rule assigned responsibility for providing the notice to the institution that is sharing eligibility information with its affiliates. The proposed rule also prohibited the affiliate that receives information from using it for marketing unless the affected consumers have been given the opportunity to opt out, but have not elected to do so.

As required by Section 214, the proposal provided certain exceptions when an opt out notice is not required. Under these exceptions, an opt out notice is not required where the marketing affiliate: (1) has a pre-existing business relationship with the consumer; (2) already provides benefits to the consumer under an employee benefit plan; (3) responds to a communication initiated by the consumer; or (4) responds to an affirmative authorization or request by the consumer.

The proposed rule provided that a financial institution may use a third party to provide the required notice on its behalf. For example, a group of affiliates could rely on an affiliate engaged solely in marketing activities. In this situation, the marketing affiliate may provide opt out notices for the entire group. Alternatively, the opt out notice could be provided by the affiliate that actually intends to do the marketing. However, if a third party transmits the notice, it must clearly explain that it is doing so on behalf of the entity with which the consumer has a relationship. The notice must either identify that entity by name or be sent on behalf of a group of affiliates that share a common name. Moreover, where a third party is used, that entity may not combine the opt out notice with marketing material from any financial institution other than the affiliate with which the consumer already has a relationship.

The proposal asked for comment about whether notices would be required for "constructive sharing," which is when one affiliate provides another with specific eligibility criteria for a solicitation and then asks that second affiliate to make the solicitation on its behalf to consumers that meet the eligibility criteria.

*3. **Comments Received.*** The FDIC received 29 comments. The commenters included eight financial institutions or financial institution holding companies, eight financial institution trade

associations, eight other business entities, one community group, the National Association of Attorneys General, and three individuals. Although many commenters sent copies of the same letter to more than one Agency, the other Agencies received other comment letters, which were also reviewed by FDIC staff.

Most industry commenters raised questions about which affiliate would be responsible for providing the notice, the scope of certain exceptions to the notice and opt-out requirement, and the reach of certain definitions such as "pre-existing business relationship." Consumer groups and the National Association of Attorneys General generally supported the proposal, although these commenters expressed concern that the Agencies would read certain exceptions to the general rule too expansively. They were particularly interested in how the Agencies would apply the "constructive sharing" concept.

4. Final Rule

When Notice and Opt Out Is Required

The FDIC's final rule will apply to state non-member banks and their subsidiaries. As in the proposal, the final rule sets out three conditions that must be met before an affiliate may use eligibility information for marketing purposes. First, an affected consumer must receive clear, conspicuous, concise, written notice that the affiliate may use shared eligibility information to make solicitations to him/her. Second, the consumer must be provided with a reasonable opportunity and a reasonable and simple method to direct the affiliate not to use his/her eligibility information for this purpose. Third, the consumer must not have exercised his/her opportunity to opt out.

Under the rule, these notice and opt out requirements come into play in the situation when an affiliated entity receives eligibility information from an affiliate; uses the information to identify the type of consumer to receive a solicitation; and, as a result of the use of the information, provides a solicitation to consumers.

An entity may receive eligibility information from its affiliate in various ways, including when the affiliate places that information into an accessible common database.

After considering the comments received about "constructive sharing," the Agencies concluded that no notice was required because no information is shared before the marketing affiliate sends marketing material to its own customers. In contrast, the opt out notice is required when an affiliate accesses a joint database, reviews data about its affiliate's consumers and, based on its review, decides to market to some of these customers regardless of whether the affiliate handles its own marketing or asks its affiliate to send it.

Under the final rule, an opt out must be valid for at least five years. After the opt-out period expires, marketing restrictions apply. Specifically, an entity that has received eligibility information from an affiliate about a consumer who previously opted out may not solicit that consumer until he/she has been given a renewal notice and a reasonable opportunity to opt out, and does not renew the opt-out.

Who Must Provide the Notice

The final rule provides that the opt-out notice must be provided by an affiliate that has or has previously had a pre-existing business relationship with the consumer.[2] This provision is important in the context of identity theft because sensitive information, such as a Social Security number, is likely to be requested to process an opt-out. Consequently, the requirement that an opt-out notice come from a party known to a consumer is consistent with the Agencies' advice against providing such information to persons or entities with whom a consumer is not familiar. However, inter-agency staff continues to work on these issues and contemplate recommending additional options to address the protection of sensitive information and the means of providing consumers with the opportunity to opt-out of information sharing and use.

Exceptions to the Notice and Opt Out Requirement

The final rule sets out the statutory exceptions to the notice and opt out requirements:

- Marketing to a consumer with whom an entity has a pre-existing business relationship;
- Facilitating communications to an individual for whose benefit an entity has provided employee benefit or other services;
- Performing services on behalf of an affiliate, except for marketing on behalf of an affiliate if the affiliate would not be permitted to do so;
- Responding to a communication about products or services initiated by the consumer;
- Responding to an authorization or request by the consumer to receive solicitations; or
- Complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which the entity is lawfully doing business.

Applicability of the Rule to Shared Service Providers

The final rule also provides carefully crafted conditions that permit a service provider to receive eligibility information from an affiliate and market to the affiliate's customers without a notice and opt out. These conditions are designed to ensure that the affiliate with the pre-existing business relationship with the consumer responsibly controls the service provider's receipt and use of the consumer's eligibility information.

Consolidation with Other Notices

Consistent with the direction of Section 214, the final rule permits an affiliate marketing notice to be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law, including the Gramm-Leach-Bliley Act privacy notice.

[2] The notice may be part of a joint notice from two or more members of an affiliated group, as long as at least one of the affiliates has or has previously had a pre-existing business relationship with the consumer.

Effective Date

The final rules will become effective January 1, 2008. Consistent with the statute's directive that the Agencies ensure that notices may be consolidated and coordinated, the mandatory compliance date is delayed to give institutions a reasonable amount of time to include the affiliate marketing opt-out notice with their initial and annual privacy notices. Accordingly, compliance is required not later than October 1, 2008.

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Attachments