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Regulation S–AM: Limitations on Affiliate Marketing; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 248

[Release Nos. 34–60423, IC–28842, IA–2911; File No. S7–29–04]

RIN 3235–AJ24

Regulation S–AM: Limitations on Affiliate Marketing

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting Regulation S–AM to implement Section 624 of the Fair Credit Reporting Act as amended by Section 214 of the Fair and Accurate Credit Transactions Act of 2003, which required 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 a reasonable opportunity and a reasonable and simple method to opt out of such solicitations. The final rules implement the requirements of Section 624 with respect to investment advisers and transfer agents registered with the Commission, as well as brokers, dealers and investment companies.

DATES: *Effective Date:* September 10, 2009.

Compliance Date: Compliance will be mandatory as of January 1, 2010.

FOR FURTHER INFORMATION CONTACT: For information regarding the regulation as it relates to brokers, dealers, or transfer agents, contact Brice Prince, Special Counsel, or Ignacio Sandoval, Attorney, Office of Chief Counsel, Division of Trading and Markets, (202) 551–5550, or regarding the regulation as it relates to investment companies or investment advisers, contact Penelope Saltzman, Assistant Director, Office of Regulatory Policy, Division of Investment Management, (202) 551–6792, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission today is adopting Regulation S–AM, 17 CFR 248.101 through 248.128, under the Fair and Accurate Credit Transactions Act of 2003 (''FACT Act''),[1] the Securities Exchange Act of 1934 (the ''Exchange Act''),[2] the Investment Company Act of 1940 (the ''Investment Company Act''),[3] and the Investment Advisers Act (the ''Advisers Act'').[4]

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I. Background

Section 214 of the FACT Act added Section 624 to the Fair Credit Reporting Act (''FCRA'').[5] This new section of the FCRA gives consumers the right to restrict a person from making marketing solicitations to them using certain information about them obtained from the person's affiliate. Section 214 also required the Office of the Comptroller of the Currency (''OCC''), the Board of Governors of the Federal Reserve System (''Board''), the Federal Deposit Insurance Corporation (''FDIC''), the Office of Thrift Supervision, the National Credit Union Administration (''NCUA'') (collectively, the ''Banking Agencies'') and the Federal Trade Commission (''FTC'') (collectively with the Banking Agencies, the ''Agencies''), and the Commission, in consultation and coordination with one another, to issue rules implementing Section 624 of the FCRA.

Commission staff consulted and coordinated with staff of the Agencies in drafting rules to implement Section 624. As required by Section 214 of the FACT Act, Regulation S–AM is, to the extent possible, consistent with and comparable to the implementing regulations adopted by the Agencies.[6]

[1] Public Law 108–159, Section 214, 117 Stat. 1952, 1980 (2003).

[2] 15 U.S.C. 78q, 78w, and 78mm.

[3] 15 U.S.C. 80a–30 and 80a–37.

[4] 15 U.S.C. 80b–4 and 80b–11.

[5] *See* Public Law 108–159, Section 214, 117 Stat. 1952, 1980 (2003); 15 U.S.C. 1681s–3 and note. 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 amended the FCRA to add a new Section 624, while other provisions of Section 214 were not incorporated into the FCRA. Throughout this release, references to ''Section 214'' or ''Section 624 of the FCRA'' are used depending on whether the reference is to Section 624 or to a portion of Section 214 not incorporated into the FCRA.

[6] *See* Banking Agencies, *Fair Credit Reporting Affiliate Marketing Regulations*, 72 FR 62910 (Nov. 7, 2007) (''Joint Rules''). Citations to particular

Regulation S–AM contains rules of general applicability that are substantially similar to the rules that have been adopted by the Agencies. Regulation S–AM also contains examples that illustrate the application of the general rules. These examples differ from those used by the Agencies in order to provide more meaningful guidance to financial institutions subject to the Commission's jurisdiction.

II. Overview of Comments Received and Explanation of Regulation S–AM

A. Overview of Comments Received

On July 8, 2004, the Commission proposed Regulation S–AM (the ''proposal'' or ''proposed rules'').[7] The Commission received 15 comments on the proposed rules from financial institutions and their representatives.[8] While a number of commenters generally supported the Commission's proposals,[9] others expressed concerns regarding particular provisions of the proposed rules. The most significant areas of concern raised by the commenters related to: (1) Proposed restrictions on ''constructive sharing''; (2) which affiliate would be responsible for providing the notice; (3) the proposed definitions for terms such as ''affiliate,'' ''eligibility information,'' ''clear and conspicuous,'' ''pre-existing business relationship,'' and ''marketing solicitation''; and (4) the scope of certain proposed exceptions to the proposed rules' notice and opt out requirements.[10] A more detailed discussion of the comments is contained in the Section-by-Section analysis below.

B. Explanation of Regulation S–AM

Regulation S–AM will allow a consumer, in certain limited situations, to block affiliates of a person subject to Regulation S–AM that the consumer does business with from soliciting the consumer based on certain ''eligibility information'' (*i.e.*, certain financial information, such as information regarding the consumer's transactions or experiences with the person) received from the person. Unlike Regulation S–P, the Commission's privacy rule,[11] Regulation S–AM does not prohibit the *sharing* of information with another entity. Instead, Regulation S–AM prohibits a company from *using* eligibility information received from an affiliate to make marketing solicitations to consumers, unless: (1) The potential marketing use of the information has been clearly, conspicuously, and concisely disclosed to the consumer; (2) the consumer has been provided a reasonable opportunity and a simple method to opt out of receiving the marketing solicitation; and (3) the consumer has not opted out. Regulation S–AM also provides that a notice and opt out required under Regulation S–AM can be combined with other disclosures required by law, such as the initial and annual privacy notices required by Regulation S–P. Regulation S–AM also contains a number of exceptions to its notice and opt out requirements, such as when an affiliate making a marketing solicitation has a pre-existing business relationship with the consumer, or provides marketing material in response to an affirmative request by the consumer or in response to a communication initiated by the consumer. In addition, the Appendix to Regulation S–AM provides model forms that, when used properly, satisfy Regulation S–AM's requirement that an affiliate marketing notice be clear, conspicuous, and concise. Regulation S–AM also includes examples illustrating the applicability of the final rules to certain situations. The facts and circumstances of each individual situation, however, will determine whether compliance with an example, to the extent applicable, constitutes compliance with the final rules.

As adopted, Regulation S–AM differs from the proposed rules in several significant ways. First, an affiliate communicating eligibility information is not responsible for providing an affiliate marketing notice. Instead, the notice may be provided by any affiliate identified in the notice that has, or has previously had, a pre-existing business relationship with the consumer to whom the notice is provided. Second, the final rules do not apply to ''constructive sharing'' scenarios, as considered in the Proposing Release. Third, the Commission requested and received comment on the use of oral notices, and after careful consideration of the comments, the final rules provide that notices cannot be delivered orally, but instead, must be delivered electronically or in writing. While consumers can elect to opt out orally after receipt of the notice, they may not orally revoke their opt out. Fourth, unlike the proposal which referred to ''making or sending'' marketing solicitations, the final rules eliminate the reference to ''send'' because we concluded, based on comments, that ''sending'' and ''making'' marketing solicitations are different activities. Fifth, the final rules clarify that an opt

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provisions of the ''Joint Rules'' refer to the numbering system used in the Board's final rules. *See* 12 CFR 222.1 to 222.28. *See also* FTC, *Affiliate Marketing Rule*, 72 FR 61424 (Oct. 30, 2007) (''FTC Rule'').

[7] *Limitations on Affiliate Marketing (Regulation S–AM)*, Exchange Act Release No. 49985 (July 8, 2004), 69 FR 42302 (July 14, 2004) (''Proposing Release'').

[8] The Securities Industries Association, n/k/a the Securities Industry and Financial Markets Association (''SIFMA'') submitted two comment letters. We consider these letters to be one comment. *See* Letters from Alan E. Sorcher, Vice President and Associate General Counsel, SIFMA to Jonathan G. Katz, Secretary, Commission (Aug. 13, 2004) (''SIFMA Letter I'') and from Alan E. Sorcher, Vice President and Associate General Counsel, SIFMA to Jonathan G. Katz, Secretary, Commission (Aug. 18, 2004) (''SIFMA Letter II'') (together ''SIFMA Letters''). Unless otherwise noted, all letters referred to below were addressed to the Secretary of the Commission.

See Letter from Michael E. Bleier, General Counsel, Mellon Financial Corporation (July 26, 2004) (''Mellon Letter''); Letter from Ira Friedman, Senior Vice President, Chief Privacy Officer and Special Counsel, Metropolitan Life Insurance Company (Aug. 3, 2004) (''MetLife Letter''); Letter from Larkin Fields, Senior Vice President and Chief Privacy Officer, United Services Automobile Association (Aug. 11, 2004) (''USAA Letter''); Letter from Jeffrey A. Tassey, Executive Director, Coalition to Implement the FACT Act (Aug. 12, 2004) (''Coalition Letter''); Letter from Monique S. Botkin, Counsel, Investment Counsel Association of America, Inc., n/k/a Investment Adviser Association (Aug. 12, 2004) (''IAA Letter''); Letter from Robert G. Rowe, III, Regulatory Counsel, Independent Community Bankers of America (Aug. 12, 2004) (''ICBA Letter''); Letter from Peter L. McCorkell, Senior Counsel, Wells Fargo & Company (Aug. 12, 2004) (''Wells Fargo Letter''); Letter from Roberta B. Meyer, Senior Counsel, Risk Classification, American Council of Life Insurers (''ACLI'') (Aug. 13, 2004) (''ACLI Letter''); Letter from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute (''ICI'') (Aug. 13, 2006) (''ICI Letter''); Letter from Henry H. Hopkins, Chief Legal Counsel, and Karen Nash-Goetz, Associate Legal Counsel, T. Rowe Price Associates, Inc. (Aug. 13, 2004) (''T. Rowe Price Letter''); Letter from J. Stephen Zielezienski, Vice President & Associate General Counsel, American Insurance Association (''AIA'') (Aug. 15, 2004) (''AIA Letter''); Letter from Beth L. Climo, Executive Director, American Bankers Association Securities Association (''ABASA'') (Aug. 16, 2004) (''ABASA Letter''); Letter from Robert C. Drozdowski, Vice President, Payments and Technology Policy, America's Community Bankers (''ACB'') (Aug. 16, 2004) (''ACB Letter''); Letter from Richard M. Whiting, Executive Director and General Counsel, The Financial Services Roundtable (''FSR'') (Aug. 16, 2004) (''FSR Letter''). Each of these letters is available at *http://www.sec.gov/rules/proposed/s72904.shtml*.

[9] *See, e.g.*, IAA Letter; ICI Letter; Mellon Letter; MetLife Letter.

[10] *See infra* Part III.D.

[11] Currently, Regulation S–P is codified at 17 CFR Part 248. With the adoption of Regulation S–AM, we are redesignating Regulation S–P as Subpart A of Part 248, and adopting Regulation S–AM as Subpart B of Part 248. We are also adopting technical and conforming amendments to Regulation S–P to reflect this change as detailed *infra* Part X. In particular, we are changing the current subpart designations within Regulation S–P to undesignated center headings, revising all references in Regulation S–P to ''this part'' to read ''this subpart,'' and for consistency with the term used in Regulation S–AM, revising all references to ''G–L–B Act'' to read ''GLBA.'' We are consolidating Regulation S–P and Regulation S–AM in Part 248 because both regulations address information sharing and safekeeping.

out notice may apply to eligibility information obtained in connection with one or more continuing relationships the consumer establishes with an entity or its affiliates, as long as the notice adequately describes the relationships covered by the notice. Sixth, the final rules include a new section describing the conditions under which a service provider for both an entity that has a pre-existing business relationship with a consumer and the entity's affiliate would be acting for the entity rather than its affiliate whose products or services are being marketed. Finally, the definition of ''affiliate,'' ''control,'' ''marketing solicitation,'' and ''pre-existing business relationship'' have been revised to reflect comments we received.[12]

III. Section-by-Section Analysis

While the Proposing Release placed Regulation S–AM in 17 CFR 247.1–247.28, the final rules are located in 17 CFR 248.101 through 248.128.[13]

A. Section 248.101 Purpose and Scope

We received no comments on proposed § 247.1, which identifies the purposes and scope of the rules, and we are adopting it as proposed, redesignated as § 248.101. Paragraph (a) of § 248.101 of Regulation S–AM provides that the purpose of Regulation S–AM is to implement the affiliate marketing provisions of Section 624 of the FCRA. Paragraph (b) of § 248.101 lists the entities to which the final rules apply. Although the FACT Act does not specifically identify the entities that are to be subject to the rules prescribed by the Commission,[14] Congress's inclusion of the Commission as one of the agencies required to adopt implementing regulations suggests that Congress intended that our rules apply to those entities that the Commission regulates, *i.e.*, 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'').[15] These entities are referred to as ''you'' throughout Regulation S–AM. We have excluded from the scope of the regulation broker-dealers registered by notice with the Commission under Section 15(b)(11) of the Exchange Act for the purpose of conducting business in security futures products (''notice-registered broker-dealers'').[16]

B. Section 248.102 Examples

We are adopting as proposed § 247.2, which clarifies the effect of the examples used in the rules and model forms, redesignated as § 248.102. Given the wide range of possible situations covered by Section 624 of the FCRA, Regulation S–AM includes general rules, provides more specific examples, and includes model opt out notice forms. The examples, which are not exclusive, provide guidance concerning the rules' application in ordinary circumstances. The facts and circumstances of each individual situation, however, will determine whether compliance with an example, to the extent applicable, constitutes compliance with this subpart.[17] Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise under this subpart. Similarly, the examples do not illustrate any issues that may arise under other laws or regulations. We received no comment on this section.

C. Section 248.120 Definitions

As noted, for consistency and ease of reference, Regulation S–AM generally follows the section numbering used in the Joint Rules and the FTC Rule. Therefore, the defined terms proposed under § 247.3 are now located in § 248.120. In addition, the examples corresponding to the definition of ''pre-existing business relationship,'' in proposed § 247.20(d)(1), are now included in the definition of ''pre-existing business relationship,'' which is redesignated as § 248.120(q)(2) in the final rules.[18]

1. Affiliate

We are revising the proposed definition of ''affiliate'' in response to issues raised by commenters. The proposal defined ''affiliate'' of a Covered Person as any person that is related by common ownership or common corporate control with the Covered Person. The proposed rule also provided that a Covered Person is considered an affiliate of another person for purposes of Regulation S–AM 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.[19] The proposed

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[12] These and other changes are discussed in greater detail *infra* Part III.

[13] *See supra* note 11. This numbering system differs slightly from the one used by the Agencies, but is still consistent with the Joint Rules—Regulation S–AM uses section numbers that are higher by 100 than those used in the Joint Rules. For example, references to § 22 of the Joint Rules would correspond to § 122 of Regulation S–AM. In addition, the Commission believes that placing Regulation S–AM in the same part of the CFR as the Commission's privacy rules (*i.e.*, Regulation S–P) will provide persons subject to the rules with an easier point of reference, especially since we expect that these persons would consolidate the notice and opt out requirements of the affiliate marketing rules together with those of the privacy rules.

[14] Section 214(b) of the FACT Act directed that regulations implementing Section 624 of the FCRA 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 [15 U.S.C. 1681s] and the Securities and Exchange Commission * * * .'' *See* 15 U.S.C. 1681s–3 note. Section 621(a)(1) of the FCRA grants enforcement authority to the FTC for all persons subject to the 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(a)(1). The Commission is not one of the agencies included under subsection (b). The Commission was added to the list of Federal agencies required by Section 214(b) to adopt regulations implementing Section 624 of the FCRA in conference committee. There is no legislative history on this issue.

[15] The term ''Covered Persons'' is used for the purposes of this release and is not a defined term in Regulation S–AM. The application of Regulation S–AM to investment companies, brokers, dealers (other than notice-registered broker-dealers), and registered transfer agents and investment advisers is consistent with Regulation S–P. Not all transfer agents, investment companies or investment advisers are required to register with the Commission. Section 17A(c) of the Exchange Act requires that transfer agents register with the appropriate regulatory agency, which can be the Commission, the Board, the OCC or the FDIC. 15 U.S.C. 78c(a)(34) (defining ''appropriate regulatory agency''); 15 U.S.C.78q–1(c) (describing the registration requirements for transfer agents). Section 6(f) of the Investment Company Act (15 U.S.C. 80a–6(f)) provides an exemption from registration for a closed-end investment company that elects to be regulated as a business development company pursuant to Section 54 of the Act (15 U.S.C. 80a–53). Sections 203 and 203A of the Advisers Act govern the registration of investment advisers with the Commission. *See* 15 U.S.C. 80b–3 and 80b–3a.

[16] *See* discussion of definitions of ''broker'' and ''dealer'' *infra* Parts III.C.2 and III.C.9. 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's exclusion of the CFTC from the list of financial regulators required by Section 214(b) of the FACT Act to prescribe regulations implementing Section 624 of the FCRA 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.

[17] The Joint Rules and the FTC Rule provide that, to the extent applicable, compliance with an example constitutes compliance with the Joint Rules and the FTC Rule, respectively. *See, e.g.*, 12 CFR 222.2. The examples in our final rules, however, do not provide the same safe harbor. The examples in Regulation S–AM are intended to describe the broad outlines of situations illustrating compliance with the applicable rule. However, the specific facts and circumstances relating to a particular situation will determine whether compliance with an example constitutes compliance with the rules.

[18] *See supra* note 13.

[19] Proposed § 247.3(a)(1)–(2). This provision was designed to prevent the disparate treatment of

definition followed the definition of ''affiliates'' in Section 2 of the FACT Act, which encompasses ''persons that are related by common ownership or affiliated by corporate control.'' [20]

Commenters noted with approval the proposed definition's general consistency with the definition of ''affiliate'' in the GLBA and Regulation S–P, but some suggested the definitions should be made more consistent.[21] Two commenters suggested that we eliminate the term ''corporate'' in the Regulation S–AM definition.[22] In addition, two commenters suggested that the Commission adopt the approach to the definition of affiliate taken under California's Financial Information Privacy Act (''California Privacy Law'').[23]

After considering the comments, we are revising the definition of ''affiliate'' to eliminate the term ''corporate'' from the definition.[24] The final definition harmonizes the various FCRA and FACT Act formulations, and the GLBA definition, by defining ''affiliate'' to mean ''any person that is related by common ownership or common control with'' another person. While Section 2 of the FACT Act contains the term ''corporate,'' we did not include it in the final rule in recognition of other types of control relationships that may give rise to affiliation under the rule.[25] In contrast to the other regulators, we did not replace the term ''person'' with ''company'' in the definition because certain of our Covered Persons are natural persons. For example, some brokers-dealers and some investment advisers registered with the Commission are sole proprietors. In contrast, banking charters are held by entities other than natural persons. This change to the definition of ''affiliate'' is intended to promote consistency in the Commission's rules and to prevent gaps in the coverage of Regulation S–AM. We do not believe that there is a substantive difference between the definitions of ''affiliate'' in the FACT Act and in Section 509 of the GLBA.[26] We are not, however, incorporating elements of the California Privacy Law into the definition. To do so would be beyond our congressional mandate, especially given that Congress itself could have incorporated those elements when amending the FCRA.

2. Broker

We received no comments on the proposed definition of ''broker'' and are adopting it as proposed.[27] The definition incorporates the definition of ''broker'' in the Exchange Act and excludes notice-registered brokers.[28]

3. Clear and Conspicuous

We are adopting the definition of ''clear and conspicuous'' as proposed to mean reasonably understandable and designed to call attention to the nature and significance of the information presented.[29] Persons may wish to consider a number of methods to make their notices clear and conspicuous, including those described below. Institutions are not required to implement any particular method or combination of methods to make their disclosures clear and conspicuous. Rather, the particular facts and circumstances will determine whether a disclosure is clear and conspicuous. Consistent with the Proposing Release, a notice or disclosure may be made reasonably understandable through various methods that include:

- 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 readily subject to different interpretations.[30]

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.[31]

Persons who choose to provide the notice or disclosure by using an Internet Web site may use text or visual cues to encourage the reader to scroll down the page, if necessary, to view the entire document. Persons may also 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 or disclosure.

If a notice or disclosure required under Regulation S–AM is combined with other information, methods for designing the notice or disclosure to call attention to the nature and significance of the information in it may include distinctive type sizes, styles, fonts, paragraphs, headings, graphic devices, and appropriate groupings of information. However, there is no need to use distinctive features, such as distinctive type sizes, styles, or fonts, to differentiate an affiliate marketing opt out notice from other components of a required disclosure. For example, the notice could be included in a GLBA privacy notice that combines several opt out disclosures in a single notice. Moreover, nothing in the clear and conspicuous standard requires segregation of the affiliate marketing opt out notice when it is combined with a GLBA privacy notice or other required disclosures.

We recognize that it will not be feasible or appropriate to incorporate all of the methods described above with respect to every affiliate marketing notice. We recommend, but do not require, that institutions consider the methods described above in designing their notices. We also encourage the use of consumer or other readability testing to devise notices that are understandable to consumers.

Five commenters addressed the proposed definition of ''clear and

affiliates within a holding company structure that are regulated by different Federal regulators and to make this provision of Regulation S–AM consistent with comparable provisions of the Agencies.

[20] Several FCRA provisions apply to information sharing with persons ''related by common ownership or affiliated by corporate control,'' ''related by common ownership or affiliated by common corporate control,'' or ''affiliated by common ownership or common corporate control.'' *See, e.g.*, FCRA Sections 603(d)(2), 615(b)(2), and 625(b)(2). Each of these provisions was enacted as part of the 1996 amendments to the FCRA. Similarly, Section 2(4) of the FACT Act defines the term ''affiliate'' to mean ''persons that are related by common ownership or affiliated by corporate control.'' In contrast, the Gramm-Leach-Bliley Act (''GLBA'') defines ''affiliate'' to mean ''any company that controls, is controlled by, or is under common control with another company.'' *See* 15 U.S.C. 6809(6).

[21] *See* ACB Letter; FSR Letter; IAA Letter; ICBA Letter; ICI Letter; T. Rowe Price Letter; Wells Fargo Letter.

[22] *See* ICI Letter; T. Rowe Price Letter.

[23] *See* FSR Letter; Mellon Letter. These commenters noted that the California law places no restriction on information sharing among affiliates if they: (1) Are regulated by the same or similar functional regulators; (2) are involved in the same broad line of business, such as banking, insurance, or securities; and (3) share a common brand identity. *See* Cal. Financial Code Section 4053(c).

[24] Section 248.120(a).

[25] As discussed below, ''control'' is defined in Regulation S–AM to include control relationships that go beyond those based on corporate control. *See infra* Part III.C.8.

[26] This approach is also consistent with the Agencies' final rules. *See* Joint Rules at 72 FR 62912; FTC Rule at 72 FR 61426.

[27] *See* § 248.120(b), which was proposed as § 247.3(b).

[28] *See supra* note 16.

[29] *See* § 248.120(c), proposed as § 247.3(c).

[30] *See* Proposing Release at 69 FR 42305.

[31] *Id.*

conspicuous.'' [32] One commenter expressed approval of the proposed definition because of its similarity to the definition of the term found in Regulation S–P.[33] However, other commenters suggested that the definition could give rise to an increased risk of litigation and civil liability for financial institutions.[34] While these commenters recognized that the proposed definition was derived from the GLBA privacy regulations, they noted that compliance with the GLBA privacy regulations is enforced exclusively through administrative actions and not through private litigation. One commenter suggested the definition was unnecessary to ensure that consumers receive a clear and conspicuous notice as required by Section 624 of the FCRA, noting that other affiliate sharing notice and opt out requirements have operated in the FCRA for several years without a regulatory definition.[35] Commenters also pointed to the Board's withdrawal of a similar definition in other regulations as support for not including the definition.[36] In the alternative, one commenter suggested that the Commission and the Agencies issue questions and answers or non-exclusive examples indicating that compliance with one of these examples would satisfy the rule's requirements.[37] Another commenter suggested outlining reasonable expectations for what would be considered ''clear and conspicuous'' and suggested including reasonable protections against liability and administrative penalties when unintentional errors occur.[38]

Because the FACT Act requires that we provide specific guidance on how to comply with the clear and conspicuous standard,[39] we believe that it is important to both define ''clear and conspicuous'' in the final rules and provide specific guidance for how to satisfy that standard.[40] The Commission notes that an affiliate sharing opt out notice required under the FCRA, which may be enforced through private rights of action, must be included in a GLBA privacy notice.[41] Therefore, the affiliate sharing opt out notices generally are provided in a manner consistent with the clear and conspicuous standard set forth in the GLBA privacy regulations.[42] We believe that Covered Persons' experience in providing clear and conspicuous affiliate sharing notices should help them provide clear and conspicuous affiliate marketing notices under Regulation S–AM.

Accordingly, we are adopting the definition of ''clear and conspicuous'' as proposed.[43] We urge Covered Persons to consider the guidance discussed above regarding practices and methods for making notices clear and conspicuous. Moreover, like the Agencies, we are adopting model forms that may, but are not required to, be used to facilitate compliance with the affiliate marketing notice requirements.[44] The requirement that a notice be clear and conspicuous would be satisfied by the appropriate use of one of the model forms. Accordingly, use of the model forms, although optional, should help alleviate risks from litigation related to the requirement that notices be clear and conspicuous, about which some commenters expressed concern.[45]

4. Commission

We received no comment on the definition of ''Commission'' to mean the Securities and Exchange Commission and are adopting it as proposed.[46]

5. Company

We received no comment on the definition of ''company'' and are adopting the term as proposed.[47]

6. Concise

We received no comment on the definition of ''concise'' and are adopting it as proposed.[48] Section 248.120(f)(1) defines the term ''concise'' to mean a reasonably brief expression or statement. Paragraph (f)(2) provides that a notice required by Regulation S–AM may be concise even if it is combined with other disclosures required or authorized by Federal or State law.[49]

7. Consumer

Proposed paragraph (f) of § 247.3 defined ''consumer'' to mean an individual, including an individual acting through a legal representative.[50] Some commenters suggested that the definition of ''consumer'' used in Regulation S–AM should track the definition in Regulation S–P.[51] Some also asked that the Commission include in the definition the examples that accompany the definition of ''consumer'' in Regulation S–P.[52]

The Commission is aware of the narrower definition of ''consumer'' in the privacy regulations enacted under Title V of the GLBA.[53] However, we believe that the use of distinct definitions of ''consumer'' reflects differences in the scope and objectives of the two statutes. Accordingly, we are adopting the definition of ''consumer'' as proposed.[54] For purposes of this definition, an individual acting through

[32] *See* ACB Letter; Coalition Letter; IAA Letter; ICBA Letter; Wells Fargo Letter.

[33] *See* IAA Letter. *See also* 17 CFR 248.3(c)(1) (defining ''clear and conspicuous'' for purposes of Regulation S–P).

[34] *See* ACB Letter; ICBA Letter; Wells Fargo Letter.

[35] *See* Coalition Letter. The FCRA contains ''affiliate *sharing''* notice and opt out provisions that are distinct from the ''affiliate *marketing''* provisions of Regulation S–AM. Section 603(d)(2)(A)(iii) of the FCRA provides that a person may communicate information that is not transaction or experience information among its affiliates without that information becoming a consumer report if the sharing is clearly and conspicuously disclosed to the consumer and the consumer is given an opportunity to opt out of the sharing. In contrast, Regulation S–AM limits the *use* of information by affiliates for marketing purposes, not the *sharing* of information among affiliates.

[36] *See* Coalition Letter; Wells Fargo Letter. These commenters cited the Board's decision to withdraw a similar proposal to define ''clear and conspicuous'' for purposes of Regulations B, E, M, Z, and DD, in part because of concerns over civil liability.

[37] *See* ICBA Letter. One commenter urged us to make clear that a person does not have to use specific terms for opt out and that this should be included as part of the account opening process. *See* SIFMA Letter I.

[38] *See* ACB Letter; *see also* 12 U.S.C. 4301, *et seq.*

[39] *See* 15 U.S.C. 1681s–3(a)(2)(B) (''Notwithstanding subparagraph (A), the notice required under paragraph (1) shall be clear, conspicuous, and concise * * *. The regulations prescribed to implement this section shall provide specific guidance regarding how to comply with such standards.'').

[40] The Commission is providing two types of specific guidance on satisfying the requirement to provide a clear and conspicuous affiliate marketing opt out notice. First, this release and § 248.121(a) describe certain techniques that may be used to make notices clear and conspicuous. Second, the Commission is adopting as part of Regulation S–AM the model forms set forth in the Appendix to Subpart B—Model Forms (''Appendix'') that may, but are not required to, be used to facilitate compliance with the affiliate marketing notice requirements.

[41] *See* 15 U.S.C. 6803(b)(4).

[42] *See, e.g.*, the definition and examples in Regulation S–P at 17 CFR 248.3(c).

[43] *See* § 248.120(c), which was proposed as § 247.3(c).

[44] *See* Appendix to Regulation S–AM.

[45] *See* ACB Letter; ICBA Letter; Wells Fargo Letter.

[46] *See* § 248.120(d), which was proposed as § 247.3(d).

[47] *See* § 248.120(e), which was proposed as § 247.3(e).

[48] *See* § 248.120(f), which was proposed as § 247.21(b)(3). The Appendix provides that the requirement for a concise notice would be satisfied by the appropriate use of one of the model forms contained in the Appendix, although use of the model forms is not required. *See supra* note 40.

[49] Such disclosures include, but are not limited to, a GLBA privacy notice, an affiliate-sharing notice under Section 603(d)(2)(A)(iii) of the FCRA, and other consumer disclosures.

[50] The proposed definition follows the statutory definition of Section 603(c) of the FCRA. *See* 15 U.S.C. 1681a(c).

[51] *See* ACB Letter; IAA Letter; T. Rowe Price Letter.

[52] *See* IAA Letter; T. Rowe Price Letter.

[53] *See* Proposing Release at 69 FR 42305.

[54] *See* § 248.120(g).

a legal representative would qualify as a consumer.

8. Control

We are adopting the definition of ''control'' as proposed.[55] Two commenters supported the proposed definition, indicating it was consistent with the one found in Regulation S–P and the GLBA.[56] For purposes of Covered Persons, ''control'' 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.[57] Ownership of more than 25 percent of a company's voting securities would create a presumption of control of the company.[58] As the Proposing Release explained, this definition would be used to determine when companies are affiliated [59] and would result in financial institutions being considered affiliates regardless of whether the control is exercised by a company or an individual.[60]

9. Dealer

We received no comments on the definition of ''dealer'' and are adopting it as proposed.[61] Section 248.120(i) defines ''dealer'' to have the same meaning as in Section 3(a)(5) of the Exchange Act,[62] regardless of whether the dealer is registered under Section 15(b) of the Exchange Act.[63] The term includes a municipal securities dealer as defined in Section 3(a)(30) of the Exchange Act,[64] other than a bank (as defined in Section 3(a)(6) of the Exchange Act),[65] regardless of whether it is registered under Section 15(b) or 15B(a)(2) of the Exchange Act.[66] In addition, the term includes a government securities dealer as defined in Section 3(a)(44) of the Exchange Act,[67] regardless of whether it is registered under Section 15(b) or 15C(a)(2) of the Exchange Act.[68] The definition specifically excludes notice-registered broker-dealers.[69]

10. Eligibility Information

We are adopting the proposed definition of ''eligibility information'' to mean any information, the communication of which would be a consumer report, if the statutory exclusions from the definition of ''consumer report'' in Section 603(d)(2)(A) of the FCRA, for transaction or experience information and for ''other'' information that is subject to the affiliate-sharing opt out, did not apply.[70] As under the proposal, eligibility information would include a Covered Person's own transaction or experience information, such as information about a consumer's account history with that Covered Person, and ''other'' information under Section 603(d)(2)(A)(iii), such as information from consumer reports or applications.[71]

We have revised the definition of ''eligibility information'' to clarify that the term does not apply to aggregate or blind data that does not contain personal identifiers.[72] Examples of personal identifiers listed in the definition include account numbers, names or addresses, and also could include Social Security numbers, driver's license numbers, telephone numbers, or other types of information that, depending on the circumstances or when used in combination, could identify the individual or individuals to whom the data relates. Other types of personal identifiers could include passwords, screen names, user names, e-mail addresses, or Internet Protocol addresses.

We recognized in the Proposing Release that it might be burdensome for Covered Persons to determine and track whether consumer report information is (1) ''eligibility information'' and thus subject to the notice and opt out provisions of Section 624 or (2) information that might be shared with affiliates under other exceptions to the FCRA (to which the notice and opt out provisions of Section 624 do *not* apply). We invited comment on whether the proposed definition of ''eligibility information'' appropriately reflected the scope of coverage of the FACT Act and provided meaningful guidance to Covered Persons.

Some commenters indicated that the proposed definition did not provide enough meaningful guidance as to what sort of information is covered.[73] Others suggested that the Commission should provide examples to illustrate the common types of information that would and would not constitute eligibility information.[74] One commenter requested examples specifically relevant to the securities industry.[75] Another commenter offered an alternative definition, stating that the proposed definition was unnecessarily complex and difficult to apply.[76] Another commenter noted that, unlike the Agencies, the Commission did not provide in the Proposing Release that the term was designed to ''facilitate discussion, and not change the scope of the information covered by Section 624(a)(1)'' of the FCRA.[77] The commenter expressed concern that the divergence may signal some other

[55] *See* § 248.120(h), which was proposed as § 247.3(g).

[56] *See* IAA Letter; T. Rowe Price Letter.

[57] Section 248.120(h). This definition is consistent with definitions of control found elsewhere under the securities laws. *See, e.g.,* 17 CFR 240.19g2–1(b)(2); 17 CFR 248.3(i); 15 U.S.C. 80a–2(a)(9); 15 U.S.C. 80b–2(a)(12).

[58] 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).

[59] *See supra* Part III.C.1; Proposing Release at 69 FR 42305.

[60] In § 222.3(i) of their Joint Proposal, the Banking Agencies and the NCUA defined ''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* Banking Agencies and NCUA, *Fair Credit Reporting Affiliate Marketing Regulation; Proposed Rules,* 69 FR 42502 (July 15, 2004) (''Joint Proposal''). However, as we emphasized in the Proposing Release, the definition of ''control'' in the proposed rules differed from the Agencies' definition in the Joint Proposal. *See* Proposing Release at 69 FR 42305. The Joint Rules incorporate the definition of ''control'' to mean ''common ownership or common corporate control'' as in the Agencies' final FCRA medical information rules. *See* Joint Rules at 72 FR 62913 (citing 70 FR 70664 (Nov. 22, 2005)).

[61] *See* § 248.120(i), proposed as § 247.3(h).

[62] 15 U.S.C. 78c(a)(5).

[63] 15 U.S.C. 78*o*(b).

[64] 15 U.S.C. 78c(a)(30).

[65] 15 U.S.C. 78c(a)(6).

[66] 15 U.S.C. 78*o*(b), 78*o*–4(a)(2).

[67] 15 U.S.C. 78c(a)(44).

[68] 15 U.S.C. 78*o*(b), 78*o*-5(a)(2).

[69] *See* discussion of the inapplicability of Regulation S–AM to notice-registered broker-dealers *supra* note 16 and accompanying text.

[70] *See* § 248.120(j). *See also* 15 U.S.C. 1681a(d)(2)(A)(iii). Under the FCRA, the term ''consumer report'' is defined to include any communication of information from a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that 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 other purposes authorized elsewhere in the FCRA. 15 U.S.C. 1681a(d)(1).

[71] *See* § 248.120(j).

[72] *Id.*

[73] *See* FSR Letter; SIFMA Letter I.

[74] *See* ICI Letter; T. Rowe Price Letter.

[75] *See* ICI Letter.

[76] *See* ICBA Letter. The commenter proposed to define eligibility information as ''any information that bears 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 market products and services for personal, family or household purposes to that person.''

[77] *See* Coalition Letter.

interpretation, but did not provide an example of a secondary interpretation.

The Commission believes that further clarification of, or exclusions from, the term ''eligibility information'' would implicate the definitions of ''consumer report'' and ''consumer reporting agency'' in Sections 603(d) and (f), respectively, of the FCRA. The Commission does not define the terms ''consumer report'' and ''consumer reporting agency'' in this rulemaking or construe terms therein, such as ''transaction or experience'' information. We note that financial institutions have relied on these statutory definitions for many years. Providing examples of information that would or would not be eligibility information would not necessarily reduce the complexity of the definition, and could create greater uncertainty with regard to information that is not covered by an example. The definition of ''eligibility information'' in Regulation S–AM is the same as the one found in the Joint Rules adopted by the Banking Agencies.[78]

11. FCRA

We received no comment on the term ''FCRA'' and are adopting it as proposed to mean the Fair Credit Reporting Act.[79]

12. GLBA

The proposed rule defined ''GLB Act'' to mean the Gramm-Leach-Bliley Act. We received no comment on this definition but are changing the term to ''GLBA'' to be more consistent with the way the Agencies refer to the Gramm-Leach-Bliley Act.[80]

13. Investment Adviser

We received no comment on the definition of ''investment adviser'' and are adopting it as proposed.[81] This definition incorporates the definition of ''investment adviser'' in the Investment Advisers Act.

14. Investment Company

We received no comment on the definition of ''investment company'' and are adopting it as proposed.[82] This definition incorporates the definition of ''investment company'' in the Investment Company Act.

15. Marketing Solicitation

We are adopting the definition of ''marketing solicitation,'' with modifications discussed below.[83] The proposed rule defined ''marketing solicitation'' to mean marketing initiated by a Covered Person to a particular consumer that is based on eligibility information communicated to that Covered Person by its affiliate, and that is intended to encourage the consumer to purchase or obtain a product or service. The definition included 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. It did 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. We noted in the Proposing Release that the definition tracked the definition in Section 624 of the FCRA but did not follow the statute exactly to prevent confusion with the term ''solicitation'' in the context of the Federal securities laws.[84] Although Section 624 also authorizes the Commission to exclude other communications from the definition of ''marketing solicitation,'' we did not propose to do so, but rather, sought comment on whether any other communications should be excluded from the statutory definition of ''solicitation.'' [85] We also requested comment on whether, and to what extent, various tools used in Internet-based marketing, such as pop-up ads, could constitute marketing solicitations as opposed to communications directed at the general public.

Seven commenters addressed the definition of ''marketing solicitation.'' [86] Some expressed concern that the proposed definition was not the same as the definition in Section 214 of the FCRA [87] and suggested including the phrase ''of a product or service'' in the introductory language to be consistent.[88] Other commenters favored the exclusion from the definition of marketing solicitation, solicitations made to the general public.[89] However, one commenter believed that the phrase ''distributed without the use of eligibility information communicated by an affiliate'' inadvertently misstated the types of general marketing that would not be marketing solicitations.[90] Another commenter asked the Commission to clarify that any communications directed at the general public are not marketing solicitations regardless of whether they were developed using specific eligibility information.[91]

Several commenters also addressed Internet-based marketing and generally opposed including it in this rulemaking.[92] Some expressed the view that discussion of a particular delivery mechanism would be counterproductive and contrary to congressional intent, noting that the Internet was not specifically addressed in this legislation.[93] Another suggested that Internet issues should be addressed in a separate process to ensure that notice and opportunity to be heard are given to the parties affected.[94]

The commenter also opined that pop-up ads that appear automatically without the use of eligibility information or information from other affiliates are communications directed at the general public, and that a consumer visiting an Internet Web site is effectively making an inquiry which is tantamount to an affirmative request for information. In addition, the commenter asked for clarification that pre-recorded messages played while consumers are on hold when calling a call center should be construed as general marketing solicitations. Another commenter asked for a similar clarification for advertisements that appear on password-protected Web sites.[95]

The revised definition tracks the statutory language more closely by encompassing the marketing ''of a product or service.'' [96] To ensure consistency with the definition of ''pre-existing business relationship,'' the definition applies to marketing intended to encourage the consumer to purchase

[78] In adopting their final rules, the Banking Agencies stated that they anticipate addressing the definitions of ''consumer report'' and ''consumer reporting agency'' in a separate rulemaking after the required FACT Act rules have been completed. *See* Joint Rules at 72 FR 62915.

[79] *See* § 248.120(k), which was proposed as § 247.3(j).

[80] *See* § 248.120(*l*), proposed as § 247.3(k).

[81] *See* § 248.120(m), proposed as § 247.3(*l*).

[82] *See* § 248.120(n), proposed as § 247.3(m).

[83] *See* § 248.120(*o*), proposed as § 247.3(n).

[84] *See* Proposing Release at 69 FR 42306. In particular, Regulation S–AM uses the term ''marketing solicitation'' rather than ''solicitation.'' Although ''solicitation'' is a defined term in Section 624 of the FACT Act, the operative phrase in Section 624(a) is ''solicitation for marketing purposes.'' *See* 15 U.S.C. 1681s–3(a).

[85] 15 U.S.C. 1681s–3(d)(2).

[86] *See* Coalition Letter; FSR Letter; ICBA Letter; ICI Letter; MetLife Letter; SIFMA Letter I; Wells Fargo Letter.

[87] *See* FSR Letter; SIFMA Letter I.

[88] *Id.* One commenter indicated that the lack of this phrase raised the possibility that the definition could be misinterpreted. *See* FSR Letter.

[89] *See* Coalition Letter; ICBA Letter; Wells Fargo Letter.

[90] *See* Coalition Letter.

[91] *See* Wells Fargo Letter.

[92] *See* Coalition Letter; FSR Letter; MetLife Letter.

[93] *See* Coalition Letter; MetLife Letter.

[94] *See* MetLife Letter.

[95] *See* ICI Letter.

[96] For purposes of this release and the final rule, we interpret and use the term ''products and services'' to include shareholder investments in investment companies.

''or obtain'' a product or service. In this way, the definition includes marketing for the rental or lease of goods or services, financial transactions, and financial contracts. The Commission is not adopting the reference to communications ''distributed without the use of eligibility information communicated by an affiliate'' in the exclusion for marketing directed at the general public because we do not believe it is necessary. Marketing that is undertaken without the use of eligibility information received from an affiliate is not covered by the affiliate marketing rules. Moreover, there is no restriction on using eligibility information received from an affiliate in marketing directed at the general public, such as radio, television, general circulation magazine, billboard advertisements, or publicly available Web sites that are not directed to particular consumers.[97]

The definition of ''marketing solicitation'' does not distinguish among different delivery methods or media. A determination of whether a marketing communication in any medium constitutes a marketing solicitation depends upon the facts and circumstances. The Commission declines to exclude categorically from the definition of ''marketing solicitation,'' pre-recorded messages played while a consumer is on hold with a call center, or advertisements that appear solely on password-protected Web sites. Marketing delivered by such media may constitute a marketing solicitation if it is targeted to a particular consumer based on eligibility information received from an affiliate. For example, a pre-recorded message played while a consumer is on hold with a call center would be a marketing solicitation if it is targeted to a particular consumer based on eligibility information received from an affiliate, but would not be a marketing solicitation if it is played for all consumers who are on hold with the call center.

We note that the Agencies declined to exclude educational seminars, customer appreciation events, focus group invitations, and similar forms of communication from the definition of ''solicitation'' in their final rules.[98] While we received no comments on these types of activities, like the Agencies, we believe that such activities must be evaluated according to the facts and circumstances, and that some of these activities may be coupled with, or a prelude to, a marketing solicitation. For example, an invitation to a financial educational seminar when the invitees are selected based on eligibility information received from an affiliate may be a marketing solicitation if the seminar is used to solicit the consumer to purchase or obtain investment products or services.

16. Person

We received no comment on the definition of ''person,'' and we are adopting it as proposed.[99] The proposed rule defined ''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 Regulation S–AM, actions taken by an agent on behalf of a person that are within the scope of the agency relationship will be treated as actions of that person.

17. Pre-Existing Business Relationship

a. Definition

We are adopting the definition of ''pre-existing business relationship'' substantially as proposed,[100] with the modifications discussed below. The proposed rule contained a three-part definition of ''pre-existing business relationship.'' Under the first part, a ''pre-existing business relationship'' would exist when there is a financial contract in force between a Covered Person and a consumer.[101] Under the second part, a ''pre-existing business relationship'' would exist when a consumer purchased, rented, or leased a Covered Person's goods or services, or entered into a financial transaction (including holding an active account or a policy in force or having another continuing relationship) with a Covered Person during the 18-month period immediately preceding the date on which a marketing solicitation is made.[102] Under the third part, a ''pre-existing business relationship'' would exist when, in certain circumstances, a consumer inquired about, or applied for, a product or service offered by a Covered Person during the three-month period immediately preceding the date on which a marketing solicitation is made to the consumer.[103] In the Proposing Release, we noted that the proposed definition tracked the definition in Section 624 of the FCRA but did not follow the statute exactly.[104] We also noted that while Section 624 authorizes the Commission to recognize any other circumstances that would constitute a pre-existing business relationship, we did not propose to exercise this authority.[105]

Ten commenters addressed the definition of ''pre-existing business relationship.'' [106] Several commenters noted that the statutory reference to ''a person's licensed agent'' was not in the rule.[107] One commenter expressed the view that Congress intended the phrase to be included in any implementing rule because it is in the statute.[108] Two commenters noted the importance of licensed agents in the insurance industry, and stated that independent, licensed agents frequently act as the main point of contact between a consumer and an insurance company.[109] In light of these comments and to more closely track the statute, we have added the phrase ''or a person's licensed agent'' in the final definition of ''pre-existing business relationship.'' For example, a person who is both a licensed agent for an insurance company and a registered representative for a broker-dealer may sell to a consumer a variable annuity issued by the insurance company. The licensed agent may use eligibility information that it obtains in connection with selling the variable annuity to the consumer to market the insurance company's life insurance policies to the consumer for the duration of the pre-existing business relationship without offering an opt out opportunity.

Some commenters questioned the requirement in the first part of the definition that a financial contract be in force ''on the date on which the consumer is sent a marketing

[97] *See supra* text accompanying note 90. Similarly, visiting a publicly available Web site should not, by itself, constitute an ''inquiry'' for purposes of the pre-existing business relationship exception.

[98] *See* Joint Rules at 72 FR 62919; FTC Rule at 72 FR 61432.

[99] *See* § 248.120(p), proposed as § 247.3(*o*).

[100] *See* § 248.120(q)(1), proposed as § 247.3(p).

[101] *See* Proposed § 247.3(p)(1).

[102] *See* Proposed § 247.3(p)(2).

[103] *See* Proposed § 247.3(p)(3).

[104] *See* Proposing Release at 42306 (citing 15 U.S.C. 1681s–3(d)(1)).

[105] *Id.* (citing 15 U.S.C. 1681s–3(d)(1)(D)).

[106] *See* ABASA Letter; ACB Letter; ACLI Letter; AIA Letter; Coalition Letter; FSR Letter; ICBA Letter; MetLife Letter; Wells Fargo Letter; SIFMA Letter I.

[107] *See* ACB Letter; ACLI Letter; Coalition Letter; FSR Letter; ICBA Letter; MetLife Letter; SIFMA Letter I.

[108] *See* Coalition Letter.

[109] *See* ACLI Letter; MetLife Letter. The ACLI Letter also noted that this type of role played by licensed agents would have implications for not only life insurers who issue variable life insurance and variable annuity contracts but also the broker-dealers who sell these products.

solicitation.'' [110] In their view, delays between the time when information is processed and prepared for a marketing solicitation and the time a marketing solicitation is made or sent would create an undue burden of having to synchronize the sending of the marketing solicitation with a contract that is in force. They recommended that a contract should only have to be in force when the information is prepared for a marketing solicitation and not when the marketing solicitation is made. We do not agree with these comments and are adopting the second part of the definition as proposed. This approach is consistent with the approach used in the other two parts of the statutory definition.[111] We also note that the second part of the definition alleviates these synchronization problems since a pre-existing business relationship would continue to exist for another 18 months after a financial contract ceases to be in force.

Some commenters addressed various parts of the second part of the definition.[112] One commenter suggested that ''any account with outstanding contractual responsibilities on either side of an account relationship should be considered an active account, regardless of whether the individual transactions occur or do not occur under the account.'' [113] We decline to interpret an ''active account'' in this way. Section 603(r) of the FCRA defines an ''account'' to have the same meaning as in Section 903 of the Electronic Fund Transfer Act (''EFTA'').[114] Section 903 of the EFTA defines the term ''account'' to mean a demand deposit, savings deposit, or other asset account established primarily for personal, family, or household purposes.[115] In addition, our view regarding the term ''account'' is analogous to the views expressed by the Agencies.

One commenter stated that when consumers pay in advance for future services, the 18-month exemption under the second part of the definition should not begin until after the last payment or shipment of the product.[116] Another commenter suggested that the 18-month period should begin at the time that all contractual responsibilities expire.[117] The Commission declines to adopt these suggestions because they could lead to consumers receiving marketing solicitations long after closing or transferring an account. For purposes of the final rule, a pre-existing business relationship terminates when an investor redeems or sells investment company shares or closes or transfers an account, and not when the investor receives the last statement relating to the account or when an obligation assumed by a Covered Person in an account opening document expires. The final rule includes examples to help clarify the scope of this part of the definition of a pre-existing business relationship.[118]

Two commenters discussed the third part of the definition of ''pre-existing business relationship''—an inquiry or application by the consumer regarding a product or service offered by the person during the preceding three months.[119] These commenters generally stated that the exception should not depend on consumers providing contact information or on a consumer's expectations. One commenter indicated that an e-mail inquiry, a return address on an envelope, or the captured phone number of a consumer requesting information about products or services should qualify as a ''pre-existing business relationship.'' [120]

Certain elements of the definition of ''pre-existing business relationship'' are substantially similar to the definition of ''established business relationship'' under the FTC's Telemarketing Sales Rule (''TSR'').[121] The TSR definition was informed by Congress's intent that the ''established business relationship'' exemption to the ''do not call'' provisions of the Telephone Consumer Protection Act [122] should be grounded on the reasonable expectations of the consumer.[123] Congress's incorporation of similar language in the definition of ''pre-existing business relationship'' [124] suggests that it is appropriate to consider the reasonable expectations of the consumer in determining the scope of this exception. For purposes of Regulation S–AM, an inquiry would include any affirmative request by a consumer for information after which the consumer would reasonably expect to receive information from the affiliate about its products or services.[125] A consumer would not reasonably expect to receive information from an affiliate if the consumer did not request information from or provide contact information to the affiliate. For this reason, the Commission does not believe that an automatically captured telephone number of a consumer is sufficient to create an inquiry, particularly when the financial institution could easily ask the consumer for contact information during the telephone call that captured the consumer's telephone number. Similarly, we do not believe that information such as an Internet Protocol address or data contained in an Internet ''cookie'' that is automatically collected about a consumer visiting a Covered Person's Web site is, by itself, sufficient to create an inquiry. We understand that industry practice in the case of telephone calls is to ask the consumer to provide or confirm his or her contact information.[126] To provide additional guidance to industry, we have provided additional examples in the definition that deal with consumer calls and e-mails.[127] These examples, along with other examples, are discussed below. One commenter urged the Commission to clarify that all three parts of the definition of ''pre-existing business relationship'' include a transaction-based relationship between a consumer and a securities affiliate regardless of the issuer of the security purchased by the consumer.[128] This commenter

[110] *See* ACLI Letter; SIFMA Letter I; Wells Fargo Letter.

[111] *See* 15 U.S.C. 1681s(d)(1)(A)–(C). As noted earlier, the definition of ''pre-existing business relationship'' in Regulation S–AM tracks the statutory definition. Although the statutory definition does not contain the term ''sent'' for the provision dealing with a contract that is in force (15 U.S.C.1681s(d)(1)(A)), the other two parts of the statutory definition do contain the term ''sent'' (15 U.S.C. 1681s(d)(1)(B)–(C)). Accordingly, we believe that the statutory definition is best implemented by including this concept in all three parts of the definition in Regulation S–AM.

[112] *See* Coalition Letter; Wells Fargo Letter.

[113] *See* Wells Fargo Letter.

[114] *See* 15 U.S.C. 1681a(r)(4).

[115] *See* 15 U.S.C. 1693(a)(2).

[116] *See* Coalition Letter.

[117] *See* Wells Fargo Letter.

[118] *See* §§ 248.120(q)(2) and 248.120(q)(3).

[119] *See* Coalition Letter; Wells Fargo Letter.

[120] *See* Wells Fargo Letter.

[121] *See* 16 CFR 310.2(n).

[122] 47 U.S.C. 227, *et seq.*

[123] H.R. Rep. No. 102–317, at 14–15 (1991). *See also* FTC, Telemarketing Sales Rule, 68 FR 4580, 4591–94 (Jan. 29, 2003) (''TSR Adopting Release'').

[124] 149 Cong. Rec. S13,980 (daily ed. Nov. 5, 2003) (statement of Senator Feinstein) (noting that the ''pre-existing business relationship'' definition ''is the same definition developed by the Federal Trade Commission in creating a national 'Do Not Call' registry for telemarketers.'').

[125] *See* TSR Adopting Release at 68 FR 4594.

[126] Similarly, the Commission does not believe that a return address on an envelope is sufficient to constitute an affirmative request by a consumer for information about a person's products or services. A consumer would not have a reasonable expectation of being contacted about products and services simply by providing a return address on an envelope. In our view, a consumer provides a return address on an envelope to ensure that if a piece of mail is undeliverable, it is returned to the consumer and not because they are seeking to establish a business relationship. Accordingly, we consider a return address on an envelope analogous to an automatically captured telephone number.

[127] *See* §§ 248.120(q)(2)(v)–(vii) and (q)(3).

[128] *See* ABASA Letter (stating that the proposed rule supports the conclusion that a pre-existing business relationship exists between a securities affiliate and a consumer when the consumer purchases a proprietary securities product like a bank's own mutual fund and expressing concern that the purchase of non-proprietary securities products from the securities affiliate could be

asserted that a consumer whose securities and investment transactions are managed through a bank-owned securities affiliate would not be surprised, and may later expect, to receive marketing solicitations for other securities products based on eligibility information the securities affiliate has received from the affiliated bank. Another commenter urged the Commission to expand the definition to include relationships arising out of the ownership of servicing rights, a participation interest in lending or other similar relationships.[129] Another commenter suggested that the definition should apply to manufacturers that make sales through dealers, such as an automobile manufacturer that sells vehicles not directly to consumers, but through franchised dealers.[130] The commenter urged the Commission to consider the relationship between a manufacturer and a consumer as a pre-existing business relationship based on the purchase, rental, or lease of the manufacturer's goods.

Like the Agencies, the Commission believes it is not necessary to add any additional bases for a pre-existing business relationship. Paragraph (q)(2)(i) of § 248.120 provides an example of a brokerage firm with a pre-existing business relationship using eligibility information from an affiliate to make marketing solicitations about products or services. This example should provide Covered Persons with sufficient guidance regarding a securities affiliate's use of eligibility information.

b. Examples

Paragraph (d)(1) of proposed § 247.20 provided four examples to illustrate the pre-existing business relationship exception. Proposed paragraphs (d)(1)(i) through (iii) contained examples illustrating each of the three parts of the definition.[131] Proposed paragraph (d)(1)(iv) provided an example of a consumer calling a centralized call center for a group of affiliated companies to inquire about the consumer's existing securities account with a broker-dealer, and indicated that such a call would not establish a pre-existing business relationship between the consumer and the broker-dealer's affiliates. We requested comment on these examples.

One commenter generally expressed approval of the examples we provided, other than the example in proposed § 247.20(d)(1)(iii).[132] Another commenter requested that the Commission provide further examples dealing with consumer calls to call centers to clarify what would and would not be considered subject to Regulation S–AM's opt out notice requirement.[133]

We are adopting seven examples of a pre-existing business relationship set out in § 248.120(q)(2).[134] In § 248.120(q)(3) we have provided three examples of the absence of a pre-existing relationship.[135]

18. Transfer Agent

We received no comment on the definition of ''transfer agent'' and are adopting it as proposed.[136] The rule defines ''transfer agent'' to have the same meaning as in Section 3(a)(25) of the Exchange Act.[137]

19. You

We received no comment on the definition of ''you'' and are adopting it substantially as proposed.[138] The one difference is that the final definition does not include notice-registered broker-dealers.[139]

D. Section 248.121 Affiliate Marketing Opt Out and Exceptions

Proposed § 247.20 set forth the requirement that a consumer be provided with notice and a reasonable opportunity to opt out before a receiving affiliate uses eligibility information to make marketing solicitations to the consumer. Proposed paragraphs (a) and (b) bifurcated duties between the ''communicating affiliate'' and ''receiving affiliate'' to resolve what we perceived as an ambiguity in the FCRA with regard to which affiliate was to provide the opt out notice to the consumer.[140] Proposed paragraph (c)

considered to be outside of the first two provisions of the definition of a pre-existing business relationship).

[129] *See* Wells Fargo Letter.

[130] *See* FSR Letter. The commenter further indicated that vehicle financing may be arranged through a manufacturer's captive finance company or independent sources of financing, and noted that manufacturers often provide consumers with information about warranty coverage, recall notices, and other product information. This commenter stated that manufacturers also send solicitations to consumers about their products and services, drawing in part on transaction or experience information from the captive finance company.

[131] *See* Proposed §§ 247.20(d)(1)(i) (illustrating the first part), (d)(1)(ii) (illustrating the second part) and (d)(1)(iii) (illustrating the third part).

[132] The example in proposed § 247.20(d)(1)(iii) illustrated that a pre-existing business relationship would exist with a Covered Person's affiliate when a consumer made an inquiry about, or applied for, a product or service offered by the affiliate during the three-month period immediately preceding the date on which a marketing solicitation is made to the consumer based on eligibility information received from the Covered Person. The Coalition Letter stated that a consumer should not be required to provide contact information as part of an inquiry in order to establish a pre-existing business relationship. As stated above, however, we do not believe that a consumer would reasonably expect to have established a pre-existing business relationship in the absence of providing contact information. *See also supra* text accompanying notes 125 and 126.

[133] *See* MetLife Letter.

[134] Section 248.120(q)(2)(i) provides an example of a pre-existing business relationship based on a consumer's open account with a brokerage firm. Section 248.120(q)(2)(ii) provides a similar example of a pre-existing business relationship with a registered investment adviser. Section 248.120(q)(2)(iii) provides an example in which a pre-existing business relationship is established for 18 months after the date a consumer who was the record owner of investment company securities redeems all of those securities. Section 248.120(q)(2)(iv) provides an example in which a consumer applies for a product or service, but does not obtain the product or service for which she applied, and a pre-existing business relationship is established for three months after the date of the application. Contact information is not mentioned in this example because the consumer presumably would have supplied it on the application. Section 248.120(q)(2)(v) provides an example in which a consumer makes a telephone inquiry about a product or service offered by a brokerage firm and provides contact information to the institution, but does not obtain a product or service from or enter into a financial transaction with the institution. As noted earlier, we do not believe that, by itself, an institution's capture of a consumer's telephone number during a telephone conversation with the consumer about the institution's products or services is sufficient to create an inquiry. In these circumstances, to ensure that an inquiry has been made, the institution should ask the consumer to provide his or her contact information. Section 248.120(q)(2)(vi) provides an example in which pre-existing business relationships are established for three months after the date a consumer makes an e-mail inquiry to a broker-dealer about one of its affiliated investment company's products or services without providing any contact information other than the consumer's e-mail address. Unlike telephone communications, e-mail communications do not provide institutions with an opportunity to ask for additional contact information at the time of a consumer's initial request for information. Section 248.120(q)(2)(vii) provides an example in which a pre-existing business relationship between a consumer and a broker-dealer is established for three months by a consumer's telephone call to a centralized call center for the broker-dealer and an affiliated investment company with which the consumer has an existing relationship, and the consumer provides contact information to the call center and inquires about products and services offered by the broker-dealer, but does not obtain any products or services.

[135] Section 248.120(q)(3)(i) is similar to § 248.120(q)(2)(vii) except that the consumer does not inquire about an affiliate's products or services but about an existing account with the broker-dealer. In this situation, a pre-existing business relationship with an affiliate of the broker-dealer is not established. Section 248.120(q)(3)(ii) is substantively similar to the example in proposed § 247.20(d)(2)(iii), whereby a pre-existing business relationship is not created by simply requesting information about retail hours and locations. Section 248.120(q)(3)(iii) illustrates that a call in response to an advertisement for a free promotional item is not an inquiry about a product or service that would establish a pre-existing business relationship.

[136] *See* § 248.120(r), proposed as § 247.3(q).

[137] 15 U.S.C. 78c(a)(25).

[138] *See* § 248.120(s), proposed as § 247.3(r).

[139] *See supra* note 16.

[140] In the proposed rules, we differentiated between affiliates by referring to an affiliate that communicated eligibility information to an affiliate

Continued

contained exceptions to the requirements of Regulation S–AM and incorporated each of the statutory exceptions to the affiliate marketing notice and opt out requirements that are set forth in Section 624(a)(4) of the FCRA, and paragraph (d) illustrated those exceptions with examples. Proposed paragraph (e) provided that Regulation S–AM would not be applicable to marketing solicitations that were based on information received by an affiliate prior to the proposed mandatory compliance date.[141] Proposed paragraph (f) clarified the relationship between sharing information and becoming a credit reporting agency. The final rules modify many of these proposed provisions as discussed below.

1. Section 248.121(a)

Under proposed § 247.20(a)(1), before a receiving affiliate could use eligibility information to make or send marketing solicitations to a consumer, the communicating affiliate would have had to provide a notice to the consumer stating that the information may be communicated to and used by the receiving affiliate for marketing purposes. The consumer also would have had to have a reasonable opportunity to opt out through some simple method before the receiving affiliate could make a marketing solicitation. The notice and opt out requirements would have applied only if a receiving affiliate would use eligibility information for marketing purposes.[142] Proposed paragraph (a)(2) included two ''rules of construction'' to give further guidance regarding how affiliate marketing notices might be provided to consumers.[143]

Proposed § 247.20(b) set forth the general duties of a receiving affiliate. In particular, a receiving affiliate could not have used the eligibility information it received from its affiliate to make marketing solicitations to a consumer unless, prior to such use the consumer had: (1) Been provided an opt out notice (as described in proposed paragraph (a) of § 247.20) that applied 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. The Commission solicited comment on these provisions. In addition, the Commission also solicited comment on whether there were situations where oral notices and opt outs should be allowed and, if so, how the statute's clear and conspicuous standard could be satisfied.[144]

Five commenters addressed the duties of the communicating affiliate and the receiving affiliate.[145] Some commenters supported having the communicating affiliate provide the notice and opt out, indicating that consumers may be more likely to expect a notice from the communicating affiliate and could unknowingly miss the opportunity to opt out if they do not have a pre-existing relationship with the company that is sending the notice and opt out.[146] Other commenters disagreed with the provision in the proposal that would have required the communicating affiliate provide the notice and opt out.[147] One commenter viewed the statute's lack of direction regarding which entity must provide the notice and opt out as evidence of Congressional intent to permit companies to structure the notice and opt out in a manner that meets their unique needs and situations.[148] Another commenter stated that the FCRA contemplates that the receiving affiliate would provide the notice, and that to require the communicating affiliate to provide it would create a basis for civil liability if a communicating affiliate does not provide notice and an opportunity to opt out before a receiving affiliate uses eligibility information to make a marketing solicitation.[149]

Six commenters addressed oral notices and supported permitting their use.[150] One commenter indicated that the use of oral notices would be an easier method by which consumers could exercise their rights under the proposed rules.[151] This commenter indicated that this was especially so for consumers who primarily conduct business over the telephone, suggesting that when information is provided over the phone, a consumer is less likely to disregard a privacy notice.[152] Another commenter generally noted the changing technological landscape and stated that limiting delivery of the notice to written form could create a barrier to improved customer service.[153] Another commenter asserted that the FTC, in its TSR, has permitted clear and conspicuous oral notices without any enforcement difficulties.[154] One commenter also stated that the clear and conspicuous standard could be more easily met with oral notices through the use of scripts or lists of frequently asked questions.[155]

After considering these comments regarding proposed paragraphs (a) and (b), the Commission is adopting these paragraphs, redesignated as § 248.121(a), with modifications. Section 248.121(a)(1) sets forth the general rule and contains the three conditions that must be met before a Covered Person may use eligibility information about a consumer that it

as the ''communicating affiliate'' and to the affiliate receiving the eligibility information as the ''receiving affiliate.''

[141] This section, redesignated as § 248.128(c), is discussed below. *See infra* Part III.K.2.

[142] Proposed paragraph (a)(1) would not have applied if no eligibility information was communicated to affiliates, or if no receiving affiliate would use eligibility information to make marketing solicitations. In the proposal, we provided an example in which paragraph (a) was inapplicable. In the example, a financing company affiliated with a broker-dealer asked the broker-dealer to include financing-company marketing materials in periodic statements sent to consumers by the broker-dealer without regard to eligibility information.

[143] The first rule of construction would have permitted the notice to be provided either in the name of a person with which the consumer currently did or previously had done business, or by using one or more common corporate names shared by members of an affiliated group of companies that included the common corporate name used by that person. This rule of construction also would have provided three alternatives regarding the manner in which the notice could have been given. First, a communicating affiliate could have provided the notice to the consumer directly. Second, a communicating affiliate could have used an agent to provide the notice, so long as the agent provided the notice in the name of the communicating affiliate or by using a common corporate name. When using an agent however, the communicating affiliate would have remained responsible for any failure of the agent to fulfill the affiliate's notice obligations. Third, a communicating affiliate could have provided a joint notice with one or more of its affiliates. Of course, if the agent was an affiliate of the person that provides the notice, that affiliate could not have included any marketing solicitations of its own on or with the notice, unless one of the exceptions in paragraph (c) of proposed § 247.20 applied. Even if the agent sending the notice were not an affiliate, the agent would have been permitted to use the information only for limited purposes under Regulation S–P. *See* 17 CFR 248.11. The second rule of construction would have discussed how to avoid issuing duplicate notices when Affiliate A communicated information to Affiliate B, who in turn communicated information to Affiliate C.

[144] The proposal also contemplated that the opt out notice would be provided to the consumer in writing or, if the consumer agreed, electronically. *See* Proposing Release at 69 FR 42308.

[145] *See* ACLI Letter; ICBA Letter; ICI Letter; T. Rowe Price Letter; Wells Fargo Letter.

[146] *See* ICI Letter; T. Rowe Price Letter.

[147] *See* ACLI Letter; ICBA Letter; Wells Fargo Letter.

[148] *See* ACLI Letter. One commenter also suggested allowing companies to decide the best method of providing the notice. *See* ICBA Letter.

[149] *See* Wells Fargo Letter.

[150] *See* Coalition Letter; IAA Letter; ICBA Letter; ICI Letter; T. Rowe Price Letter; Wells Fargo Letter.

[151] *See* ICI Letter.

[152] *See* ICI Letter. One commenter suggested that the regulation permit the notice to be given by an affiliate while the consumer is being called with a marketing solicitation. *See* Wells Fargo Letter. Another commenter suggested that delivery of the notice would be better effectuated if the affiliate representative and consumer engaged in a dialogue. *See* IAA Letter.

[153] *See* ICBA Letter.

[154] *See* Coalition Letter.

[155] *See* IAA Letter.

receives from an affiliate to make a marketing solicitation to the consumer. First, it must be clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that the Covered Person may use shared eligibility information to make marketing solicitations to the consumer. Second, the consumer must be provided a reasonable opportunity and a reasonable and simple method to opt out of the use of that eligibility information to make marketing solicitations to the consumer. Third, the consumer must not have opted out. Section 248.121(a)(2) provides an example of the general rule.

The Commission has eliminated as unnecessary the rules of construction in proposed paragraph (a)(2) as well as the provisions in the proposal relating to notice provided by an agent. General agency principles, however, continue to apply. An affiliate that has a pre-existing business relationship with the consumer may direct its agent to provide the opt out notice on its behalf. In light of one commenter's concern about civil liability, the final rules do not impose duties on any affiliate other than the affiliate that intends to use shared eligibility information to make solicitations to the consumer. Although an opt out notice must be provided by or on behalf of an affiliate that has a pre-existing business relationship with the consumer (or as part of a joint notice), that affiliate has no duty to provide such a notice. Instead, the final rules provide that absent such a notice, an affiliate must not use shared eligibility information to make solicitations to the consumer.

Proposed paragraph (b) of § 247.20 has been deleted and replaced with paragraph (a)(3) in § 248.121. Section 248.121(a)(3) provides that the initial opt out notice must be provided either by an affiliate that has a pre-existing business relationship with the consumer, or as part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has a pre-existing business relationship with the consumer. This follows the general approach taken in the proposal to ensure that the notice would be provided by an entity known to the consumer. While we used the terms ''communicating affiliate'' and ''receiving affiliate'' in the proposal and continue to use these terms in this release, the final rule text does not include these terms in order to avoid potential confusion.[156] The Commission has considered the comments regarding oral notices and opt outs and concluded that the opt out notice may not be provided orally. The Commission is required, under the FACT Act, to consider the affiliate-sharing notification practices employed on the date of enactment and to ensure that notices and disclosures may be coordinated and consolidated in promulgating regulations. Any affiliate-sharing notice required under Section 603(d)(2)(A)(iii) of the FCRA generally must be included in a GLBA privacy notice, which must be provided in writing, or if the consumer agrees, electronically. We find it consistent with existing affiliate-sharing notification practices to require the affiliate marketing opt out notice to be provided in writing, or if the consumer agrees, electronically. The Commission believes that this will promote coordination and consolidation of the FCRA affiliate marketing and sharing notice with the GLBA privacy notices. We are not persuaded that there are any circumstances in which an oral opt out notice would be necessary. While oral opt out *notices* are not permitted, a number of key *exceptions* to the initial notice and opt out requirement may be triggered by an oral communication with the customer. These include the: (1) Pre-existing business relationship exception; (2) consumer-initiated communication exception; and (3) consumer authorization or request exception. We understand that some Covered Persons currently require consumers to provide their Social Security numbers when exercising their existing GLBA or FCRA opt out rights. To combat identity theft and prevent ''phishing,'' however, consumers have been advised *not* to provide sensitive personal information such as Social Security numbers to unknown entities. Furthermore, as one of the Federal agencies participating in the President's Identity Theft Task Force, the Commission has made a commitment to examine and recommend ways to limit the private sector's use of Social Security numbers. The approach recommended by some industry commenters would allow an entity unknown to the consumer to not only provide the affiliate marketing opt out notice, but also to require the consumer to reveal his or her Social Security number to that unknown entity in order to exercise the opt out. The Commission notes that requiring that a consumer reveal his or her Social Security number to an unknown entity in order to exercise his or her opt out right would send conflicting messages to consumers about providing Social Security numbers to unknown entities. This approach would be inconsistent with the Commission's current joint efforts with the Agencies to develop a comprehensive record on the uses of the Social Security number in the private sector and evaluate their necessity, as recommended by the President's Identity Theft Task Force.[157]

2. Section 248.121(b)

a. Making Marketing Solicitations

The proposed rules referred to ''making or sending'' marketing solicitations. One commenter urged us not to address ''sending'' marketing solicitations.[158] The commenter indicated that by making a reference to ''sending'' marketing solicitations, it appears that the rule encompasses entities that send a marketing solicitation on behalf of another entity. The general rule in Section 624(a)(1) of the FCRA, along with the duration provisions in Section 624(a)(3) and the pre-existing business relationship exception in Section 624(a)(4)(A), refer to ''making'' or ''to make'' a marketing solicitation. Other provisions of the FCRA, such as the consumer choice provision in Section 624(a)(2)(A), the service provider exception in Section 624(a)(4)(C), the non-retroactivity provision in Section 624(a)(5), and the definition of ''pre-existing business relationship'' in Section 624(d)(1), refer to ''sending'' or ''to send'' a marketing solicitation. The verb ''to send,'' as used in the statute, refers to a ministerial act that a service provider, such as a mail house, performs for the person making

[156] The Commission continues to believe that the statute's silence with regard to which affiliates may provide the opt out notice makes the statute ambiguous on this point. We agree with the commenters who indicated that consumers are less likely to disregard a notice provided by a person known to the consumer. We are concerned that a notice provided by an entity unknown to the consumer may not provide meaningful or effective notice because consumers are more likely to ignore or discard these notices. However, we note that while an agent unknown to the consumer may provide a notice, the notice itself would have to clearly indicate that it is on behalf of either the company the consumer has or had a pre-existing relationship with or be a joint notice from two or more members of an affiliated group of companies so long as one of the companies on the joint notice has or had a pre-existing relationship with the consumer. *See* § 248.121(a)(3).

[157] *See Combating Identity Theft: A Strategic Plan* at 26–27 (April 2007) (available at *http://www.idtheft.gov*). *See also* Regulation S–P: Privacy of Consumer Financial Information and Safeguarding Personal Information, Exchange Act Release No. 57427 (Mar. 4, 2008); 73 FR 13692 (Mar. 13, 2008).

[158] *See* Wells Fargo Letter.

the marketing solicitation,[159] or indicates the time after which marketing solicitations are no longer permitted.[160]

The Commission concludes that ''making'' and ''sending'' marketing solicitations are different activities and that the focus of the FCRA is primarily on the ''making'' of marketing solicitations.[161] Accordingly, the final rules refer to ''making'' a marketing solicitation, except where the FCRA specifically refers to ''sending'' a marketing solicitation. The FCRA, however, does not describe what a person must do in order ''to make'' a marketing solicitation. The legislative history is silent on this point. Nevertheless, the Commission believes it is important to provide clear guidance regarding what activities constitute making a marketing solicitation.

The Commission has added new § 248.121(b) in the final rules to clarify what constitutes ''making'' a marketing solicitation for purposes of Regulation S–AM. Section 248.121(b)(1) provides that a Covered Person makes a marketing solicitation to a consumer if: (1) It receives eligibility information from an affiliate; (2) it uses that eligibility information to identify the consumer or type of consumer to receive a marketing solicitation, establish the criteria used to select the consumer to receive a marketing solicitation, or decide which of its products or services to market to the consumer or tailor its marketing solicitation to that consumer; and (3) as a result of its use of the eligibility information, the consumer is provided a marketing solicitation.

The Commission understands that several common business practices may complicate application of this provision. Affiliated groups sometimes use a common database as the repository for eligibility information obtained by various affiliates, and information in that database may be accessible to multiple affiliates. In addition, affiliated companies sometimes use the same service providers to perform marketing activities, and some of those service providers may provide services for a number of different affiliates. Moreover, an affiliate may use its own eligibility information to market the products or services of another affiliate. Paragraphs (b)(2)–(5) of § 248.121 address these issues.

Section 248.121(b)(2) clarifies that a Covered Person may receive eligibility information from an affiliate in various ways, including by the affiliate placing that information into a common database that a Covered Person may access. Of course, receipt of eligibility information from an affiliate is only one element of making a marketing solicitation. In the case of a common database, *use* of the eligibility information will be important in determining whether a person has made a marketing solicitation.

To clarify the application of the concept of ''making'' a marketing solicitation in the context of a Covered Person using a service provider, § 248.121(b)(3) generally provides that a person receives or uses an affiliate's eligibility information if a service provider acting on behalf of the Covered Person receives or uses that information on the Covered Person's behalf.[162] Section 248.121(b)(3) also provides that all relevant facts and circumstances will determine whether a service provider is acting on behalf of a Covered Person when it receives or uses an affiliate's eligibility information in connection with marketing the Covered Person's products or services.

b. Constructive Sharing and Service Providers

In § 248.121(b)(4), we address the concept of ''constructive sharing.'' In the proposing release, we illustrated the constructive sharing concept with an example in which a consumer has a pre-existing business relationship with a broker-dealer that is affiliated with a financing company. In the example, the financing company would provide the broker-dealer with specific eligibility criteria, such as consumers who have a margin loan balance in excess of $10,000, for the purpose of having the broker-dealer make marketing solicitations on behalf of the financing company to consumers that meet those criteria. A consumer who meets the eligibility criteria would contact the financing company after receiving the financing company marketing materials in the manner specified in those materials. We contemplated that the consumers' responses would provide the financing company with discernable eligibility information, such as through a coded response form that would identify a consumer as an individual who meets the specific eligibility criteria.[163]

We solicited comment on whether, given the policy objectives of Section 214 of the FACT Act, the notice and opt out requirements of these rules should apply to circumstances that involve a constructive sharing of eligibility information to make marketing solicitations.

Commenters consistently opposed inclusion of the concept of constructive sharing in the final rules.[164] One commenter argued that inclusion of the proposed example of constructive sharing would restrict the ability of financial institutions to market products to their own customers.[165] Others stated that including the example was inconsistent with many of the exceptions provided in the proposed rules.[166] In general, commenters argued that constructive sharing was outside the scope of Regulation S–AM because the rules should address the making of marketing solicitations and not the sharing of information.[167]

After carefully considering the comments, we conclude that the FCRA only covers situations in which a person *uses* eligibility information that it received from an affiliate to make a marketing solicitation to the consumer about its products or services. In a constructive sharing scenario like that described in the proposal and above,[168] a pre-existing business relationship is established between the consumer and the financing company when the consumer contacts the financing company to inquire about or apply for products or services as a result of the consumer's receipt of the financing company's marketing materials from the broker-dealer. Thus, a pre-existing business relationship is established before the financing company uses any shared eligibility information to make marketing solicitations to the consumer. Because the financing company does not use shared eligibility information to make marketing solicitations to the consumer before it establishes a pre-existing business relationship with the

[159] *See* 15 U.S.C. 1681s–3(a)(4)(C).

[160] *See* 15 U.S.C. 1681s–3(d)(1)(B) and (C).

[161] For example, a service provider may send a marketing solicitation to a consumer on behalf of another entity, but it is the entity on whose behalf the marketing solicitation is sent that is making the marketing solicitation and thus, is subject to the general prohibition on making a marketing solicitation without first giving the consumer an affiliated marketing notice and an opportunity to opt out.

[162] The service provider's activities would be those described in §§ 248.121(b)(1)(i) and (b)(1)(ii), discussed above. Section 248.121(b)(5), as discussed below, provides an exception to this general rule.

[163] *See* Proposing Release at 69 FR 42307.

[164] *See* ABASA Letter; ACB Letter; Coalition Letter; FSR Letter; ICBA Letter; ICI Letter; MetLife Letter; SIFMA Letter I; T. Rowe Price Letter; Wells Fargo Letter.

[165] *See* T. Rowe Price Letter.

[166] *See* Coalition Letter; FSR Letter; ICBA Letter; Wells Fargo Letter; SIFMA Letter I.

[167] *See* Coalition Letter; ICBA Letter; SIFMA Letter I; Wells Fargo Letter. Although the Commission did not receive comment from consumer groups, consumer groups argued to the Agencies that constructive sharing would contravene the intent of Congress and would amount to a loophole that should be fixed.

[168] *See supra* note 163 and accompanying text.

consumer, the FCRA's affiliate marketing notice and opt out requirement does not apply.

The Commission acknowledges that the FCRA's affiliate marketing provisions only limit the use of eligibility information received from an affiliate to make marketing solicitations to a consumer. Separately, the affiliate sharing notice and opt out provisions of the FCRA (Section 603(d)(2)(A)(iii)) regulate the sharing of eligibility information other than transaction or experience information among affiliates and prohibit the sharing of such information among affiliates, unless the consumer is given notice and an opportunity to opt out.[169] The FCRA does not restrict the sharing of transaction or experience information (other than medical information) among affiliates.[170]

Section 248.121(b)(4) describes two situations in which a Covered Person has *not* made a solicitation subject to Regulation S–AM. Both situations assume that the Covered Person has not used eligibility information received from an affiliate in the manner described in § 248.121(b)(1)(ii). In the first situation, the affiliate uses its own eligibility information that it obtained in connection with a pre-existing business relationship that it has or had with the consumer to market the Covered Person's products or services to the affiliate's consumers.[171] In the second situation, which builds on the first, a Covered Person's affiliate directs its service provider to use the affiliate's own eligibility information to market the Covered Person's products or services to the affiliate's consumer, and the Covered Person does not communicate directly with the service provider regarding that use of the eligibility information.

The core concept is that the affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer controls the actions of the service provider using that information. Therefore, the service provider's use of the eligibility information should not be attributed to the Covered Person whose products or services will be marketed to consumers. In such circumstances, the service provider is acting on behalf of the affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer, and not on behalf of the Covered Person whose products or services will be marketed to that affiliate's consumers.

In addition, the Commission recognizes that there may be situations in which the Covered Person whose products or services are being marketed *does* communicate with the affiliate's service provider.[172] To address these situations, the Commission has added § 248.121(b)(5) which describes the conditions under which a service provider would be deemed to be acting on behalf of the affiliate with the pre-existing business relationship, rather than the Covered Person whose products or services are being marketed, notwithstanding direct communications between the Covered Person and the service provider.[173]

Section 248.121(b)(5) provides that a Covered Person does not make a marketing solicitation subject to Regulation S–AM if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that the Covered Person may access) receives and uses eligibility information from the Covered Person's affiliate to market the Covered Person's products or services to the affiliate's consumer, so long as five conditions are met.

First, the Covered Person's affiliate must control access to and use of its eligibility information by the service provider (including the right to establish specific terms and conditions under which the service provider may use such information to market the Covered Person's products or services). This requirement must be set forth in a written agreement between the Covered Person's affiliate and the service provider. The Covered Person's affiliate may demonstrate control by, for example, establishing and implementing reasonable policies and procedures applicable to the service provider's access to and use of its eligibility information.[174]

Second, the Covered Person's affiliate must establish specific terms and conditions under which the service provider may access and use that eligibility information to market the Covered Person's products or services (or those of affiliates generally) to the affiliate's consumers, and periodically evaluates the service provider's compliance with those terms and conditions. These terms and conditions may include the identity of the affiliated companies whose products or services may be marketed to the affiliate's consumers by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the affiliate's consumers may receive marketing materials. While the specific terms and conditions established by the Covered Person's affiliate must be set forth in writing, they are not required to be set forth in a written agreement between the affiliate and the service provider. If a periodic evaluation by the Covered Person's affiliate reveals that the service provider is not complying with those terms and conditions, the Commission expects the Covered Person's affiliate to take appropriate corrective action.[175]

Third, the Covered Person's affiliate must require the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the affiliate relating to the marketing of the Covered Person's products or services. This requirement must be set forth in a written agreement between the Covered Person's affiliate and the service provider.[176]

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[169] Section 603(d)(2)(A)(iii) of the FCRA operates independently of FCRA's affiliate marketing provisions. Thus, the existence of a pre-existing business relationship between a consumer and an affiliate that seeks to use shared eligibility information, such as credit scores or income, to market to that consumer (or the applicability of another exception to these affiliate marketing rules) does not relieve the entity sharing the eligibility information from the requirement to comply with the affiliate sharing notice and opt out provisions of Section 603(d)(2)(A)(iii) of the FCRA before it shares with its affiliate eligibility information other than transaction or experience information. *See* 15 U.S.C. 1681a(d)(2)(A)(iii).

[170] Information sharing occurs if a reference code included in marketing materials reveals one affiliate's information about a consumer to another affiliate upon receipt of a consumer's response.

[171] As an example, a broker-dealer that sells investment company shares to a consumer has a pre-existing business relationship with the consumer (as does the investment company if the consumer is the record owner of its shares). The broker-dealer may make a marketing solicitation for an investment in an affiliated investment company based on eligibility information the broker-dealer obtained in connection with its pre-existing business relationship with the consumer.

[172] For example, a service provider may perform services for various affiliates relying on information maintained in and accessed from a common database. In certain circumstances, the person whose products or services are being marketed may communicate with the service provider of the affiliate with the pre-existing business relationship, yet the service provider is still acting on behalf of the affiliate when it uses the affiliate's eligibility information in connection with marketing the person's products or services.

[173] This section builds upon the concept of control of a service provider and thus is a natural outgrowth of § 248.121(b)(4). Under the conditions set forth in § 248.121(b)(5), the service provider is acting on behalf of an affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer because, among other things, the affiliate controls the actions of the service provider in connection with the service provider's receipt and use of eligibility information.

[174] *See* § 248.121(b)(5)(i)(A).

[175] *See* § 248.121(b)(5)(i)(B).

[176] *See* § 248.121(b)(5)(i)(C).

Fourth, the Covered Person's affiliate must be identified on or with the marketing materials provided to the consumer. This requirement will be construed flexibly. For example, the affiliate may be identified directly on the marketing materials, on an introductory cover letter, on other documents included with the marketing materials such as a periodic statement, or on the envelope that contains the marketing materials.[177]

Fifth, the Covered Person must not directly use the affiliate's eligibility information in the manner described in § 248.121(b)(1)(ii).[178]

Under these conditions, the service provider is acting on behalf of an affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer because, among other things, the affiliate controls the actions of the service provider in connection with the service provider's receipt and use of the eligibility information.[179] The five conditions together are intended to ensure that the service provider is acting on behalf of the affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer because that affiliate controls the service provider's receipt and use of that affiliate's eligibility information.

To provide additional guidance to Covered Persons, § 248.121(b)(6) provides six illustrative examples of the rules relating to making marketing solicitations.

3. Sections 248.121(c) and (d)

Proposed § 247.20(c) contained exceptions to the requirements of Regulation S–AM and incorporated each of the statutory exceptions to the affiliate marketing notice and opt out requirements that are set forth in Section 624(a)(4) of the FCRA. The Commission has revised the preface to the exceptions for clarity to provide that Regulation S–AM does not apply to ''you'' if a Covered Person uses eligibility information that it receives from an affiliate in certain circumstances. In addition, each of the exceptions has been moved to § 248.121(c) in the final rules and is discussed below.[180]

a. Pre-Existing Business Relationship Exception

Proposed paragraph (c)(1) of § 247.20 clarified 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. We are adopting § 247.20(c)(1) substantially as proposed,[181] deleting the word ''send'' for the reasons discussed above and eliminating, as unnecessary, the cross-reference to the location of the definition of ''pre-existing business relationship.'' [182] Commenters' views, and the scope of this exception, have been addressed above.[183] However, to help clarify the scope of the ''pre-existing business relationship'' exception, § 248.121(d)(1) provides an example to illustrate a situation in which the pre-existing business relationship exception would apply.[184]

b. Employee Benefit Plan Exception

Proposed § 247.20(c)(2) provided that Regulation S–AM would not apply to an affiliate using the information to facilitate communications to an individual for whose benefit the affiliate provided 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. One commenter stated that the exception should be revised to permit communications ''to an affiliate about an individual for whose benefit an entity provides 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.'' [185] This commenter also suggested deleting the phrase ''you receive from an affiliate'' in the introduction to proposed § 247.20(c). In this commenter's view, the proposed exception should have permitted an employer or plan sponsor to share information with its affiliates in order to offer other financial services, such as brokerage accounts or IRAs, to its employees. This commenter also requested clarification on whether the exception applies only if related to products offered as an employee benefit.

We decline to adopt the changes suggested by this commenter and adopt the employee benefit exception, redesignated as § 248.121(c)(2), as proposed. The focus of the rule is on facilitating communications ''to an individual for whose benefit the [Covered Person] provides employee benefit or other services,'' which more closely tracks the statutory language than the alternative language proposed by the commenter.

Moreover, we note that the only type of Covered Person to whom Section 624 of the FCRA might apply is one that receives eligibility information from an affiliate.[186] The FCRA thus makes clear that the exceptions in Section 624(a)(4) were meant to apply to persons that otherwise would be subject to Section 624. In the case of the employee benefit exception, the person using the information is also ''the person provid[ing] employee benefit or other services pursuant to a contract with an employer.'' [187] Therefore, this exception, like the other provisions of Regulation S–AM, should apply only to a Covered Person that uses eligibility information it receives from an affiliate to make marketing solicitations to consumers about its products or services.[188]

c. Service Provider Exception

Proposed § 247.20(c)(3) provided that the notice and opt out requirements of Regulation S–AM would not apply when the eligibility information is used to perform services for another affiliate. The exception would not have applied if the other affiliate was 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, under the proposal, when the notice has been provided to a consumer and the consumer has opted out, a receiving affiliate subject to the

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[177] *See* § 248.121(b)(5)(i)(D).

[178] *See* § 248.121(b)(5)(i)(E).

[179] This provision is designed to minimize uncertainty that may arise from the application of the facts and circumstances test in § 248.121(b)(3) to situations that involve direct communications between a service provider and a Covered Person whose products and services will be marketed to consumers.

[180] One commenter requested that the Commission delete the phrase ''if you use eligibility information you receive from an affiliate'' in the introductory words to Proposed § 247.20(c). The Commenter stated that this could inadvertently and mistakenly expose companies that share information with affiliates to potential liability. *See* SIFMA Letter II. That concern was addressed in the constructive sharing discussion above. *See supra* Part III.D.2.b.

[181] Proposed § 247.20 (d)(1) provided examples of the pre-existing business relationship exception. As explained above, we have revised the examples from proposed § 247.20(d)(1) in the final rule and included them as examples of the definition of ''pre-existing business relationship'' rather than as examples of exceptions from the application of the rule. *See* § 248.120(q)(2); *See also* discussion of ''pre-existing business relationship'' and corresponding examples *supra* Part III.C.17.

[182] *See* § 248.121(c)(1).

[183] *See supra* Part III.C.17.

[184] *See* §§ 248.120(q)(2)–(3) for examples illustrating situations in which a pre-existing business relationship exists and situations in which a pre-existing business relationship does not exist.

[185] *See* FSR Letter.

[186] The statutory preface to the exceptions provides that ''[t]his section shall not apply to a person'' using information to do certain enumerated things. *See* 15 U.S.C. 1681s–3(a)(4).

[187] 15 U.S.C. 1681s–3(a)(4)(B).

[188] There is no corresponding example for this provision.

consumer's opt out election could not circumvent the opt out by instructing the communicating affiliate or another affiliate to make or send marketing solicitations to the consumer on its behalf.[189]

One commenter urged the Commission to adopt this exception.[190] Others suggested conforming it to the statutory provision by deleting the references to marketing solicitations on behalf of service providers.[191] One of these commenters maintained that these references would impose additional burdens and costs on companies that use a single affiliate to provide various administrative services to other affiliates and would make it more difficult to provide general educational materials to consumers.[192] One commenter also asked the Commission to clarify that the limitation in FCRA Section 624(a)(4)(C) only applies to the service provider exception.[193]

We are adopting the service provider exception, redesignated as § 248.121(c)(3), substantially as proposed. We have eliminated the references to marketing solicitations made by a service provider on its own behalf. The general rule in § 248.121(a)(1) prohibits a service provider from using eligibility information it received from an affiliate to make marketing solicitations to a consumer about its own products or services unless the consumer is given notice and an opportunity to opt out and has not opted out, or unless one of the other exceptions applies. The service provider exception simply allows a service provider to do what the affiliate on whose behalf it is acting may do, such as using shared eligibility information to make marketing solicitations to consumers to whom the affiliate is permitted to make such marketing solicitations.[194] Nothing in the service provider and pre-existing business relationship exceptions will prevent an affiliate that has a pre-existing business relationship with the consumer from relying upon the service provider exception, as long as the arrangement satisfies the requirements of the rule and applicable exceptions. To help clarify the scope of the service provider exception, § 248.121(d)(2) provides two examples.[195]

d. Consumer-Initiated Communication Exception

Proposed paragraph (c)(4) of § 247.20 provided that the notice and opt out requirements would not have applied when eligibility information was used in response to a communication initiated by the consumer. This exception could have been 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. Paragraph (d)(2) of the proposed rule provided three examples of situations that would and would not meet the exception.[196]

Five commenters addressed this exception.[197] One commenter suggested that the Commission delete the phrase ''orally, electronically, or in writing,'' [198] while another suggested modifying it to read ''whether orally, electronically, or in writing.'' [199] Other commenters objected to requiring the use of eligibility information to be ''responsive'' to the communication initiated by the consumer.[200] In their view, the concept of ''responsiveness'' would create a vague standard and encourage a narrow reading of the exception. Another commenter stated that the Commission did not and could not provide a clear definition of what would be ''responsive'' and opined that this standard would cause a Covered Person to be uncertain as to their compliance.[201] One commenter asserted that consumers may not be familiar with the various types of products or services available to them and the different affiliates that offer those products or services and may rely on the institution to inform them about available options.[202] For this reason, the commenter maintained that the exception should not limit an affiliate from responding with solicitations about any product or service. This commenter also stated that the Senate bill that preceded the FACT Act used more restrictive language in this exception than the final legislation passed by Congress.

Some commenters objected to the example in proposed § 247.20(d)(2)(ii), stating that a consumer responding to a call-back message should qualify as a consumer-initiated communication and noting that the consumer has the option of not returning the call.[203] One commenter expressed concern about the example in proposed paragraph (d)(2)(iii) regarding the consumer who calls to ask for retail locations and hours, and stated that this would create a vague standard that would be difficult to apply and subject to differing interpretations.[204]

After considering the comments, we are adopting paragraphs (c)(4) and (d)(2) of proposed § 247.20 with some modifications, redesignated as §§ 248.121(c)(4) and (d)(3), respectively. The final rule eliminates the reference to oral, electronic, or written communications. Any form of communication may come within the exception as long as the consumer initiates the communication, whether in-person or by mail, e-mail, telephone, facsimile, or through other means.

Section 248.121(c)(4) provides that the communications covered by the exception must be consumer-initiated and must concern a Covered Person's products or services. The FCRA requires a person relying on the exception to use eligibility information only ''in response to'' a communication initiated by a consumer.[205] The Commission believes that the exceptions should be construed narrowly to avoid undermining the general rule requiring notice and opt out. Thus, consistent with the purposes of the FCRA, the Commission does not believe that a consumer-initiated

[189] Similarly, this exception would not permit a service provider to make marketing solicitations on its own behalf if eligibility information is communicated and the FCRA's affiliate marketing notice and opt out provisions otherwise would apply.

[190] *See* ICBA Letter.

[191] *See* FSR Letter; MetLife Letter.

[192] *See* FSR Letter.

[193] *See* MetLife Letter.

[194] As discussed above, the final rule does not include the word ''make'' because ''making'' and ''sending'' solicitations are distinct activities and this provision of the statute uses the verb ''to send.'' *See supra* Part II.B.

[195] Sections 248.121(b)(4) and 248.121(b)(5) are consistent with comparable provisions of the Joint Rules and the FTC Rule, 72 FR 62922–24 and 72 FR 61435–37, respectively.

[196] Proposed § 247.20(d)(2)(i) provided that the exception would apply when a consumer holding an account with an institution calls the institution's affiliate for information about the affiliate's products and services, leaving contact information with the affiliate. Proposed § 247.20(d)(2)(ii) provided that the exception would not apply when a consumer did not initiate a communication but rather called an affiliate back after the affiliate made an initial marketing call and left a message for a consumer. Proposed § 247.20(d)(2)(iii) provided that the exception would not apply when a consumer called an affiliate asking for retail locations without asking about the affiliate's products and services.

[197] *See* Coalition Letter; ICBA Letter; SIFMA Letter I; Wells Fargo Letter; USAA Letter.

[198] *See* Coalition Letter.

[199] *See* ICBA Letter.

[200] *See* Wells Fargo Letter; USAA Letter.

[201] *See* Coalition Letter.

[202] *See* Wells Fargo Letter.

[203] *See* SIFMA Letter I; Wells Fargo Letter; Coalition Letter.

[204] *See* ICBA Letter. The commenter, however, did not explain why it thought the example was vague.

[205] *See* 15 U.S.C. 1681s–3(a)(4)(D). The Commission believes this statutory language contemplates that the consumer-initiated communications will relate to a Covered Person's products or services, and that the marketing solicitations covered by the exception will be those made in response to that communication.

communication unrelated to a Covered Person's products or services should trigger the exception. A rule that allowed any consumer-initiated communication, no matter how unrelated to a Covered Person's products or services, to trigger the exception would not give meaning to the phrase ''in response to'' and could produce incongruous results. For example, if a consumer calls a broker-dealer to ask about retail locations and hours, but does not request information about its products or services, the broker-dealer may not use eligibility information it receives from an affiliate to make marketing solicitations to the consumer because the consumer-initiated communication does not relate to the broker-dealer's products or services. The use of eligibility information received from an affiliate would not be responsive to the communication, and the exception would not apply.

However, the Commission recognizes that if a consumer-initiated conversation turns to a discussion of products or services the consumer may need, marketing solicitations may be responsive if the consumer agrees to receive marketing materials and provides or confirms contact information by which he or she can receive those materials. For example, if a consumer calls a broker-dealer to ask about retail locations and hours, the broker-dealer's customer service representative asks the consumer if there is a particular product or service about which the consumer is seeking information, the consumer responds affirmatively and expresses an interest in mutual funds offered by the broker-dealer, the customer service representative offers to provide that information by telephone and mail additional information to the consumer, and the consumer agrees and provides or confirms contact information for receipt of the materials to be mailed, the broker-dealer may use eligibility information it receives from an affiliate to make marketing solicitations to the consumer about mutual funds because such marketing solicitations would respond to the consumer-initiated communication about mutual funds.

Likewise, if a consumer who has opted out of an affiliate's use of eligibility information to make marketing solicitations calls the affiliate for information about a particular product or service, (*i.e.,* life insurance), marketing solicitations regarding that specific product or service could be made in response to that call, but marketing solicitations regarding other products or services could not. Because marketing solicitations will likely be made quickly, we do not believe it is appropriate to adopt a specific time limit for making solicitations following a consumer-initiated communication about products or services.

We are adopting the example in proposed § 247.20(d)(2)(i), redesignated as § 248.121(d)(3)(i), and modified to delete the references to a telephone call as the specific form of communication and the reference to providing contact information. As discussed above and illustrated in the examples in §§ 248.120(q)(2)(v) and (vi), the need to provide contact information may vary depending on the form of communication used by the consumer. A new example in § 248.121(d)(3)(ii) illustrates a situation involving a consumer-initiated communication in which a consumer does not know exactly what products, services, or investments he or she wants, but initiates a communication to obtain information about investing for a child's college education. We are adopting the call-back example in proposed § 247.20(d)(2)(ii), redesignated as § 248.121(d)(3)(iii) and modified to illustrate that when a Covered Person makes an initial marketing call without using eligibility information received from an affiliate and leaves a message that invites the consumer to receive information about the Covered Person's products and services by calling a toll-free number, the consumer's response qualifies as a consumer-initiated communication about a product or service. The modified example is intended to avoid requiring Covered Persons to track which calls are call-backs.[206]

We are adopting the retail hours example in proposed § 247.20(d)(2)(iii) substantially as proposed and redesignated as § 248.121(d)(3)(iv). We are also adopting a new example in § 248.121(d)(3)(v) to address the situation where a consumer calls to ask about retail locations and hours and a call center representative, after eliciting information about the reason the consumer wants to visit a retail location, offers to provide information about products of interest to the consumer by telephone and mail, and the consumer agrees and provides or confirms contact information. This example demonstrates how a conversation may develop to the point where making marketing solicitations would be responsive to the consumer's call.

[206] Although the Commission received no specific comment regarding tracking call-backs, we have revised § 248.121(d)(3)(iii) in order to be consistent with the changes made by the Agencies in response to comments they received.

e. Consumer Authorization or Request Exception

Proposed § 247.20(c)(5) provided that the notice and opt out requirements would not apply when the information is used to make marketing solicitations that have been affirmatively authorized or requested by the consumer.[207] We contemplated that this provision could be triggered by an oral, electronic, or written authorization or request by the consumer but indicated that a pre-selected check box would not constitute an affirmative authorization or request.[208] In addition, we noted that boilerplate language in a disclosure or contract would not have constituted an affirmative authorization.[209] The exception in proposed paragraph (c)(5) could have been triggered, for example, if a consumer opens a securities account with a broker-dealer and authorizes or requests marketing solicitations about insurance from an insurance affiliate of the broker-dealer. Under the proposed exception, the consumer could have provided the authorization or made the request either through the Covered Person with whom he or she has a business relationship or directly to the affiliate that would make the marketing solicitation.[210] The duration of the authorization or request would have depended on the facts and circumstances. Proposed § 247.20(d)(3) provided an example of the affirmative authorization or request exception.

Some commenters noted that the proposed exception would have required an ''affirmative'' authorization or request but that the FCRA did not.[211] One commenter indicated that the proposal did not indicate how the authorization would be affirmative.[212] Another commenter indicated that inclusion of the term ''affirmative'' in the exception would have introduced uncertainty as to what would constitute an authorization or request by the consumer, and stated that the term should be deleted.[213] Other commenters asserted that a pre-selected check box should be sufficient to evidence a consumer's authorization or request for

[207] *See* Proposing Release at 69 FR 42309.

[208] *Id.*

[209] *Id.*

[210] Nothing in this exception supersedes the restrictions on telemarketing contained in rules of self-regulatory organizations, the Federal Communications Commission, or in the TSR, including the operation of the ''Do-Not-Call List'' established by the FTC and the Federal Communications Commission.

[211] *See* ACLI Letter; SIFMA Letter I; Wells Fargo Letter. *See also* 15 U.S.C. 1681s–3(a)(4)(E).

[212] *See* Wells Fargo Letter.

[213] *See* SIFMA Letter I. However, the commenter did not provide an example of how this would create uncertainty.

marketing solicitations.[214] In their view, a consumer's decision not to deselect a pre-selected check box should constitute a knowing act of the consumer to authorize or request marketing solicitations if the boxes are properly used.[215] Other commenters stated that preprinted language in a disclosure or contract should be sufficient to evidence a consumer's authorization or request for marketing solicitations.[216] Another commenter requested that the Commission clarify that a consumer's authorization or request does not have to refer to a specific product or service or to a specific provider of products or services in order for the exception to apply.[217]

We are adopting § 247.20(c)(5), redesignated as § 248.121(c)(5), substantially as proposed but without the word ''affirmative.'' This change does not affect the meaning of the exception and the consumer still must take steps to ''authorize'' or ''request'' marketing solicitations. The GLBA and the implementing privacy rules include an exception to permit the disclosure of nonpublic personal information ''with the consent or at the direction of the consumer.'' [218] Section 624 of the FCRA creates an exception to permit the use of shared eligibility information ''in response to solicitations authorized or requested by the consumer.'' The Commission interprets the ''authorized or requested'' provision in the FCRA exception to require the consumer to take affirmative steps in order to trigger the exception despite deletion of the term from the rule. The Commission construes this exception, like the other exceptions, narrowly and in a manner that does not undermine Regulation S–AM's general notice and opt out requirement. In this regard, affiliated companies cannot avoid use of the FCRA's notice and opt out requirement by including preprinted boilerplate language in the disclosures or contracts they provide to consumers, such as a sentence (or a pre-selected box next to a sentence) stating that by applying to open an account, the consumer authorizes or requests to receive marketing solicitations from affiliates. Such an interpretation would permit the exception to swallow the rule, a result that cannot be squared with the intent of Congress to give consumers notice and an opportunity to opt out of marketing solicitations. We are adopting the consumer authorization or request example in proposed § 247.20(d)(3), redesignated as § 248.121(d)(4)(i), with conforming changes in light of the changes made to § 248.121(c)(5). In addition, to provide more guidance, we are adopting three additional examples. The example in § 248.121(d)(4)(ii) illustrates how a consumer can authorize or request solicitations by checking a blank check box. The examples in §§ 248.121(d)(4)(iii) and (iv) illustrate that preprinted boilerplate language and a pre-selected check box would not meet the authorization or request requirement. The Commission does not believe it is appropriate to set a fixed time period for an authorization or request. As noted in the proposal, the duration of the authorization or request depends on what is reasonable under the facts and circumstances.[219] Of course, an authorization to make marketing solicitations to the consumer terminates if the consumer revokes the authorization.

For the reasons discussed in connection with the consumer-initiated communication exception, we omitted the reference to oral, electronic, or written communications from this exception. We do not believe it is necessary to clarify the elements of an authorization or request. Section 624(a)(4)(E) of the FACT Act clearly refers to ''solicitations authorized or requested by the consumer.'' The facts and circumstances will determine what marketing solicitations have been authorized or requested by the consumer.

f. Compliance With Applicable Laws Exception

Proposed § 247.20(c)(6) clarified that the provisions of Regulation S–AM would not apply to an affiliate if compliance with the requirements of Section 624 by the affiliate would prevent that affiliate from complying with any provision of State insurance law pertaining to unfair discrimination in a State where the affiliate is lawfully doing business.[220] The Commission received no comments on this provision and is adopting it as proposed, redesignated as § 248.121(c)(6). There is no corresponding example for this exception.

4. Relation to Affiliate-Sharing Notice and Opt Out

Proposed paragraph (f) of § 247.20 clarified the relationship between the affiliate-sharing notice and opt out opportunity required under Section 603(d)(2)(A)(iii) of the FCRA and the affiliate marketing notice and opt out opportunity required by new Section 624 of the FCRA.[221] Specifically, proposed paragraph (f) provided that nothing in proposed Regulation S–AM would have limited 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 and experience information with affiliates if it wishes to avoid becoming a consumer reporting agency.

One commenter urged the Commission to delete this provision as unnecessary.[222] In the alternative, this commenter asked the Commission to confirm that Section 603(d)(2)(A)(iii) of the FCRA applies to the sharing of information that would otherwise meet the definition of a ''consumer report,'' and that the sharing affiliate does not automatically become a consumer reporting agency, but risks becoming a consumer reporting agency.[223] In response, the Commission is clarifying that the FCRA, not Regulation S–AM,

[214] *See* ICBA Letter; USAA Letter; Wells Fargo Letter.

[215] *See* USAA Letter; Wells Fargo Letter.

[216] *See* Coalition Letter. This commenter cited case law and FTC informal staff opinion letters relating to a consumer's written instructions to obtain a consumer report pursuant to Section 604(a)(2) of the FCRA as support for allowing boilerplate language to constitute authorization or request.

[217] *See* Wells Fargo Letter.

[218] *See* 15 U.S.C. 6802 (e)(1)(A); 17 CFR 248.14(a)(1).

[219] *See* Proposing Release at 69 FR 42310.

[220] *See* FCRA Section 624(a)(4).

[221] In general, Section 603(d)(2)(A) of the FCRA governs the sharing of creditworthiness and similar information among affiliates. As discussed in note 5 above, the FCRA sets standards for the collection, communication, and use of information bearing on a consumer's creditworthiness, 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 and 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 provides that a person may communicate to its affiliates information other than transaction and 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 are adopting. The two provisions are distinct, however, and they serve different purposes. Nothing in these rules regarding the limitations on affiliate marketing under Section 624 of the FCRA supersedes or replaces the affiliate sharing notice and opt out requirement contained in Section 603(d)(2)(A)(iii) of the FCRA.

[222] *See* Coalition Letter.

[223] *Id.*

establishes the standard for defining a person as a consumer reporting agency. Accordingly, we are adopting proposed § 247.20(f), redesignated as § 248.121(e) and modified to replace the reference to becoming a consumer reporting agency with the phrase ''where applicable,'' in order to highlight this clarification.

E. Section 248.122 Scope and Duration of Opt Out

1. Section 248.122(a)

The scope of the opt out was addressed in various sections of the proposal. Proposed § 247.21(c) provided that the notice could have allowed 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 receiving marketing solicitations that use certain types of information or are delivered using certain methods of communication. If a Covered Person provided a menu of alternatives, one of the alternatives would have had to allow the consumer to opt out with respect to all affiliates, all eligibility information, and all methods of delivering marketing solicitations. Proposed § 247.25(d) described how the termination of a consumer relationship would have affected the consumer's opt out. Under the proposal, if a consumer's relationship with a Covered Person terminated for any reason when the consumer's opt out election was in force, the opt out would have continued to apply indefinitely unless revoked by the consumer. The Proposing Release indicated that the opt out would have been tied to the consumer, rather than to the information used for the marketing solicitations.[224]

Some commenters were critical of the provision requiring Covered Persons that provide a menu of alternatives, to provide the consumer with the ability to opt out with respect to all affiliates, all eligibility information, and all methods of delivery.[225] One commenter stated that this requirement should be eliminated, arguing that this requirement does not appear in the FCRA.[226] Another commenter indicated that the reference to ''all eligibility information'' made the provision confusing because it implied that there were various forms of eligibility information.[227] One commenter opined that this universal opt out was not Congress's intent and stated that a notice should allow opt outs on an account basis rather than an individual basis.[228] Several commenters generally opposed the indefinite opt out requirement for consumers that terminate a relationship with a person.[229]

After considering the comments, we are adopting the provision relating to the scope of the opt out, with modifications, as § 248.122(a) of Regulation S–AM. Under this section, which is modeled on Section 624(a)(2)(A) of the FCRA, the scope of the opt out depends upon the content of the opt out notice. Under § 248.122(a)(1), except as otherwise provided in that section, a consumer's election to opt out prohibits any affiliate covered by the opt out notice from using the eligibility information received from another affiliate as described in the notice to make marketing solicitations to the consumer.

Section 248.122(a)(2)(i) clarifies that, in the context of a continuing relationship, an opt out notice may apply to eligibility information obtained in connection with a single continuing relationship, multiple continuing relationships, continuing relationships established subsequent to delivery of the opt out notice, or any other transaction with the consumer. Section 248.122(a)(2)(ii) provides examples of continuing relationships. These examples are substantially similar to the examples used in the GLBA privacy rules, with added references to relationships between consumers and affiliates.[230]

Section 248.122(a)(3)(i) limits the scope of an opt out notice that is not connected with a continuing relationship. This section provides that if there is no continuing relationship between a consumer and a Covered Person or its affiliate, and if the Covered Person or its affiliate provides an opt out notice to a consumer that relates to eligibility information obtained in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, the opt out notice only applies to eligibility information obtained in connection with that transaction. The notice cannot apply to eligibility information that may be obtained in connection with subsequent transactions or a continuing relationship that may be subsequently established by the consumer with the Covered Person or its affiliate. Section 248.122(a)(3)(ii) provides examples of isolated transactions.

Section 248.122(a)(4) provides that a consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit marketing solicitations. An opt out notice may give the consumer the opportunity to elect to prohibit marketing solicitations from certain types of affiliates covered by the opt out notice but not other types of affiliates covered by the notice, marketing solicitations based on certain types of eligibility information but not other types of eligibility information, or marketing solicitations by certain methods of delivery but not other methods of delivery, so long as one of the alternatives is the opportunity to prohibit all marketing solicitations from all of the affiliates that are covered by the notice. We continue to believe that Section 624(a)(2)(A) of the FCRA requires the opt out notice to contain a single opt out option for all marketing solicitations within the scope of the notice. The Commission recognizes that consumers could receive a number of different opt out notices, even from the same affiliate. Accordingly, we anticipate monitoring industry notice practices and evaluating whether further action is needed.

Section 248.122(a)(5)(i) contains a special rule that explains the obligations with respect to notice following the termination of a continuing relationship. Under this rule, a consumer must be given a new opt out notice if, after all continuing relationships with a person or its affiliate have been terminated, the consumer subsequently establishes a new continuing relationship with that person or the same or a different affiliate and the consumer's eligibility information is to be used to make a marketing solicitation.[231] This will afford the consumer and the Covered Person a fresh start following termination of all continuing relationships by requiring a new opt out notice if a new continuing relationship is subsequently established. The new opt out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. The new opt out notice may apply more broadly to information obtained in connection

[224] *See* Proposing Release at 69 FR 42311.

[225] *See* ACLI Letter; Coalition Letter; FSR Letter.

[226] *See* ACLI Letter. *See also* 15 U.S.C. 1681s–3(a)(2).

[227] *See* FSR Letter. Another commenter also indicated that the ''option for all eligibility information'' could be interpreted to mean all eligibility information pertaining to the consumer in perpetuity. This commenter sought clarification. *See* Coalition Letter.

[228] *See* Coalition Letter.

[229] *See* ACLI Letter; Coalition Letter; FSR Letter; ICBA Letter; SIFMA Letter I.

[230] *See, e.g.*, 17 CFR 248.4(c)(3).

[231] This provision was designed to address comments regarding consumers that terminate a continuing relationship with a Covered Person. *See* supra note 229.

with a terminated relationship and give the consumer the opportunity to opt out with respect to eligibility information obtained in connection with both the terminated and the new continuing relationships. A consumer's failure to opt out does not override a prior, but still in-effect, opt out election made by the consumer and applicable to eligibility information obtained in connection with a terminated relationship. The prior opt out would still be in effect regardless of whether the new opt out notice provided to the consumer applies to eligibility information that was obtained in connection with the terminated relationship.[232] Section 248.122(a)(5)(ii) contains an example of this special rule. The Commission notes, however, that when a consumer was not given an opt out notice in connection with the initial continuing relationship because eligibility information obtained in connection with that continuing relationship was not shared with affiliates for use in making marketing solicitations, an opt out notice provided in connection with a new continuing relationship would have to apply to any eligibility information obtained in connection with the terminated relationship that is to be shared with affiliates for use in making future marketing solicitations.

2. Section 248.122(b) Duration and Timing of Opt Out

Proposed § 247.25 addressed the duration and effect of a consumer's opt out election. Section 247.25(a) provided 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 the paragraph limited the ability of Covered 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. We also stated that 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 § 247.25(b) provided 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 proposed § 247.20(c) or if the consumer had revoked his or her opt out.[233] The proposal would have tied the opt out to the consumer, not to the information.[234] Proposed § 247.25(c) clarified 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 was not prompted by an opt out notice, the consumer could still have opted out. Regardless of when the consumer opted out, the opt out would be effective for at least five years.

Commenters generally favored the five-year opt out provisions.[235] As discussed above, most commenters were concerned with the indefinite opt out provision when a consumer terminates a relationship with a person.[236] One commenter suggested that consumers should be allowed to revoke their opt outs orally, stating this would be consistent with the FCRA's flexible approach.[237] Another commenter stated that the opt out should not be broadly tied to a consumer but should be done on an account basis.[238] This commenter also asked for clarification on the implementation date, suggesting that the ''reasonably practicable'' language in the provision should be clarified to mean the opt out would begin on the date the opt out is received.

We are adopting the provisions addressing the duration of the opt out as redesignated § 248.122(b), with some modifications. The final rule clarifies that the opt out period expires if the consumer revokes his or her opt out in writing, or, if the consumer agrees, electronically. This is consistent with the approach taken in the GLBA privacy rules. We do not believe it is necessary or appropriate to permit oral revocations. Many of the exceptions to Regulation S–AM's notice and opt out provisions may be triggered by oral communications, as discussed above, which would permit the use of shared eligibility information to make marketing solicitations pending receipt of a written or electronic revocation. Also, as noted in the proposal, nothing prohibits setting an opt out period longer than five years, including an opt out period that does not expire unless revoked by the consumer.[239]

The Commission does not agree that the opt out period should begin on the date the consumer's election to opt out is received. We interpret the FACT Act requirement to mean that the consumer's opt out election must be honored for a period of at least five years from the date the election is implemented. We believe that Congress did not intend for the opt out period to be shortened to a period of less than the five years specified in the statute to reflect the time between the date the consumer's opt out election is received and the date the consumer's opt out election is implemented.

The Commission also believes that it is neither necessary nor appropriate to set a mandatory deadline for implementing the consumer's opt out election. A general standard better reflects that the time it will reasonably take to implement a consumer's opt out election may vary depending on the facts and circumstances of the situation.

Consistent with the special rule for a notice following termination of a continuing relationship, the duration of the opt out is not affected by the termination of a continuing relationship. When a consumer opts out in the course of a continuing relationship and that relationship is terminated during the opt out period, the opt out remains in effect for the remainder of the opt out period. If the consumer subsequently establishes a new continuing relationship while the

[232] The Agencies received comment that it was inappropriate to tie the opt out to the consumer, rather than to the information used for making marketing solicitations. Upon further examination, we conclude that tying the opt out to the consumer could have had unintended consequences. For example, if the opt out were tied to the consumer, a Covered Person would have to track the consumer indefinitely, even if the consumer's relationship with the Covered Person terminated and a new relationship with that Covered Person was not established until years later. We do not believe that Covered Persons should be required to track consumers indefinitely following termination of a relationship.

[233] As discussed above, proposed § 247.20(c) provided exceptions from Regulation S–AM's 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. *See supra* Part III.D.3.

[234] Thus, under the proposed rules, if a consumer initially elected to opt out but did not extend the opt out upon expiration of the opt out period, the receiving affiliate could use all of the eligibility information it had received about the consumer from its affiliate, including eligibility information that it received during the opt out period. However, if the consumer subsequently opted 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, including any information it received during the period in which no opt out election was in effect. *See* Proposing Release at 69 FR 42311.

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).

[235] *See* ACLI Letter; Coalition Letter; FSR Letter; ICBA Letter; SIFMA Letter I.

[236] *See supra* Part III.E.1.

[237] *See* ACLI Letter.

[238] *See* Coalition Letter.

[239] *See* Proposing Release at 69 FR 42322.

opt out period remains in effect, the opt out period may not be shortened with respect to information obtained in connection with the terminated relationship by sending a new opt out notice to the consumer when the new continuing relationship is established, even if the consumer does not opt out upon receipt of the new opt out notice. A person may track the eligibility information obtained in connection with the terminated relationship and provide a renewal notice to the consumer, or may choose not to use eligibility information obtained in connection with the terminated relationship to make marketing solicitations to the consumer.

3. Section 248.122(c)

Proposed § 247.25(c) clarified that a consumer could opt out at any time.[240] As explained in the proposal, 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 was not prompted by an opt out notice, a consumer could still opt out. Regardless of when the consumer opted out, the opt out would have had to be effective for a period of at least five years. We received no comment on this provision and are adopting it as proposed, redesignated as § 248.122(c).

F. Section 248.123 Contents of Opt Out Notice; Consolidated and Equivalent Notices

1. Section 248.123(a)

a. Joint Notice

Proposed § 247.21 addressed the contents of the affiliate marketing opt out notice, and proposed § 247.24(c) permitted joint notices with affiliates identified in the notice with respect to which the notice was accurate. Proposed § 247.21(a) would have required 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 had to provide the consumer with a reasonable and simple method to opt out.[241] Under the proposal, use of the proposed model forms in the proposed Appendix A, while not required, would have complied with proposed § 247.21(a) in appropriate circumstances. We received one comment on this section that urged the Commission to clarify that a Covered Person would not have to send an additional notice if the Covered Person initially provided an opt out of limited duration and then determined to increase the length of time of the duration or make the opt out permanent.[242]

We are adopting proposed § 247.21(a), redesignated as § 248.123(a) with some modifications to enhance the clarity and usability of the model notices. We are also incorporating provisions of proposed § 247.24(c), pertaining to joint notices.[243] Paragraph (a)(1)(i) provides that all opt out notices must provide the name of the affiliate or affiliates providing the notice, and allows for a joint notice by a group of affiliates. If affiliates share a common name, such as ''ABC,'' then the notice may indicate that it is being provided by the family or group of companies with the ''ABC'' name. The notice may identify the companies by stating that it is being provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. A representation that the notice is provided by ''the ABC banking, credit card, insurance, and securities companies'' applies to all companies in those categories and not just to some of those companies. If the affiliates providing the notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates. For example, if the affiliates providing the notice do business under both the ABC name and the XYZ name, then the notice could list each affiliate by name or indicate that the notice is being provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and securities companies and the XYZ insurance companies.'' Section 248.123(a)(1)(ii) provides that an opt out notice must contain a list of the affiliates or types of affiliates covered by the notice. The notice may apply to multiple affiliates and to companies that become affiliates after the notice is provided to the consumer. The rules for identifying the affiliates covered by the notice are substantially similar to the rules for identifying the affiliates providing the notice in § 248.123(a)(1)(i) described above.

Sections 248.123(a)(1)(iii)–(vii) require the opt out notice to include: (1) A general description of the types of eligibility information that may be used to make marketing solicitations to the consumer; (2) a statement that the consumer may elect to limit the use of eligibility information to make marketing solicitations to the consumer; (3) a statement that the consumer's election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires; (4) if the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, a statement that the consumer who has chosen to limit marketing offers does not need to act again until the consumer receives a renewal notice; and (5) a reasonable and simple method for the consumer to opt out. The requirement in § 248.123(a)(1)(vi) to include a statement regarding consumers who may have previously opted out would be satisfied by appropriate use of the model forms in the Appendix.[244] These forms, unlike the model forms in the proposed Appendix, include a statement that can be used in a notice given to a consumer who may have previously opted out to advise the consumer that he or she does not need to act again until he or she receives a renewal notice. The Commission continues to believe that the opt out notice must specify the length of the opt out period, if one is provided. However, an institution that subsequently chooses to increase the duration of the opt out period that it previously disclosed or honor the opt out in perpetuity has no obligation to provide a revised notice to the consumer. In that situation, the

[240] *See* Proposing Release at 69 FR 42311.

[241] Proposed § 247.21(a) reflected the intent of Congress, as expressed in Section 624(a)(2)(B) of the FCRA, that a notice required by Section 624(a)(2)(B) must be ''clear, conspicuous, and concise,'' and the method for opting out be ''simple.''

[242] *See* T. Rowe Price Letter.

[243] Proposed § 247.24(c)(1) permitted 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. Section 248.123(a)(1)(i) incorporates the substance of proposed § 247.24(c)(1) and clarifies ways in which affiliates that share a name may be identified. Proposed § 247.24(c)(2) would have permitted affiliates to provide a joint notice if the affiliates shared a common name. One commenter suggested that the rule make clear that if in a joint notice some affiliates share a common name and other affiliates do not, the notice may identify those affiliates with a common name as a group. *See* T. Rowe Price Letter.

[244] The Commission, the Agencies, and the CFTC have proposed a model privacy form in a joint rulemaking. *See Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act,* Exchange Act Release No. 55497 (Mar. 20, 2007); 72 FR 14940 (Mar. 29, 2007). This model privacy form is intended to meet the notice content requirements of Regulation S–AM.

result is the same as if the institution established a five-year opt out period and then did not send a renewal notice at the end of that period. A person receiving eligibility information from an affiliate would be prohibited from using that information to make marketing solicitations to a consumer unless a renewal notice is first provided to the consumer and the consumer does not renew the opt out. So long as no marketing solicitations are made using eligibility information received from an affiliate, there would be no violation of the FCRA or Regulation S–AM for failing to send a renewal notice in this situation.

b. Joint Relationships

Proposed § 247.24(d)(1) set out rules that would have applied when two or more consumers (referred to in the proposed regulation as ''joint consumers'') jointly obtained a product or service, such as a joint securities account.[245] It also provided several examples. Under the proposed rules, a Covered Person could have provided a single opt out notice to joint accountholders that would have had to indicate whether the Covered Person would treat an opt out election by one joint accountholder as applying to all of the associated accountholders, or whether each accountholder would have to opt out separately. The Covered Person could not have required all accountholders to opt out before honoring an opt out direction by one of the joint accountholders. In addition, we provided an example in proposed paragraph (d)(2) to explain how the rules would operate and noted that while the example was patterned after similar provisions in the GLBA privacy rules as promulgated in Regulation S–P,[246] they differed from the GLBA privacy rules in that Section 624 of the FCRA deals with the *use* of information for marketing by affiliates, rather than the *sharing* of information among affiliates.

In the proposal, we requested specific comment on proposed paragraph (d)(1)(vii) and the example in paragraph (d)(2)(iii) that addressed the situation in which only one of two joint consumers had opted out. Under those paragraphs, in a joint consumer situation, if A had opted out only for A, and B did not opt out, we indicated that a Covered Person's affiliate could use eligibility information about B to send marketing solicitations to B as long as the eligibility information was not based on A and B's joint consumer relationship. One commenter argued that this approach would be overly restrictive and challenging to implement because exclusion of joint account information could block information about both a customer who had decided to opt out and one that had not.[247] According to this commenter, Covered Persons should be able to use information about joint accounts to make marketing solicitations to the consumer who had decided not to opt out.

We are adopting proposed paragraphs (d)(1) and (d)(2) of § 247.24 with modifications, redesignated as § 248.123(a)(2). However, in light of the comment received, we are not adopting the example of joint relationships in proposed § 247.24(d)(2) because it addressed, in part, the sharing of information rather than the use of information to make marketing solicitations, and thus would be beyond the scope of this rulemaking. In addition, we have also made some technical changes to improve readability and promote consistency with the GLBA privacy rules.[248]

c. Alternative Contents

Proposed § 247.21(d) provided that if a person chose to give consumers a broader opt out right than 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 had provided. Proposed Model Form A–3 of Appendix A provided guidance for Covered Persons wishing to allow consumers to prevent all marketing from that person and its affiliates. We received no comments on this provision and are adopting it as proposed, redesignated as § 248.122(a)(3). We are adopting proposed Model Form A–3, redesignated as Model Form A–5 with slight modifications for clarity.

d. Model Notices

Section 248.123(a)(4) provides that model notices are in the Appendix. The Commission has provided model notices to facilitate compliance with the rule, although the final rules do not require their use.

2. Coordinated, Consolidated, and Equivalent Notices

Proposed § 247.27 provided 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.[249] We indicated that these notices could include but were not limited to the affiliate sharing and opt out notices described in Section 603(d)(2)(A)(iii) of the FCRA [250] and the privacy notices required by Title V of the GLBA. We further noted that a notice or other disclosure that was equivalent to the notice required by the proposal, and that was provided to a consumer together with disclosures required by any other provision of law, would satisfy the requirements of the proposed rule.

We requested comment on whether persons subject to the proposed rules would plan to consolidate their affiliate marketing notices with GLBA privacy notices or affiliate sharing opt out notices, whether we provided sufficient guidance on consolidated notices, and whether consolidation would be helpful or confusing to consumers. While one commenter expressed general support for the provision,[251] another stated that, while financial institutions may consider consolidating the affiliate marketing notice with the GLBA privacy notice, the decision to consolidate would be affected by the five-year duration of the affiliate marketing opt out.[252] However, the commenter did not specify whether this would make a firm more or less likely to consolidate notices. However, because Covered Persons are only encouraged to consolidate affiliate marketing notices with other notices they are required to provide, the Commission is, with the exception of technical changes made for clarity, adopting the consolidated and equivalent notice provisions as proposed, redesignated as §§ 248.123(b) and (c).

We encourage Covered Persons to consolidate their affiliate marketing opt out notice with GLBA privacy notices, including any affiliate sharing opt out notice under Section 603(d)(2)(A)(iii) of the FCRA, so that consumers receive a single notice they can use to review and exercise all applicable opt outs. We recognize, however, that special issues arise when these notices are

[245] *See* Proposing Release at 69 FR 42321.

[246] *See* 17 CFR 248.7(d).

[247] *See* T. Rowe Price Letter.

[248] Some implementation issues may arise from providing a single opt out notice to joint consumers in the context of this rule (which focuses on the *use* of information) and in the context of other privacy rules (which focus on the *sharing* of information). For example, a consumer may opt out with respect to affiliate marketing in connection with an individually-held account, but not opt out with respect to affiliate marketing in connection with a joint consumer account. In that situation, it could be challenging to identify which consumer information may and may not be used by affiliates to make marketing solicitations to the consumer.

[249] This is consistent with Section 624(b) of the FCRA. *See also* 15 U.S.C. 1681s–3 note.

[250] *See* discussion of FCRA Section 603(d)(2)(A)(iii) *supra* note 221.

[251] *See* Coalition Letter.

[252] *See* FSR Letter.

consolidated. For example, the affiliate marketing opt out may be limited to a period of at least five years, subject to renewal, while the GLBA privacy and affiliate sharing opt out notices are not time-limited. This difference, if applicable, must be made clear to the consumer. Thus, if a Covered Person uses a consolidated notice and the affiliate marketing opt out is limited in duration, the notice must inform consumers that if they previously opted out, they do not need to opt out again until they receive a renewal notice when the opt out expires or is about to expire. In addition, as discussed more fully below, the Commission and the Agencies, in a joint rulemaking, have proposed a model privacy form that includes an affiliate marketing opt out.[253] The proposed model privacy form is designed to satisfy the requirement to provide an affiliate marketing opt out notice.

G. Section 248.124 Reasonable Opportunity To Opt Out

1. Section 248.124(a)

Proposed § 247.22(a) provided that the communicating affiliate would have to provide a consumer a ''reasonable opportunity to opt out'' after delivery of the opt out notice but before a marketing solicitation based on eligibility information is sent. We noted that because of the various circumstances in which opt out rights are provided, a ''reasonable opportunity to opt out'' should be generally construed to avoid 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. We received no comments on proposed § 247.22(a) and are adopting it substantially as proposed, redesignated as § 248.124(a) with technical changes for clarity.

2. Section 248.124(b)

Proposed §§ 247.22(b)(1) through (5) provided examples of what might constitute a reasonable opportunity to opt out in different situations. Proposed §§ 247.22(b)(1) and (2) provided examples of reasonable opportunities to opt out by mail or by electronic means consistent with the examples used in the GLBA privacy rules.[254] Both examples illustrated that giving consumers 30 days in which to decide whether to opt out would be reasonable in most cases. Proposed § 247.22(b)(3) provided an example of a reasonable opportunity to opt out when the consumer was required to decide as a necessary part of proceeding with an electronic transaction, whether to opt out before completing the transaction.[255] Proposed paragraph (b)(4) of § 247.22 provided that including the affiliate marketing opt out notice in a notice under the GLBA privacy rules could satisfy the reasonable opportunity standard.[256] Proposed paragraph (b)(5) provided that an ''opt-in'' would satisfy the reasonable opportunity to opt out requirement, as long as a consumer's affirmative consent is documented.[257] We sought comment on whether additional guidance or examples were needed regarding the reasonable opportunity to opt out.

A number of commenters addressed the 30-day safe harbor.[258] Some commenters stated that it would provide consumers with a reasonable opportunity to opt out.[259] Others were concerned that the time period would be viewed as a de facto minimum even though we had stated it would not.[260] Most commenters however, objected to informing the consumer that he or she has a specific period of time by which to respond,[261] citing a lack of Congressional intent,[262] customer confusion,[263] and unnecessary compliance burdens if Covered Persons decided to consolidate the GLBA notices with the Regulation S–AM notice.[264] While we received no specific comment on the opportunity to opt out by mail provision, one commenter stated that requiring consumers to acknowledge receipt of notices sent electronically, as in proposed § 247.22(b)(2), would violate the Electronic Signatures in Global and National Commerce Act (''E–Sign Act'').[265] In addition, one commenter suggested broadening the scope of proposed § 247.22(b)(3) to include all transactions.[266] This commenter also opined that proposed paragraphs (b)(4) and (b)(5) were inconsistent, appearing to equate an opt in with obtaining an opt out for the purposes of the proposal, and urged the Commission to omit the opt-in example. Another commenter did not agree that pre-selected boxes would be an unacceptable method for obtaining customer authorization, if used properly.[267]

We are adopting §§ 247.22(b)(1) and (b)(3) substantially as proposed, redesignated as §§ 248.124(b)(1) and (3). We are retaining the 30-day safe harbor because it helps afford certainty to entities that choose to follow the 30-day waiting period. We understand, however, that shorter waiting periods may be adequate under certain facts and circumstances in accordance with the general test for a reasonable opportunity to opt out.

The final rule divides proposed § 247.22(b)(2) into two subparts, redesignated as §§ 248.124(b)(2)(i) and (ii), to illustrate the different means of delivering an electronic notice. The example illustrates that for notices provided electronically, such as at an Internet Web site at which the consumer has obtained a product or service, a reasonable opportunity to opt out would include giving the consumer 30 days after the consumer acknowledges receipt of the electronic notice to opt out by any reasonable means. The acknowledgement of receipt aspect of this example is consistent with an example in the GLBA privacy regulations.[268] The example also illustrates that for notices provided by e-mail to a consumer who had agreed to receive disclosures by e-mail from the

[253] *See supra* note 244.

[254] *See* 17 CFR 248.7(a)(3)(i)–(ii).

[255] Under this proposed example, the Covered Person provided a simple process of opting out at the Internet Web site where the transaction was occurring. The opt out notice was automatically provided to the consumer, such as through the use of a mandatory link to an intermediate Web page, or ''speed bump.'' The consumer was given a choice of either opting out or not opting out at that time through a simple process conducted at the Internet Web site. In this situation we indicated that a 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. However, this example would not have included a situation in which the consumer was required to send a separate e-mail or visit a different Internet Web site in order to opt out.

[256] In this situation, the consumer would be allowed to exercise the opt out in the same manner and with the same amount of time to exercise the opt out as with respect to the GLBA privacy notice. This example takes into account the statutory requirement that we consider methods for coordinating and combining notices. *See* FACT Act Section 214(b)(3).

[257] In the proposal, we noted that some persons subject to Regulation S–AM might have a policy of not allowing affiliates to use eligibility information for marketing purposes unless a consumer affirmatively consented, or ''opted in,'' to receiving such marketing solicitations. However, we also noted that a pre-selected check box on a Web form or boilerplate language in a standard contract or disclosure document would not be evidence of the consumer's affirmative consent.

[258] *See* Coalition Letter; FSR Letter; ICBA Letter.

[259] *See* FSR Letter; Wells Fargo Letter.

[260] *See* Coalition Letter; ICBA Letter.

[261] *See* ACLI Letter; Coalition Letter; FSR Letter; ICBA Letter.

[262] *See* Coalition Letter.

[263] *See* ACLI Letter; ICBA Letter.

[264] *See* Coalition Letter.

[265] *See* ACB Letter. The E–Sign Act is codified at 15 U.S.C. Chapter 96.

[266] *See* Coalition Letter.

[267] *See* USAA Letter.

[268] *See* 17 CFR 248.9(b)(1)(iii).

person sending the notice, a reasonable opportunity to opt out would include giving the consumer 30 days after the e-mail is sent to elect to opt out by any reasonable means. Consumer acknowledgement is not necessary when the consumer has agreed to receive disclosures by e-mail. Moreover, the electronic delivery of affiliate marketing opt out notices does not require consumer consent in accordance with the E–Sign Act because neither Section 624 of the FCRA nor these final rules require that the notice be provided in writing. Persons that provide electronic affiliate marketing opt out notices under Regulation S–AM may do so pursuant to the agreement of the consumer, as specified in these rules, or in accordance with the requirements of the E–Sign Act.

We agree with commenters that the example regarding electronic transactions in redesignated § 248.124(b)(3) is limited in scope, and have added a new example for in-person transactions in § 248.124(b)(4). Together, these examples illustrate that an abbreviated opt out period is appropriate when the consumer is given a ''yes'' or ''no'' choice and is not permitted to proceed with the transaction unless he or she makes a choice.[269]

We received no comments on proposed § 247.22(b)(4), which provides that an affiliate marketing opt out notice can be included in a GLBA privacy notice, and are adopting it substantially as proposed, redesignated as § 248.124(b)(5). We are not adopting the example in proposed § 247.22(b)(5) that would have illustrated the option of providing a consumer with an opportunity to ''opt in'' to affiliate marketing because the example was unnecessary and confusing.

H. Section 248.125 Reasonable and Simple Methods of Opting Out

Proposed § 247.23(a) provided guidance on how a person could provide consumers with 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 GLBA privacy rules,[270] with certain modifications to give effect to Congress's mandate in the FACT Act that the method of opting out of affiliate marketing must also be ''simple.'' Accordingly, the example in proposed § 247.23(a)(2) contemplated the use of a self-addressed envelope with which the consumer could mail his or her reply form and opt out notice. If consumers were given the choice of calling a toll-free telephone number to opt out, the example contemplated that the system would be adequately designed and staffed to enable consumers to opt out with a single phone call.[271]

Proposed § 247.23(b) provided examples of opt out methods that would not be considered 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. A consumer who agrees to receive the opt out notice in electronic form only, such as by electronic mail or at an Internet 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.

Eight commenters addressed these examples,[272] and generally agreed that the examples of the use of oral opt outs were reasonable and simple methods.[273] One commenter stated that consumers should also be able to orally revoke their opt outs.[274] Some commenters requested that the Commission clarify that this section is intended only to provide examples and is not mandatory.[275] Another commenter suggested that we delete the examples of methods that did not provide a reasonable and simple method of opting out, stating that these examples could expose Covered Persons to civil liability.[276] Other commenters objected to the reference to self-addressed envelopes.[277] One stated that a self-addressed envelope was unnecessary and inconsistent with Congress's intent because it was not required by the statute or necessary for GLBA notices.[278] Another commenter asserted that Covered Persons would view the use of a self-addressed envelope as a requirement.[279] This commenter opined that consumers would use the envelopes for other purposes, like sending remittances or address change forms, which would have ''disastrous'' consequences including unavoidable delays and lapsed notices.

Other commenters addressed electronic opt outs.[280] One commenter viewed the proposed requirement for the opt out to be electronic when the notice is electronic as arbitrary, stating that a similar requirement is not imposed on opt out notices sent by mail.[281] Another commenter opined that this requirement was not intended by Congress and requested that we adopt the GLBA rule examples.[282] Finally, some commenters believed that a company that provides a reasonable and simple method of opting out should not be required to honor an opt out through a different mechanism.[283]

We are adopting § 247.23, redesignated as § 248.125, revised as discussed below. Paragraph (a) provides the general rule that Covered Persons must not use eligibility information from an affiliate in order to make marketing solicitations to a consumer unless the consumer has been provided with a reasonable and simple method to opt out. Paragraph (b) provides examples illustrating opt out methods that are reasonable and simple, as well as examples that are not.[284]

We decline to follow commenters' suggestion that we adopt the GLBA examples without change. Section 624 of the FCRA requires the Commission to ensure that the consumer is given reasonable and *simple* methods of opting out. The GLBA did not require simple methods of opting out, although the Commission sought to provide examples of simple methods in the GLBA privacy rules. Most of the examples we are adopting are substantially similar to those in proposed § 247.23, but have been revised for clarity. We are retaining the examples in proposed §§ 247.23(a)(1) and (3), redesignated as § 248.125(b)(1)(i) and (iii), respectively. The example in § 248.125(b)(1)(ii) has been revised to reflect our understanding that the reply form and self-addressed envelope would be included together with the opt out notice and to clarify that the example is not mandatory. We do not find commenters' other views on this example to be persuasive. As in the proposal, the example in § 248.125(b)(1)(iv) contemplates that a

[269] For in-person transactions, consumers could be provided with a form that requires them to write ''yes'' or ''no'' to indicate their opt out preference, or a form that contains two blank check boxes: one to opt out and one not to opt out. Of course, if an opportunity to opt out is to be reasonable, a consumer must be permitted to choose freely whether to opt out or not, and must not be induced to forego his or her right to opt out.

[270] *See, e.g.*, 17 CFR 248.7(a)(2)(ii).

[271] *See* Proposed § 247.23(a)(4).

[272] *See* ACLI Letter; Coalition Letter; FSR Letter; IAA Letter; ICBA Letter; ICI Letter; T. Rowe Price Letter; Wells Fargo Letter.

[273] *See* FSR Letter; IAA Letter; ICI Letter; T. Rowe Price Letter.

[274] *See* FSR Letter.

[275] *See* ICBA Letter; Coalition Letter.

[276] *See* Wells Fargo Letter.

[277] *See* ACLI Letter; FSR Letter.

[278] *See* FSR Letter.

[279] *See* ACLI Letter.

[280] *See* Coalition Letter; Wells Fargo Letter.

[281] *See* Wells Fargo Letter.

[282] *See* Coalition Letter.

[283] *See* Coalition Letter; ICBA Letter.

[284] The examples of specific methods identified in the final rules are not an exhaustive list of permissible methods.

toll-free telephone number that consumers may call to opt out would be adequately designed and staffed to enable consumers to opt out in a single phone call. In setting up a toll-free telephone number that consumers may use to exercise their opt out rights, institutions should minimize extraneous marketing or other messages directed to consumers who are in the process of opting out.

One new example in § 248.125(b)(1)(v) illustrates that reasonable and simple methods include allowing consumers to exercise all of their opt out rights described in a consolidated opt out notice that includes GLBA privacy, FCRA affiliate sharing, and FCRA affiliate marketing opt outs, by a single method, such as calling a single toll-free telephone number. This example furthers the Commission's statutory directive to ensure that notices and disclosures may be coordinated and consolidated.[285]

We have retained the examples of opt out methods that are not reasonable and simple in proposed §§ 247.23(b)(1) through (b)(3), redesignated as §§ 248.125(b)(2)(i) through (b)(2)(iii) respectively. The example redesignated as § 248.125(b)(2)(iii) has been slightly modified to illustrate that it is not reasonable or simple to require a consumer who receives the opt out notice in electronic form, such as through posting at an Internet Web site, to opt out solely by paper mail or solely by visiting a different Web site without providing a link to that site. We did not find the commenters' views on these examples to be persuasive.

In order to be consistent with the Joint Rules and the FTC rule,[286] the Commission has added new § 248.125(c), which clarifies that a consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for the consumer. This section corresponds to a provision in Regulation S–P.[287]

I. Section 248.126 Delivery of Opt Out Notices

Paragraph (a) of proposed § 247.24 provided that a person covered by the proposed rule would have needed to deliver its opt out notice so that each consumer reasonably could be expected to receive actual notice. An electronically delivered opt out notice could have been delivered either in accordance with the electronic disclosure provisions in proposed Regulation S–AM or in accordance with the E–Sign Act.[288] The proposed rule included an example where a Covered Person could e-mail its affiliate marketing notice to consumers who had previously 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. One commenter expressed concern over the proposed requirement that the consumer acknowledge receipt of the notice as a necessary step to obtaining a particular product or service.[289] The commenter viewed this as inconsistent with the E–Sign Act.

Proposed § 247.24(b) provided examples of fulfilling the expectation of actual notice. We indicated that the ''reasonable expectation of delivery'' standard is a lesser standard than actual notice. For instance, if a communicating affiliate mailed a printed copy of its notice to the last known mailing address of a consumer, it would have met its obligation even if the consumer has changed addresses and never received the notice. One commenter expressed support for this standard.[290]

We are adopting § 247.24, redesignated as § 248.126, with modifications. We retained the reasonable expectation of actual notice standard, and the examples of a reasonable expectation of actual notice for an electronic notice have been revised and divided into two sets of examples of what does and does not meet the requirement.[291] The examples in paragraphs (b)(3)–(4) of § 248.126 illustrate that a consumer may reasonably be expected to receive actual notice if the affiliate providing the notice provides a notice by e-mail to a consumer who has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice, or posts the notice on the Internet Web site at which the consumer obtained a product or service electronically and requires the consumer to acknowledge receipt of the notice. Conversely, the examples in paragraphs (c)(2)–(c)(3) of § 248.126 illustrate that a consumer may not reasonably be expected to receive actual notice if the affiliate providing the notice sends the notice by e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice, or posts the notice on an Internet Web site without requiring the consumer to acknowledge receipt of the notice.

As discussed above, the Commission has determined that the electronic delivery of opt out notices does not require consumer consent in accordance with the E–Sign Act because nothing in Section 624 of the FCRA requires the notice to be provided in writing. Thus, we believe that requiring an acknowledgement of receipt is not inconsistent with the E–Sign Act. Moreover, this example is consistent with an example in the GLBA privacy rules and is appropriate, particularly where the notice is posted on an Internet Web site.

Unlike the Agencies, the Commission did not receive requests to require the mandatory delivery of electronic notices by e-mail. Like the Agencies, however, we decline to do so. The Commission agrees with the Agencies that concerns about unsolicited e-mail and the security of e-mail make it inappropriate to require e-mail as the only permissible form of electronic delivery for opt out notices.

J. Section 248.127 Renewal of Opt Out Elections

Proposed § 247.26 described procedures for extending an opt out. Proposed paragraph (a) of § 247.26 required consumers 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 affiliate that initially provided the notice, or its successor, would provide the extension notice. If an extension notice were 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 if, for example, 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 provided that each opt out extension would be effective for a period of at least five years, in compliance with proposed § 247.25.

Proposed § 247.26(c) addressed the contents of an extension notice.[292] Like the initial notice, an extension notice

[285] *See* 15 U.S.C. 1681s(b).

[286] *See* Joint Rules at 72 FR 62935; FTC Rule at 72 FR 61448.

[287] *See* 17 CFR 248.7(a)(2)(iv).

[288] *See* 15 U.S.C. 7001, *et seq.*

[289] *See* ACB Letter.

[290] *See* Coalition Letter.

[291] This is consistent with the approach taken in paragraph (b) of § 248.124.

[292] Covered Persons are not required to provide extension notices if they treat the consumer's opt out election as valid in perpetuity unless revoked by the consumer.

would have to be clear, conspicuous, and concise. Proposed paragraph (c) provided some flexibility in the design and contents of the notice. Under one approach, the notice could have accurately disclosed the same items required to be disclosed in the initial opt out notice under proposed § 247.21(a), along with a statement explaining that the consumer's prior opt out had expired or was about to expire, as applicable, and that the consumer would have to opt out again if he or she wished to keep the opt out election in force. Under another approach, the extension notice could have provided: (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 had expired or was about to expire, as applicable; (3) that the consumer could have elected to extend his or her previous election; and (4) a reasonable and simple method for the consumer to extend the opt out. We requested 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 § 247.26(d) addressed the timing of the extension notice and provided that an extension notice could be delivered to the consumer either a reasonable period of time before an opt out period expired, or any time after the opt out period expired, but before covered marketing solicitations were made to the consumer. Requiring the extension notice a reasonable period of time before the opt out period expired was intended to 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 might confuse consumers. We did not propose to set a fixed time for what would constitute a ''reasonable period of time,'' noting that 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, we stated that providing an extension notice in combination with the last annual privacy notice required by the GLBA that was provided to the consumer before expiration of the affiliate marketing opt out period would have been reasonable in all cases. Proposed § 247.26(e) made clear that sending an extension notice to a consumer before the expiration of the opt out period would not shorten the five-year opt out period.

We also noted that opt out elections under the GLBA do not expire, and that GLBA notices typically state that a consumer need not opt out again if the consumer previously opted out. We recognized that including an affiliate marketing opt out notice or an extension notice in combination with an initial or annual notice under the GLBA required complying with both FCRA and GLBA requirements as applicable. Under the proposal, if a person chose to make the affiliate marketing opt out effective in perpetuity, the statement in the GLBA notice would have remained correct. However, the GLBA notice would not have been accurate with respect to the extension notice if the affiliate marketing opt out were limited to a defined period of five or more years. In that case, the extension notice regarding affiliate marketing would have had to make clear to the consumer the necessity of opting out again in order to extend the opt out. We requested comment on this interaction between the FACT Act and GLBA notices, including 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.

Commenters expressed concern that the extension notice would differ from the initial notice because the extension notice would be required to inform the consumer that the consumer's prior opt out had expired or was about to expire, as applicable, and that the consumer would have to opt out again to keep the opt out election in force.[293] In their view, this additional disclosure would have been costly and have provided little benefit to consumers. One commenter maintained that the additional disclosure would make it difficult, if not impossible, to combine the extension notice with the GLBA privacy notice.[294]

The Commission is adopting proposed § 247.26, redesignated as § 248.127, with modifications as discussed below. The final rules also replace the references to ''extension'' with references to a ''renewal'' notice.

Section 248.127(a) provides that after an opt out period expires, a person may not make marketing solicitations to a consumer who previously opted out unless the consumer has been given a compliant renewal notice and a reasonable opportunity to opt out, and the consumer does not renew the opt out. This section also clarifies that a person can make marketing solicitations to a consumer after expiration of the opt out period if one of the exceptions in § 248.121(c) applies.

Section 248.127(a)(2) addresses the opt out renewal period. We continue to believe it is not necessary to set a fixed minimum period of time for a reasonable opportunity to renew the opt out, and that doing so would be inconsistent with the approach taken in other sections of Regulation S–AM and in the GLBA privacy rules. We received no comment regarding the minimum five-year period duration of the renewed opt out and are adopting this provision as proposed. Section 248.127(a)(3) states that a renewal notice must be provided either by the affiliate (or its successor) who provided the previous opt out notice, or as part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt out notice. This provision balances the goal of ensuring that the notice is provided by an entity known to the consumer with the need to provide a degree of flexibility to recognize changes in corporate structure that may occur over time.

In the proposal, we recognized that the content of the extension or renewal notice would differ from the content of the initial notice. We note that while the statute does not require that affiliate marketing initial and opt out renewal notices be identical, it does require that the Commission provide guidance to ensure that opt out notices are clear, conspicuous, and concise. We find it unreasonable to expect a consumer, after receiving a renewal notice, to remember that he or she previously opted out five years ago (or longer). We also find it unreasonable to expect a consumer who remembers opting out to know that he or she must opt out again in order to renew that decision. To ensure that a consumer receives a meaningful renewal notice, the consumer must be: (1) Reminded that he or she previously opted out; (2) informed that the previous opt out has expired or is about to expire; and (3) advised that to continue to limit solicitations from affiliates, he or she must renew the previous opt out. The renewal notice can state that ''the consumer's election has expired or is about to expire.'' The final rule omits the words ''as applicable'' to clarify that the notice does not have to be tailored to differentiate consumers for whom the election ''has expired'' from those for whom the election ''is about to expire.''

The Commission does not agree with the commenters who indicated that the renewal notice's additional content

[293] *See* Coalition Letter; ICBA Letter.

[294] *See* ICBA Letter.

frustrates the combination of FCRA affiliate marketing opt out notices with GLBA privacy notices. Even if the language of the renewal notice were identical to the initial notice, it still could be difficult to avoid honoring a consumer's opt out in perpetuity if the opt out notice is incorporated into the GLBA privacy notice. GLBA privacy notices often state that if a consumer has previously opted out, it is not necessary for the consumer to opt out again. This statement is accurate for affiliate marketing if the consumer's opt out will be honored in perpetuity, but is inaccurate if an affiliate marketing opt out, included as part of the notice, will be effective only for a limited period of time, subject to renewal by the consumer in five-year intervals. Thus, if an affiliate marketing opt out notice were consolidated with a GLBA privacy notice and affiliate marketing opt outs were effective only for a limited period of time, the notice would have to be modified to make clear that statements about the consumer not needing to opt out again do not apply to the affiliate marketing renewal notice. Therefore, the Commission does not believe that requiring a renewal notice to contain information not included in an initial notice will significantly affect the ability to incorporate affiliate marketing opt out notices into GLBA privacy notices because consolidation of the notices is most likely to occur when the affiliate marketing opt out will be honored in perpetuity. Entities that prefer not to provide renewal notices may do so by honoring the consumer's opt out in perpetuity. We therefore are adopting § 247.26(b) substantially as proposed, but redesignated as § 248.127(b) with revisions that reflect the changes to § 248.123, as discussed above.[295]

Proposed § 247.26(d) addressed the timing of the extension or renewal notice. We received no comment on this section and are adopting it substantially as proposed, redesignated as § 248.127(d).[296] Proposed § 247.26(e) addressed the effect of an extension or renewal notice on the existing opt out period. We received no comment on this section and are adopting it substantially as proposed, redesignated as § 248.127(d), with some modifications.[297]

K. Section 248.128 Effective Date, Compliance Date, and Prospective Application

1. Section 248.128(a) and (b)

In the Proposing Release, we recognized that some institutions may want to combine their affiliate marketing opt out notice with their next annual GLBA privacy notice. Twelve commenters addressed the effective and mandatory compliance dates.[298] These commenters believed that the mandatory compliance date should be delayed until some time after the effective date of the final rules. The commenters suggested various periods for delaying the mandatory compliance date from six, 12,[299] 15,[300] and 18 months.[301] In addition, they argued that a delayed mandatory compliance date was necessary in order to make significant changes to business practices and procedures, to implement necessary operational and systems changes, and to design and provide affiliate marketing opt out notices. Commenters also noted that many institutions would like to send the affiliate marketing notices with their initial or annual GLBA privacy notices, both to minimize costs and to avoid consumer confusion. These commenters noted that many large institutions provide GLBA privacy notices on a rolling basis, and indicated that a delayed mandatory compliance date was necessary to enable institutions to introduce affiliate marketing opt out notices into this cycle. A few industry commenters believed that Congress knew that an effective date is not necessarily the same as a mandatory compliance date because banking regulations commonly have effective dates and mandatory compliance dates that differ.

Regulation S–AM becomes effective approximately 30 days after publication in the **Federal Register**.[302] Compliance with Regulation S–AM is required not later than January 1, 2010.[303] The mandatory compliance date is delayed to give Covered Persons a reasonable amount of time to include the affiliate marketing opt out notice with their initial and annual privacy notices.[304] This is consistent with the FCRA's directive that notices may be consolidated and coordinated. The Commission believes that delaying the mandatory compliance date until January 1, 2010 will give Covered Persons adequate time to develop and distribute opt out notices, as well as provide Covered Persons sufficient time to develop and distribute consolidated notices.

2. Section 248.128(c)

Proposed § 247.20(e) provided that Regulation S–AM would not apply to eligibility information received by a receiving affiliate prior to the required compliance date. Some commenters argued that the proposed rule did not track the statutory language or reflect the intent of Congress.[305] These commenters asserted the final rules should grandfather all information received by any financial institution or affiliate in a holding company before the mandatory compliance date, rather than grandfather only that information received before the mandatory compliance date by a person that intends to use the information to make solicitations to the consumer. In the alternative, one commenter requested that, if we adopted the rule as proposed, we clarify that any information placed into a common database by an affiliate be considered to have been provided to an affiliated person.[306] The commenter argued that without such a clarification, affiliated companies would have to undertake costly deconstruction of existing databases to ensure compliance.

We are adopting § 247.20(e) substantially as proposed, redesignated as § 248.128(c), with modifications discussed below. To address concerns expressed by commenters, the final rules clarify that a Covered Person receives eligibility information from an affiliate when the affiliate places that information in a common database that is accessible by a Covered Person, even if the Covered Person has not accessed or used that information as of the compliance date. The final rules do not apply to eligibility information placed in a common database before the mandatory compliance date by an affiliate who has a pre-existing business relationship with a consumer. The rules

[295] These changes relate to identification of the affiliates or group of affiliates providing the opt out, descriptions of the types of eligibility information that may be used and the ability of the consumer to limit the use of that information, as well as other requirements that make the opt out notice reasonable and simple.

[296] We have changed the reference from ''extension'' to ''renewal'' of a notice and deleted ''before any affiliate makes or sends'' as unnecessary. Proposed § 247.26(d)(2) is now referred to as ''Combination with annual privacy notice'' in § 248.127(c)(2) and clarified for ease of reference.

[297] The phrase ''to a period of less than 5 years'' has been omitted as unnecessary.

[298] *See* ACB Letter; ACLI Letter; AIA Letter; Coalition Letter; FSR Letter; IAA Letter; ICBA Letter; ICI Letter; Metlife Letter; SIFMA Letter I; T. Rowe Price Letter; USAA Letter.

[299] *See* ACB Letter; AIA Letter; Coalition Letter; ICBA Letter; Metlife Letter.

[300] *See* IAA Letter; T. Rowe Price Letter.

[301] *See* ACLI Letter.

[302] *See* § 248.128(a).

[303] *See* § 248.128(b).

[304] In the proposal, we indicated that the final rules would become effective six months after the date on which they were issued in final form. This was consistent with the requirements of Section 624 of the FCRA. *See* Proposing Release at 69 FR 42302.

[305] *See* ACLI Letter; Coalition Letter; Wells Fargo Letter.

[306] *See* Coalition Letter.

do apply if eligibility information is obtained by an affiliate before the mandatory compliance date and is not, before the mandatory compliance date: (1) placed into a common database that is accessible to other affiliates; or (2) provided to another affiliate. The final rules also apply to new or updated eligibility information placed in a common database after the mandatory compliance date.

IV. Appendix to Subpart B—Model Forms

Proposed Appendix A provided model forms as examples to illustrate how Covered Persons could comply with the notice and opt out requirements of Section 624 of the FCRA and proposed Regulation S–AM.[307] Proposed Appendix A included three proposed model forms. Model Form A–1 was an initial opt out notice. Model Form A–2 was an extension notice that could be used when a consumer's prior opt out has expired or was about to expire. Model Form A–3 was for persons subject to proposed Regulation S–AM to use if they offered consumers a broader right to opt out of marketing than required by law.

We stated that use of the proposed model forms would not be mandatory.[308] We also noted that persons subject to proposed Regulation S–AM could use the model forms, modify them to suit particular circumstances, or use some other form, so long as the requirements of the proposed rules were met. We noted that although Model Forms A–1 and A–2 used five years as the duration of the opt out period, communicating affiliates could have chosen an opt out period longer than five years and substituted the longer time period in the opt out notices. The proposal also provided an illustration in which the communicating affiliates chose to treat the consumer's opt out as effective in perpetuity and thereby omitted 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 was designed as a stand-alone form. We anticipated that some Covered Persons might want to combine the affiliate marketing opt out notice with a GLBA privacy notice. We noted that if the notices were combined, we expected that Covered 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. Finally, we noted that the development of a model form that would combine the various opt out notices was beyond the scope of the proposed rulemaking. We received one comment on the model forms that generally supported the development of templates.[309] This commenter also suggested there should be a safe harbor for companies that use the model forms.

We are adopting the model forms in Appendix A of the proposal substantially as proposed, redesignated as Appendix to Subpart B—Model Forms, with additions and revisions to reflect changes incorporated in the final rules, discussed above. The model forms are designed to be helpful for entities that give notices and beneficial for consumers. As under the proposal, the model forms are provided as stand-alone documents. Persons may also choose to combine their affiliate marketing notices with other consumer disclosures, such as GLBA privacy notices.[310] Creating a consolidated model form is beyond the scope of this rulemaking. However, as discussed above, institutions can combine affiliate marketing opt out notices with other disclosures, including GLBA privacy and opt out notices. If a combined model notice is adopted, we would expect the use of that model to satisfy the requirement to provide an initial affiliate marketing opt out notice.[311] As adopted, the Appendix includes five model forms. Model Form A–1 is for an initial notice provided by a single affiliate. Model Form A–2 is for an initial notice provided as a joint notice from two or more affiliates. Model Form A–3 is for a renewal notice provided by a single affiliate. Model Form A–4 is for a renewal notice provided as a joint notice from two or more affiliates. Model Form A–5 is for a voluntary ''no marketing'' opt out.

While use of the model forms is not mandatory, appropriate use of the model forms satisfies the requirement in Section 624 of the FCRA that Covered Persons provide notices that are ''clear, conspicuous, and concise.'' [312] As adopted, the model forms state that a consumer's opt out election applies either for a fixed number of years or for ''at least 5 years.'' This revision permits Covered Persons that use a longer opt out period or that subsequently extend their opt out period to rely on the model language. The model forms also contain a reference to the consumer's right to revoke an opt out, and the model forms clarify that, with an opt out of limited duration, the consumer does not have to opt out again until a renewal notice is sent.

V. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits of its rules and understands that the rules may impose costs on Covered Persons. Regulation S–AM's requirement to provide consumers with notice and an opportunity to opt out of receiving affiliate marketing solicitations is designed to benefit consumers by enabling them to limit certain marketing solicitations from affiliated companies. In addition, the notice requirement should enhance the transparency of each Covered Person's affiliate marketing and information sharing practices.

In the proposal, we noted that the proposed rules would impose costs upon Covered Persons [313] that wish to engage in affiliate marketing based on the communication of eligibility information. Absent an exception, a Covered Person is prohibited from *using* eligibility information received from an affiliate to make marketing solicitations to consumers, unless: (1) The potential marketing use of the information has been clearly, conspicuously and concisely disclosed to the consumer; (2) the consumer has been provided a reasonable opportunity and a simple method to opt out of receiving the

[307] *See* Proposing Release at 69 FR 42322.

[308] *See* Proposing Release at 69 FR 42312.

[309] *See* ICBA Letter.

[310] On March 31, 2006, the Commission and the Agencies released a report entitled *Evolution of a Prototype Financial Privacy Notice* prepared by Kleimann Communication Group, Inc., summarizing research that led to the development of a prototype short-form GLBA privacy notice. This report is available at *http://www.ftc.gov/privacy/privacyinitiatives/FTCFinalReportExecutiveSummary.pdf*. That prototype included an affiliate marketing opt out notice. The prototype assumed that the notice would be provided by the affiliate that is sharing eligibility information. The Commission believes that providing model forms in this rule for stand-alone opt out notices that may be used in a more diverse set of circumstances than a model privacy form is appropriate and consistent with efforts to develop a model privacy form. On March 29, 2007, the Commission, the Agencies, and the CFTC published for public comment in the **Federal Register** a model privacy form based on the prototype that includes the affiliate marketing opt out notice. *See supra* note 244.

[311] *See supra* Part III.F.

[312] Persons may use or not use the model forms, or modify the forms, so long as the requirements of the regulation are met. For example, although some of the model forms use five years as the duration of the opt out period, an opt out period of longer than five years may be used and the longer time substituted in the opt out notices. However, Covered Persons that modify the forms or use different forms for their notice requirements should take care to ensure that their notices are clear, conspicuous, and concise.

[313] ''Covered Persons'' include brokers, dealers (except notice-registered broker-dealers), and investment companies, as well as investment advisers and transfer agents that are registered with the Commission.

marketing solicitation; and (3) the consumer has not opted out.

In proposing the rules, we estimated that approximately 6,768 broker-dealers, 5,182 investment companies, 7,977 registered investment advisers, and 443 registered transfer agents would be required to comply with Regulation S–AM.[314] We also indicated that a Covered Person's obligation to provide notice and opportunity to opt out would depend on the information sharing policies of that person and the marketing policies of its affiliates.[315] After considering a number of factors,[316] we estimated in the Proposing Release that approximately 10% of Covered Persons, or 2,037 respondents, would be required to provide consumers with notice and an opt out opportunity under Regulation S–AM.[317] We further estimated that 14,259 Covered Persons each would require 1 hour on average to review its information sharing and affiliate marketing policies and practices to determine whether notice and an opt out opportunity would be necessary. After assuming a cost of $125 per hour for managerial staff time, we estimated that the total one-time cost of review would be approximately $1,782,375 (14,259 × $125). We estimated that, upon completion of the review, 2,037 Covered Persons actually would be required to provide a notice and an opt out opportunity, and that those persons would need an average of 6 hours to develop an initial notice and opt out form and 2 hours to design notices for new customers to receive on an ongoing basis (a total of 8 hours per affected Covered Person, or 16,296 hours). We assumed 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, we estimated the total cost to be $1,548,120 (16,296 × $95) in the first year. We also estimated that each of the 2,037 affected Covered 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. Finally, we noted that these tasks would not require managerial or professional involvement; thus, we estimated an average staff cost of $40 per hour, for a total annual cost of $162,960 (4,074 × $40).[318]

We received one comment on the cost-benefit analysis, which stated that the estimates understated the compliance burden associated with Regulation S–AM.[319] The commenter indicated that the Banking Agencies estimated that it would take approximately 18 hours to prepare and distribute the initial notice to customers. It also indicated that reprogramming costs could run into the millions of dollars for the securities industry. The commenter stated that, based on the experience of the securities industry in complying with the GLBA, each firm would have to spend several hundred hours to review its information sharing and affiliate marketing policies, to provide initial notice and opt out, to design notices to be sent to new customers on an ongoing basis, to deliver the notices to customers and to record any opt outs that are received. The commenter did not provide us with specific data regarding its estimates.

The Commission recognizes that costs for developing and maintaining records of delivery of affiliate marketing notices and recording opt out elections, and costs for personal training, will vary greatly, depending on the size of a financial institution, its customer base, number of affiliates, and the extent to which the institution intends to share information. Accordingly, we have revised our estimates to make them consistent with the compliance estimates provided by the Banking Agencies in their Joint Rules,[320] to update the number of entities subject to Regulation S–AM and make the dollar costs economically current. For the purposes of the final rules, we estimate that approximately 5,561 broker-dealers, 4,586 investment companies, 11,300 registered investment advisers, and 413 registered transfer agents will be required to comply with Regulation S–AM.[321] After considering a number of factors, we estimate that approximately 10% of Covered Persons, or 2,186 respondents, will be required to provide consumers with notice and an opt out opportunity under Regulation S–AM. Moreover, we estimate that 12,242[322] Covered Persons each will require 1 hour on average to review its information sharing and affiliate marketing policies and practices to determine whether notice and an opt out opportunity is necessary. Assuming a cost of $180 per hour for managerial staff time,[323] the staff estimates that the total one-time cost of review will be approximately $2,203,560 (12,242 × $180). Once the review is complete, we estimate that 2,186 Covered Persons will be required to provide an affiliate marketing notice and an opt out opportunity, and that those persons will need an average of 18 hours to prepare an initial notice and distribute it to consumers (a total of 39,348 hours). We assume that this time will be divided between senior staff, computer professionals, and secretarial staff, with review by legal professionals. We estimate an average per-hour staff cost

[314] *See* Proposing Release at 69 FR 42313.

[315] For purposes of the Paperwork Reduction Act analysis in the Proposing Release, we estimated that approximately 70% of Covered Persons have affiliates. Updated statistics reported in registration forms filed by investment advisers show that approximately 56% of registered investment advisers have a corporate affiliate, and we estimated that other Covered Persons would report a rate of affiliation similar to that reported by registered investment advisers. *Id.*

[316] In the Proposing Release we indicated that: (1) A 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 proposed notice and opt out requirements; (2) even if a communicating affiliate shared eligibility information, notice and opt out would not be required if the receiving affiliate did not use the information as a basis for marketing solicitations; (3) because the proposed rules allowed for a single, joint notice on behalf of a common corporate family, Covered Persons would not be required to independently provide affiliate marketing notices and opt out opportunities if they were included in an affiliate's notice; and (4) the proposed rules incorporated a number of statutory exceptions that would further reduce the number of persons required to provide affiliate marketing notices. In addition, in the Proposing Release we noted that if an institution were required to provide consumers notice and an opportunity to opt out, the notice could be combined with GLBA privacy notices or with any other document, including other disclosure documents or account statements. We expressed our expectation that most institutions that would be required to provide an affiliate marketing notice would combine that notice with some other form of communication. *Id.*

[317] *Id.* at 42313–14.

[318] *Id.* at 42314.

[319] *See* SIFMA Letter I.

[320] The Banking Agencies estimated that 18 hours was reasonable but expected that figure to vary among Covered Persons. *See* 69 FR 42513. In the Proposing Release, the Commission estimated 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.'' *See* Proposing Release at 69 FR 42315.

[321] A Covered Person's obligation to provide notices and opt out opportunities will depend on the information sharing policies of that person and the marketing policies of its affiliates. For purposes of the Paperwork Reduction Act, we now estimate that approximately 56% of Covered Persons have affiliates. Statistics reported in registration forms filed by investment advisers show that approximately 56% 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.

[322] This estimate is based on the following calculation: (5,561 + 4,586 + 11,300 + 413 = 21,860 × .56 = 12,242).

[323] This is the per hour cost of Senior Compliance Officer, who we feel will be the appropriate person to review notices. This figure is derived from *See* Securities Industry and Financial Markets Association, *Report on Management and Professional Earnings in the Securities Industry—2007* (2007) (''SIFMA Report''), modified by the Commission's Office of Economic Analysis to account for an 1800-hour work year, bonuses, firm size, employee benefits, and overhead.

of $256,[324] with an estimated total cost of $10,073,088 (39,348 × $256) in the first year. We also estimate that each of the 2,186 Covered Persons will spend approximately 4 hours per year (or 8,744 hours) for creating and delivering notices to new consumers and recording any opt outs that are received on an ongoing basis. Finally, as in the Proposing Release, we note that these tasks should not require managerial or professional involvement. Thus, we estimate an average staff cost of $56 per hour,[325] for a total annual cost of $489,664 (8,744 hours × $56).[326]

VI. Paperwork Reduction Act

Certain provisions of Regulation S–AM may constitute a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995.[327] The Commission submitted Regulation S–AM to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, and the OMB approved the collection of information. The title for the collection of information is ''Regulation S–AM: Limitations on Affiliate Marketing,'' its expiration date is November 30, 2010, and its OMB control number is 3235–0609. 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.[328] Responses to these collections of information will not be kept confidential. The Commission received no comments on the PRA analysis included in its proposal to adopt Regulation S–AM.[329] We do not believe that any differences between Regulation S–AM as proposed and Regulation S–AM as adopted, including the increase in average estimated burden hours, would significantly affect the collection of information or the estimated hour burden associated with the collection of information.

A. Collection of Information

Before an affiliate may use eligibility information received from another affiliate to make marketing solicitations to a consumer, the consumer must be provided with a notice informing the individual of his or her right to opt out of such marketing. In addition, as a practical matter, Covered Persons must keep records of any opt out elections in order for the opt outs to be effective. The opt out period must last at least five years. At the end of the opt out period, the consumer must be provided with a renewal notice and a new chance to opt out before the resumption of marketing solicitations to the consumer based on the consumer's eligibility information.

Notice and opt out are only required if a Covered Person uses eligibility information from an affiliate for use in marketing solicitations. Covered Persons that do not have affiliates, or whose affiliates do not make marketing solicitations based on eligibility information received from a Covered Person, are not required to provide notice and opt out. Regulation S–AM contains a number of other exceptions as directed by Section 214 of the FACT Act, such as for situations in which the affiliate has a pre-existing business relationship with the consumer or in which the consumer requests marketing information. In the final rules, we have attempted to retain procedural flexibility and to minimize compliance burdens except as required by the terms of the FACT Act.

B. Use of Information

Section 624 of the FCRA is intended to enhance the protection of consumer financial information in the affiliate marketing context and to enable consumers to limit Covered Persons from using eligibility information they receive from an affiliate to make marketing solicitations. Regulation S–AM is necessary to fulfill the statutory mandate, in Section 214 of the FACT Act, that the Commission prescribe regulations to implement Section 624.

C. Respondents

We estimate that approximately 5,561 broker-dealers, 4,586 investment companies, 11,300 registered investment advisers, and 413 registered transfer agents will be required to comply with Regulation S–AM. However, we expect that only a fraction of all Covered Persons will be required to provide notices and opt out opportunities to consumers. First, the rules only apply to Covered Persons that have affiliates, and then only if affiliates receiving eligibility information make marketing solicitations based on the eligibility information received from a Covered Person. Based on a review of forms filed with the Commission, we estimate that approximately 56% of Covered Persons have an affiliate.[330] However, we assume that many of those Covered Persons do not communicate eligibility information to their affiliates for marketing purposes and thus will not be subject to the notice and opt out requirements of Regulation S–AM.[331] The rules also incorporate a number of statutory exceptions that further reduce the number of Covered Persons required to provide affiliate marketing notices. In addition, any notices required by Regulation S–AM can be combined with notices already required by Regulation S–P. Further, if notice is required, Regulation S–AM allows all affiliates under common ownership or control to provide a single, joint notice. Accordingly, Covered Persons that are required to provide affiliate marketing notices could be covered by a notice sent by one or more affiliates, and may not be required to provide a notice independently. In light of these factors, we estimate that approximately 10% of Covered Persons, or approximately 2,186 respondents, will be required to provide consumers with notices and an opportunity to opt out under Regulation S–AM.

D. 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

[324] This estimate is derived from averaging the per hour costs of a Programmer Analyst ($194), a Senior Database Administrator ($266), a Compliance Manager ($245), a Director of Compliance ($394), a Paralegal ($168) and a Compliance Attorney ($270). *See* SIFMA Report.

[325] This estimate is derived from averaging the per hour costs of a Senior General Clerk ($52), a General Clerk ($40), an Administrative Assistant ($65), a Compliance Clerk ($62) and a Data Entry Clerk ($61). *See* SIFMA Report.

[326] We note that Regulation S–AM includes several considerations that should minimize compliance costs for affected persons. First, as required by the FACT Act, Regulation S–AM allows Covered Persons to combine their affiliate marketing opt out notices with any other notice required by law, including the privacy notices required under the GLBA. Covered Persons are already required to provide privacy notices and to accept consumer opt out elections related to information sharing. Second, Regulation S–AM allows Covered Persons some flexibility to develop and distribute the affiliate marketing opt out notices, and to record opt out elections in the manner best suited to their business and needs. Third, Regulation S–AM is consistent and comparable with the rules proposed by the Agencies, which should provide greater certainty to Covered Persons that are part of a family of affiliated companies because such affiliated companies are subject to consistent requirements. Finally, Regulation S–AM includes examples that provide specific guidance regarding what types of policies and procedures Covered Persons could develop.

[327] As amended, codified at 44 U.S.C. Chapter 35.

[328] 44 U.S.C. 3512.

[329] *See* Proposing Release at 69 FR 42314–16.

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

[331] 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).

extent to which it communicates eligibility information to affiliates for marketing purposes and whether those affiliates make marketing solicitations based on that eligibility information. This determination should be straightforward for most entities, in part because GLBA privacy regulations already require Covered Persons other than transfer agents to review their information sharing practices and disclose whether they share information with affiliates.[332] We estimate that approximately 56% of all Covered Persons, or approximately 12,242, have an affiliate. The amount of time required to review their policies will vary widely, from a few minutes for those that do not share eligibility information with affiliates to 4 hours or more for Covered Persons with more complex information sharing arrangements. We estimate that each Covered Person will require 1 hour on average to review its policies and practices, for a total one-time burden of 12,242 hours. We estimate that 2,186 Covered Persons will be required to provide notice and opt out opportunities under the rules. This process consists of several steps. First, an affiliate marketing notice would have to be created. The amount of time required to develop a notice should be reduced significantly by the inclusion of model forms in Regulation S–AM. Second, the notices will need to be delivered. The final rules allow that affiliate marketing notices may be combined with any other notice or disclosure required by law. We expect that most Covered Persons will combine their affiliate marketing notices with some other form of communication, such as an account statement or an annual privacy notice under the GLBA. 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.[333] Notices may be delivered electronically to consumers who have agreed to electronic communications, which should further reduce the costs of delivery. Third, as a practical matter, Covered Persons will need to keep accurate records in order to honor any opt out elections and to track the expiration of the opt out period. The number of actual notice mailings in any given year will depend on the number of consumers who do business with each affected person. For purposes of the PRA, we estimate that the hour burden for developing, sending, and tracking the opt out notices will range from 2–50 hours, with an average of 18 hours for each Covered Person (39,348 hours total).[334] We estimate that postage and materials costs for the notices would be negligible because the notices likely will be combined with other required mailings.[335]

Because the notice and opt out requirements are a prerequisite to conducting covered forms of affiliate marketing, most Covered Persons would provide notice within the first year after which compliance with Regulation S–AM is required. However, additional notices will be required as new customer relationships are formed. We anticipate that many Covered Persons will ensure delivery to new consumers with a minimum of additional effort by providing or combining the notices with other documents such as account opening documents or initial GLBA privacy notices. Accordingly, we estimate an ongoing annual burden of 4 hours per year (or 8,744 hours total) for creating and delivering notices to new consumers and recording any opt outs that are received on an ongoing basis.[336]

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.[337] Designing, sending, and recording opt out renewal notices will require additional hours and costs. However, because the initial opt out period must last for at least five years, any burden related to renewal notices would not arise within the first four years of the collection of information.

In sum, we estimate that each of approximately 12,242 Covered Persons will require an average one-time burden of 1 hour to review affiliate marketing practices (12,242 hours total). We estimate that the approximately 2,186 Covered Persons required to provide notices and opt out opportunities will incur an average first-year burden of 18 hours to provide notices and allow for consumer opt outs, for a total estimated first-year burden of 39,348 hours. With regard to continuing notice burdens, we estimate that each of the approximately 2,186 Covered Persons required to provide notices and opt out opportunities will incur an annual burden of 2 hours to develop notices for new consumers (4,372 hours total) and an annual burden of 2 hours to deliver the notices and record any opt outs for new consumers (4,372 hours total). These estimates represent a total one-time burden of 51,590 hours (12,242 hours plus 39,348 hours) and an ongoing annual burden of 8,744 hours (4,372 hours plus 4,372 hours). We do not expect that Covered Persons will incur start-up or materials costs in addition to the staff time discussed above.

E. Retention Period for Recordkeeping Requirements

Regulation S–AM does not contain express provisions governing the retention of records related to opt outs. However, as noted above, a person subject to 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 renewal notice would know when that notice is required.

F. Collection of Information Is Mandatory

As noted, Covered Persons that use eligibility information from their affiliates for marketing purposes will be required to comply with the notice and opt out provisions of Regulation S–AM. Assuming that no other exception applies, the disclosure and recordkeeping requirements will be mandatory with respect to those Covered Persons.

VII. Final Regulatory Flexibility Analysis

The Commission has prepared this Final Regulatory Flexibility Analysis for Regulation S–AM in accordance with 5 U.S.C. 604.

A. Need for the Rule

Regulation S–AM implements Section 214 of the FACT Act (which added new Section 624 to the FCRA) that, in general, prohibits a person from using certain information received from an

[332] *See* 17 CFR 248.6(a)(3) (initial, annual, and revised GLBA privacy notices must include ''the categories of affiliates * * * to whom you disclose nonpublic personal information''). Transfer agents are subject to consistent and comparable requirements promulgated by the Agencies.

[333] Because we assume that most affiliate marketing notices will 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.

[334] *See* discussion of new cost estimates and burden hours *supra* Part V.

[335] *See* discussion of consolidated notices *supra* Part III.F.2.

[336] *See* discussion of new cost estimates and burden hours *supra* Part V.

[337] 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.

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 required 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. The objectives of Regulation S–AM are discussed in detail in the Background, Overview of Comments Received and Explanation of Regulation S–AM, and Section-by-Section Analysis at Sections I through III above. The legal basis for Regulation S–AM is Section 214 of the FACT Act,[338] as well as Sections 17, 17A, 23, and 36 of the Exchange Act,[339] Sections 31 and 38 of the Investment Company Act,[340] and Sections 204 and 211 of the Investment Advisers Act.[341] The Commission received no comments regarding the Initial Regulatory Flexibility Analysis.

B. Description of Small Entities to Which the Final Rules Will Apply

Regulation S–AM applies to any Covered Person that uses eligibility information for the purpose of making marketing solicitations. Of the entities registered with the Commission, 896 broker-dealers, 197 investment companies, 671 registered investment advisers, and 76 registered transfer agents are considered small entities.[342] Only affiliated entities are subject to Regulation S–AM. We estimate that 56% of all Covered Persons have affiliates, although it is not clear whether small entities differ significantly from larger entities in their rates of corporate affiliation. While we invited comment from small entities that would be subject to the proposed rules as well as general comment regarding information that would help us to quantify the number of small entities that may be affected by Regulation S–AM, we received none.

C. Projected Reporting, Recordkeeping, and Other Compliance Requirements

Regulation S–AM requires Covered Persons to provide consumers with notice and an opportunity to opt out of affiliated persons' use of eligibility information for marketing purposes. The final rule prohibits a Covered Person from using eligibility information received from an affiliate to make marketing solicitations to consumers, unless: (1) The potential marketing use of the information has been clearly, conspicuously and concisely disclosed to the consumer; (2) the consumer has been provided a reasonable opportunity and a simple method to opt out of receiving the marketing solicitation; and (3) the consumer has not opted out.

For those entities that provide the Section 624 notice in consolidation with other documents such as notices provided under the GLBA or other Federally mandated disclosures, the final rules impose very limited additional reporting or recordkeeping requirements. However, for Covered Persons that choose to send the notices separately, the reporting and recordkeeping requirements and other compliance requirements may be more substantial. Although the final rules do not include specific recordkeeping requirements, in practice some system of recordkeeping must exist to ensure that any consumer opt outs are honored.

There are a number of features of the FACT Act's affiliate marketing provisions as implemented by Regulation S–AM that limit its scope. First, the law only applies to the use of eligibility information by affiliates for the purpose of making marketing solicitations. Thus, affiliates that make marketing solicitations based solely upon their own information or without regard to eligibility information are not affected by this law. Second, the law provides exceptions to its notice and opt out requirements that permit Covered Persons to market to consumers with whom they have a ''pre-existing business relationship'' or from whom they have received a request for information. Third, § 248.123(a)(1)(i) allows a single, joint notice to be sent to a consumer on behalf of multiple affiliates.

A number of alternatives exist that could reduce the costs associated with compliance with Regulation S–AM. First, significant cost savings may be obtained by consolidating affiliate marketing notices with GLBA privacy notices or with other documents provided to consumers such as account statements. In addition, the model forms could be used for opt out notices that comply with the requirements of the rules. Regulation S–AM also permits Covered Persons to reduce the need for ongoing tracking 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 GLBA and FCRA notice and opt out requirements as well as with the FACT Act's notice and opt out requirements. Small entities may wish to consider whether consolidation of their privacy and affiliate marketing notices and opt out forms can reduce their compliance costs. Similar considerations can reduce the burden of providing affiliate marketing notices to new consumers. For example, as long as the notices remain clear, conspicuous, and concise,[343] small entity Covered Persons can combine affiliate marketing notices with account opening documents or initial privacy notices provided under the GLBA in order to ensure that affiliate marketing notices are delivered to new consumers without substantial additional efforts on the part of the Covered Person.

The Commission was concerned about the potential impact of the proposed rules on small entities and requested comment on: (1) The potential impact of any or all of the provisions in the proposed rules, including any benefits and costs, that the Commission should consider; (2) 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; (3) costs to implement and to comply with the proposed rules, including any expenditure of time or money for, for example, employee training, legal counsel, or other professional time, for preparing and processing the notices; and (4) costs to record and track consumers' elections to opt out. We received no comments on these issues.

[338] Public Law 108–159, 117 Stat. 1952 (2003).

[339] 15 U.S.C. 78q, 78q–1, 78w, and 78mm.

[340] 15 U.S.C. 80a–30 and 80a–37.

[341] 15 U.S.C. 80b–4 and 80b–11.

[342] 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.

[343] *See* § 248.123(a).

D. 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 not identified any Federal statutes or regulations that duplicate, overlap, or conflict with Regulation S–AM. As discussed previously, while there is some overlap between Regulation S–AM and the affiliate sharing provisions of the FCRA and the notice provisions of Regulation S–P, we expect that Covered Persons will consolidate the notice provisions of Regulation S–AM, the affiliate sharing provisions of the FCRA and the privacy notice provisions of Regulation S–P.[344] We sought and received no comment regarding any other statute or regulation, including State or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed rules.

E. Agency Actions To Minimize Effects on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objectives of a rule while minimizing any significant adverse impact on small businesses. In connection with Regulation S–AM, the Commission considered the following alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed rules for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the proposed rules, or any part thereof, for small entities.

The Commission does not 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 final 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 final rules and the use of examples, including model forms for affiliate marketing notices. The Commission solicited and received no comment on any alternative system that would be consistent with the FACT Act but would minimize the impact on small entities.

VIII. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a)(2) of the Exchange Act[345] requires the Commission, in adopting rules under the Exchange Act, to consider the impact that the rules may have upon competition. Regulation S–AM, which implements Section 214 of the FACT Act, applies to all brokers, dealers, investment companies, registered investment advisers, and registered transfer agents. Each of these entities must provide notice and an opportunity to opt out to customers before an affiliate uses eligibility information to make marketing solicitations to consumers. Because other entities will be subject to substantially similar affiliate marketing and opt out notice rules adopted by the Agencies,[346] all financial institutions will have to bear costs of implementing the rules or substantially similar rules. We do not believe the rules will result in anti-competitive effects. Other affiliated persons that make marketing solicitations using eligibility information received from a Covered Person subject to Regulation S–AM or the substantially similar rules of the Agencies will be subject to substantially similar requirements. Therefore, all persons that engage in affiliate marketing based on eligibility information will be required to bear the costs of implementing the rules or substantially similar rules. Although these costs may vary among persons subject to the various affiliate marketing rules, we do not believe that the costs would be significantly greater for any particular entity or entities based on which affiliate marketing rule applies to that entity.

Section 3(f) of the Exchange Act,[347] Section 202(c) of the Investment Advisers Act, and Section 2(c) of the Investment Company Act[348] require the Commission, when engaging in rulemaking to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. We solicited comment on these issues but received none.[349] The rules will result in additional costs for Covered Persons and their affiliates, which may affect their efficiency. As discussed above, however, the rules and the model forms should promote efficiency by minimizing compliance costs. The ability of Covered Persons and their affiliates to use joint notices should further promote efficiency by facilitating the use of notices already prepared by affiliates and the allocation of compliance and notice delivery costs among affiliates. The rules and model forms also should promote competition among Covered Persons and between Covered Persons and other types of entities subject to the affiliate marketing rules of the Agencies by providing a common set of requirements relating to the use of eligibility information for affiliate marketing purposes. We are not aware of any effect the final rules will have on capital formation.

IX. Statutory Authority

The Commission is adopting Regulation S–AM and making conforming, technical amendments to Regulation S–P under the authority set forth in Section 214 of the FACT Act,[350] Sections 17, 17A, 23, and 36 of the Exchange Act,[351] Sections 31 and 38 of the Investment Company Act,[352] and Sections 204 and 211 of the Investment Advisers Act.[353]

X. Text of Final Rules

List of Subjects in 17 CFR Part 248

Affiliate marketing, Brokers, Consumer protection, Dealers, Investment advisers, Investment companies, Privacy, Reporting and recordkeeping requirements, Securities, Transfer agents.

■ For the reasons stated in the preamble, the Securities and Exchange Commission amends 17 CFR part 248 as follows:

PART 248—REGULATIONS S–P AND S–AM

■ 1. The authority citation for part 248 is revised to read as follows:

Authority: 15 U.S.C. 78q, 78q–1, 78w, 78mm, 80a–30, 80a–37, 80b–4, 80b–11, 1681s–3 and note, 1681w(a)(1), 6801–6809, and 6825.

[344] *See* discussion of overlap of Regulation S–AM with the affiliate sharing provisions of the FCRA *supra* Parts II.B and III.

[345] 15 U.S.C. 78w(a)(2).

[346] *See* Joint Rules and FTC rule.

[347] 15 U.S.C. 78c(f).

[348] 15 U.S.C. 80a–2(c).

[349] *See* Proposing Release at 69 FR 42318.

[350] Public Law 108–159, Section 214, 117 Stat. 1952 (2003).

[351] 15 U.S.C. 78q, 78q–1, 78w, and 78mm.

[352] 15 U.S.C. 80a–30 and 80a–37.

[353] 15 U.S.C. 80b–4 and 80b–11.

■ 2. The heading for part 248 is revised to read as set forth above.

■ 3. In part 248, wherever it may occur, remove each reference to ''this part'' and add the reference ''this subpart'' in its place.

§ 248.3 [Amended]

■ 4. In § 248.3, amend paragraphs (a)(1), (a)(2) and (p) by removing the reference ''G–L–B Act'' and adding the reference ''GLBA'' in its place.

Subpart A—[Amended]

■ 5. Remove the heading of subpart A of part 248 and add in its place the following undesignated center heading: ''Privacy and Opt Out Notices''.

Subpart B—[Amended]

■ 6. Remove the heading of subpart B of part 248 and add in its place the following undesignated center heading: ''Limits on Disclosures''.

Subpart C—[Amended]

■ 7. Remove the heading of subpart C of part 248 and add in its place the following undesignated center heading: ''Exceptions''.

Subpart D—[Amended]

■ 8. Remove the heading of subpart D of part 248 and add in its place the following undesignated center heading: ''Relation to Other Laws; Effective Date''.

Subpart A—Regulation S–P: Privacy of Consumer Financial Information and Safeguarding Personal Information

■ 9. Designate §§ 248.1 through 248.30 as subpart A and add a heading to read as set forth above.

■ 10. Reserve §§ 248.31 through 248.100 in subpart A.

Appendix A to Subpart A [Redesignated as Appendix B to Subpart A]

■ 11. Appendix A to part 248 is redesignated as Appendix B to subpart A.

■ 12a. A new Appendix A to Subpart A is added and reserved to read as follows:

Appendix A to Subpart A—Forms [Reserved]

■ 12b. The heading for newly redesignated Appendix B to Subpart A is revised to read as follows:

Appendix B to Subpart A—Sample Clauses

■ 13. Subpart B (§§ 248.101 through 248.128 and Appendix to Subpart B) is added to part 248 to read as follows:

Subpart B—Regulation S–AM: Limitations on Affiliate Marketing

Sec.

Subpart B—Regulation S–AM: Limitations on Affiliate Marketing

§ 248.101 Purpose and scope.

(a) *Purpose.* The purpose of this subpart is to implement section 624 of the Fair Credit Reporting Act, 15 U.S.C. 1681, *et seq.* (''FCRA''). Section 624, which was added to the FCRA by section 214 of the Fair and Accurate Credit Transactions Act of 2003, Public Law 108–159, 117 Stat. 1952 (2003) (''FACT Act'' or ''Act''), regulates the use of consumer information received from an affiliate to make marketing solicitations.

(b) *Scope.* This subpart applies to any broker or dealer other than a notice-registered broker or dealer, to any investment company, and to any investment adviser or transfer agent registered with the Commission. These entities are referred to in this subpart as ''you.''

§ 248.102 Examples.

The examples in this subpart are not exclusive. The examples in this subpart provide guidance concerning the rules' application in ordinary circumstances. The facts and circumstances of each individual situation, however, will determine whether compliance with an example, to the extent applicable, constitutes compliance with this subpart. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise under this subpart. Similarly, the examples do not illustrate any issues that may arise under other laws or regulations.

§§ 248.103–248.119 [Reserved]

§ 248.120 Definitions.

As used in this subpart, 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 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 subpart if:

(1) That company is regulated under section 214 of the FACT Act, Public Law 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) *Concise.* (1) *In general.* The term ''concise'' means a reasonably brief expression or statement.

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

(g) *Consumer* means an individual.

(h) *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)).

(i) *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 dealer 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)).

(j) *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. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

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

(l) *GLBA* means the Gramm-Leach-Bliley Act (15 U.S.C. 6801, *et seq.*).

(m) *Investment adviser* has the same meaning as in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)).

(n) *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.

(o) *Marketing solicitation.* (1) *In general.* The term ''marketing solicitation'' means the marketing of a product or service 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 subpart; 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 marketing communications that are directed at the general public. For example, television, general circulation magazine, billboard advertisements and publicly available Web sites that are not directed to particular consumers would 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 particular consumer that is based on eligibility information received from an affiliate.

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

(q) *Pre-existing business relationship.* (1) *In general.* The term ''pre-existing business relationship'' means a relationship between a person, or a person's licensed agent, and a consumer based on:

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

(ii) 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 the consumer is sent a solicitation covered by this subpart; or

(iii) 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 the consumer is sent a solicitation covered by this subpart.

(2) *Examples of pre-existing business relationships.* (i) If a consumer has a brokerage account with a broker-dealer that is currently in force, the broker-dealer has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(ii) If a consumer has an investment advisory contract with a registered investment adviser, the investment adviser has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(iii) If a consumer was the record owner of securities issued by an investment company, but the consumer redeems these securities, the investment company has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date the consumer redeemed the investment company's securities.

(iv) If a consumer applies for a margin account offered by a broker-dealer, but does not obtain a product or service from or enter into a financial contract or transaction with the broker-dealer, the broker-dealer has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for three months after the date of the application.

(v) If a consumer makes a telephone inquiry to a broker-dealer about its products or services and provides contact information to the broker-dealer, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the broker-dealer has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(vi) If a consumer makes an inquiry by e-mail to a broker-dealer about one of its affiliated investment company's products or services but does not obtain a product or service from, or enter into a financial contract or transaction with the broker-dealer or the investment company, the broker-dealer and the investment company both have a pre-existing business relationship with the consumer and can therefore use eligibility information they receive from their affiliates to make solicitations to the consumer about their products or services for three months after the date of the inquiry.

(vii) If a consumer who has a pre-existing business relationship with an investment company that is part of a group of affiliated companies makes a telephone call to the centralized call center for the affiliated companies to inquire about products or services offered by a broker-dealer affiliated with the investment company, and provides contact information to the call center, the call constitutes an inquiry to the broker-dealer. In these circumstances, the broker-dealer has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from the investment company to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(3) *Examples where no pre-existing business relationship is created.* (i) If a consumer makes a telephone call to a

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

(ii) If a consumer who has an advisory contract with a registered investment adviser makes a telephone call to an affiliate of the investment adviser to ask about the affiliate's retail locations and hours, but does not make an inquiry about the affiliate's products or services, the call does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate. Also, the affiliate's capture of the consumer's telephone number does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate.

(iii) If a consumer makes a telephone call to a broker-dealer in response to an advertisement offering a free promotional item to consumers who call a toll-free number, but the advertisement does not indicate that the broker-dealer's products or services will be marketed to consumers who call in response, the call does not create a pre-existing business relationship between the consumer and the broker-dealer because the consumer has not made an inquiry about a product or service offered by the institution, but has merely responded to an offer for a free promotional item.

(r) *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)).

(s) *You* means:

(1) Any broker or dealer other than a broker or dealer 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));

(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).

§ 248.121 Affiliate marketing opt out and exceptions.

(a) *Initial notice and opt out requirement.* (1) *In general.* You may not use eligibility information about a consumer that you receive from an affiliate to make a marketing solicitation to the consumer, unless:

(i) It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that you may use eligibility information about that consumer received from an affiliate to make marketing solicitations to the consumer;

(ii) The consumer is provided a reasonable opportunity and a reasonable and simple method to ''opt out,'' or the consumer prohibits you from using eligibility information to make marketing solicitations to the consumer; and

(iii) The consumer has not opted out.

(2) *Example.* A consumer has a brokerage account with a broker-dealer. The broker-dealer furnishes eligibility information about the consumer to its affiliated investment adviser. Based on that eligibility information, the investment adviser wants to make a marketing solicitation to the consumer about its discretionary advisory accounts. The investment adviser does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The investment adviser is prohibited from using eligibility information received from its broker-dealer affiliate to make marketing solicitations to the consumer about its discretionary advisory accounts unless the consumer is given a notice and opportunity to opt out and the consumer does not opt out.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By an affiliate that has or has previously had a pre-existing business relationship with the consumer; or

(ii) As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or has previously had a pre-existing business relationship with the consumer.

(b) *Making marketing solicitations.* (1) *In general.* For purposes of this subpart, you make a marketing solicitation if:

(i) You receive eligibility information from an affiliate;

(ii) You use that eligibility information to do one or more of the following:

(A) Identify the consumer or type of consumer to receive a marketing solicitation;

(B) Establish criteria used to select the consumer to receive a marketing solicitation; or

(C) Decide which of your products or services to market to the consumer or tailor your marketing solicitation to that consumer; and

(iii) As a result of your use of the eligibility information, the consumer is provided a marketing solicitation.

(2) *Receiving eligibility information from an affiliate, including through a common database.* You may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that you may access.

(3) *Receipt or use of eligibility information by your service provider.* Except as provided in paragraph (b)(5) of this section, you receive or use an affiliate's eligibility information if a service provider acting on your behalf (whether an affiliate or a nonaffiliated third party) receives or uses that information in the manner described in paragraph (b)(1)(i) or (b)(1)(ii) of this section. All relevant facts and circumstances will determine whether a person is acting as your service provider when it receives or uses an affiliate's eligibility information in connection with marketing your products and services.

(4) *Use by an affiliate of its own eligibility information.* Unless you have used eligibility information that you receive from an affiliate in the manner described in paragraph (b)(1)(ii) of this section, you do not make a marketing solicitation subject to this subpart if your affiliate:

(i) Uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the affiliate's consumer; or

(ii) Directs its service provider to use the affiliate's own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the consumer, and you do not communicate directly with the service provider regarding that use.

(5) *Use of eligibility information by a service provider.* (i) *In general.* You do not make a marketing solicitation subject to this subpart if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that you may access) receives eligibility information from your affiliate that your affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market your products or services to that affiliate's consumer, so long as:

(A) Your affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market your products or services);

(B) Your affiliate establishes specific terms and conditions under which the service provider may access and use your affiliate's eligibility information to market your products and services (or those of affiliates generally) to your affiliate's consumers, such as the identity of the affiliated companies whose products or services may be marketed to the affiliate's consumers by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times your affiliate's consumers may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) Your affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses your affiliate's eligibility information in accordance with the terms and conditions established by your affiliate relating to the marketing of your products or services;

(D) Your affiliate is identified on or with the marketing materials provided to the consumer; and

(E) You do not directly use your affiliate's eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) *Writing requirements.* (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between your affiliate and the service provider; and

(B) The specific terms and conditions established by your affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(6) *Examples of making marketing solicitations.* (i) A consumer has an investment advisory contract with a registered investment adviser that is affiliated with a broker-dealer. The broker-dealer receives eligibility information about the consumer from the investment adviser. The broker-dealer uses that eligibility information to identify the consumer to receive a marketing solicitation about brokerage products and services, and, as a result, the broker-dealer provides a marketing solicitation to the consumer about its brokerage services. Pursuant to paragraph (b)(1) of this section, the broker-dealer has made a marketing solicitation to the consumer.

(ii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that after using the eligibility information to identify the consumer to receive a marketing solicitation about brokerage products and services, the broker-dealer asks the registered investment adviser to send the marketing solicitation to the consumer and the investment adviser does so. Pursuant to paragraph (b)(1) of this section, the broker-dealer has made a marketing solicitation to the consumer because it used eligibility information about the consumer that it received from an affiliate to identify the consumer to receive a marketing solicitation about its products or services, and, as a result, a marketing solicitation was provided to the consumer about the broker-dealer's products and services.

(iii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that eligibility information about consumers who have an investment advisory contract with a registered investment adviser is placed into a common database that all members of the affiliated group of companies may independently access and use. Without using the investment adviser's eligibility information, the broker-dealer develops selection criteria and provides those criteria, marketing materials, and related instructions to the investment adviser. The investment adviser reviews eligibility information about its own consumers using the selection criteria provided by the broker-dealer to determine which consumers should receive the broker-dealer's marketing materials and sends the broker-dealer's marketing materials to those consumers. Even though the broker-dealer has received eligibility information through the common database as provided in paragraph (b)(2) of this section, it did not use that information to identify consumers or establish selection criteria; instead, the investment adviser used its own eligibility information. Therefore, pursuant to paragraph (b)(4)(i) of this section, the broker-dealer has not made a marketing solicitation to the consumer.

(iv) The same facts as in the example in paragraph (b)(6)(iii) of this section, except that the registered investment adviser provides the broker-dealer's criteria to the investment adviser's service provider and directs the service provider to use the investment adviser's eligibility information to identify investment adviser consumers who meet the criteria and to send the broker-dealer's marketing materials to those consumers. The broker-dealer does not communicate directly with the service provider regarding the use of the investment adviser's information to market its products or services to the investment adviser's consumers. Pursuant to paragraph (b)(4)(ii) of this section, the broker-dealer has not made a marketing solicitation to the consumer.

(v) An affiliated group of companies includes an investment company, a principal underwriter for the investment company, a retail broker-dealer, and a transfer agent that also acts as a service provider. Each affiliate in the group places information about its consumers into a common database. The service provider has access to all information in the common database. The investment company controls access to and use of its eligibility information by the service provider. This control is set forth in a written agreement between the investment company and the service provider. The written agreement also requires the service provider to establish reasonable policies and procedures designed to ensure that the service provider uses the investment company's eligibility information in accordance with specific terms and conditions established by the investment company relating to the marketing of the products and services of all affiliates, including the principal underwriter and the retail broker-dealer. In a separate written communication, the investment company specifies the terms and conditions under which the service provider may use the investment company's eligibility information to market the retail broker-dealer's products and services to the investment company's consumers. The specific terms and conditions are: a list of affiliated companies (including the retail broker-dealer) whose products or services may be marketed to the investment company's consumers by the service provider; the specific products or services or types of products or services that may be marketed to the investment company's consumers by the service provider; the categories of eligibility information that may be used by the service provider in marketing products or services to the investment company's consumers; the types or categories of the investment company's consumers to whom the service provider may market products or services of investment company affiliates; the number and types of marketing communications that the service provider may send to the investment company's consumers; and the length of time during which the service provider may market the products or services of the investment company's affiliates to its consumers.

The investment company periodically evaluates the service provider's compliance with these terms and conditions. The retail broker-dealer asks the service provider to market brokerage services to certain of the investment company's consumers. Without using the investment company's eligibility information, the retail broker-dealer develops selection criteria and provides those criteria, its marketing materials, and related instructions to the service provider. The service provider uses the investment company's eligibility information from the common database to identify the investment company's consumers to whom brokerage services will be marketed. When the retail broker-dealer's marketing materials are provided to the identified consumers, the name of the investment company is displayed on the retail broker-dealer's marketing materials, an introductory letter that accompanies the marketing materials, an account statement that accompanies the marketing materials, or the envelope containing the marketing materials. The requirements of paragraph (b)(5) of this section have been satisfied, and the retail broker-dealer has not made a marketing solicitation to the consumer.

(vi) The same facts as in the example in paragraph (b)(6)(v) of this section, except that the terms and conditions permit the service provider to use the investment company's eligibility information to market the products and services of other affiliates to the investment company's consumers whenever the service provider deems it appropriate to do so. The service provider uses the investment company's eligibility information in accordance with the discretion afforded to it by the terms and conditions. Because the terms and conditions are not specific, the requirements of paragraph (b)(5) of this section have not been satisfied.

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

(1) To make a marketing solicitation to a consumer with whom you have a pre-existing business relationship;

(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 paragraph shall not be construed as permitting you to send marketing solicitations on behalf of an affiliate if the affiliate would not be permitted to send the marketing solicitation as a result of the election of the consumer to opt out under this subpart;

(4) In response to a communication about your products or services initiated by the consumer;

(5) In response to an authorization or request by the consumer to receive solicitations; or

(6) If your compliance with this subpart 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) *Example of the pre-existing business relationship exception.* A consumer has a brokerage account with a broker-dealer. The consumer also has a deposit account with the broker-dealer's affiliated depository institution. The broker-dealer receives eligibility information about the consumer from its depository institution affiliate and uses that information to make a marketing solicitation to the consumer about the broker-dealer's college savings accounts. The broker-dealer may make this marketing solicitation even if the consumer has not been given a notice and opportunity to opt out because the broker-dealer has a pre-existing business relationship with the consumer.

(2) *Examples of service provider exception.* (i) A consumer has a brokerage account with a broker-dealer. The broker-dealer furnishes eligibility information about the consumer to its affiliate, a registered investment adviser. Based on that eligibility information, the investment adviser wants to make a marketing solicitation to the consumer about its advisory services. The investment adviser does not have a pre-existing business relationship with the consumer and none of the other exceptions in paragraph (c) of this section apply. The consumer has been given an opt out notice and has elected to opt out of receiving such marketing solicitations. The investment adviser asks a service provider to send the marketing solicitation to the consumer on its behalf. The service provider may not send the marketing solicitation on behalf of the investment adviser because, as a result of the consumer's opt out election, the investment adviser is not permitted to make the marketing solicitation.

(ii) The same facts as in paragraph (d)(2)(i) of this section, except the consumer has been given an opt out notice, but has not elected to opt out. The investment adviser asks a service provider to send the solicitation to the consumer on its behalf. The service provider may send the marketing solicitation on behalf of the investment adviser because, as a result of the consumer's not opting out, the investment adviser is permitted to make the marketing solicitation.

(3) *Examples of consumer-initiated communications.* (i) A consumer who is the record owner of shares in an investment company initiates a communication with an affiliated registered investment adviser about advisory services. The affiliated investment adviser may use eligibility information about the consumer it obtains from the investment company or any other affiliate to make marketing solicitations regarding the affiliated investment adviser's services in response to the consumer-initiated communication.

(ii) A consumer who has a brokerage account with a broker-dealer contacts the broker-dealer to request information about how to save and invest for a child's college education without specifying the type of savings or investment vehicle in which the consumer may be interested. Information about a range of different products or services offered by the broker-dealer and one or more of its affiliates may be responsive to that communication. Such products, services, and investments may include the following: investments in affiliated investment companies; investments in section 529 plans offered by the broker-dealer; or trust services offered by a different financial institution in the affiliated group. Any affiliate offering products or services that would be responsive to the consumer's request for information about saving and investing for a child's college education may use eligibility information to make marketing solicitations to the consumer in response to this communication.

(iii) A registered investment adviser makes a marketing call to the consumer without using eligibility information received from an affiliate. The investment adviser leaves a voice-mail message that invites the consumer to call a toll-free number to receive information about services offered by the investment adviser. If the consumer calls the toll-free number to inquire about the investment advisory services, the call is a consumer-initiated communication about a product or service, and the investment adviser may now use eligibility information it receives from its affiliates to make marketing solicitations to the consumer.

(iv) A consumer calls a broker-dealer to ask about retail locations and hours, but does not request information about

its products or services. The broker-dealer may not use eligibility information it receives from an affiliate to make marketing solicitations to the consumer because the consumer-initiated communication does not relate to the broker-dealer's products or services. Thus, the use of eligibility information received from an affiliate would not be responsive to the communication and the exception does not apply.

(v) A consumer calls a broker-dealer to ask about retail locations and hours. The customer service representative asks the consumer if there is a particular product or service about which the consumer is seeking information. The consumer responds that the consumer wants to stop in and find out about mutual funds (*i.e.,* registered open-end investment companies). The customer service representative offers to provide that information by telephone and mail additional information to the consumer. The consumer agrees and provides or confirms contact information for receipt of the materials to be mailed. The broker-dealer may use eligibility information it receives from an affiliate to make marketing solicitations to the consumer about mutual funds because such marketing solicitations would respond to the consumer-initiated communication about mutual funds.

(4) *Examples of consumer authorization or request for marketing solicitations.* (i) A consumer who has a brokerage account with a broker-dealer authorizes or requests information about life insurance offered by the broker-dealer's insurance affiliate. The authorization or request, whether given to the broker-dealer or the insurance affiliate, would permit the insurance affiliate to use eligibility information about the consumer it obtains from the broker-dealer or any other affiliate to make marketing solicitations to the consumer about life insurance.

(ii) A consumer completes an online application to open an online brokerage account with a broker-dealer. The broker-dealer's online application contains a blank check box that the consumer may check to authorize or request information from the broker-dealer's affiliates. The consumer checks the box. The consumer has authorized or requested marketing solicitations from the broker-dealer's affiliates.

(iii) A consumer completes an online application to open an online brokerage account with a broker-dealer. The broker-dealer's online application contains a check box indicating that the consumer authorizes or requests information from the broker-dealer's affiliates. The consumer does not deselect the check box. The consumer has not authorized or requested marketing solicitations from the broker-dealer's affiliates.

(iv) The terms and conditions of a brokerage account agreement contain preprinted boilerplate language stating that by applying to open an account the consumer authorizes or requests to receive solicitations from the broker-dealer's affiliates. The consumer has not authorized or requested marketing solicitations from the broker-dealer's affiliates.

(e) *Relation to affiliate-sharing notice and opt out.* Nothing in this subpart limits the responsibility of a person to comply with the notice and opt out provisions of Section 603(d)(2)(A)(iii) of the FCRA (15 U.S.C. 1681a(d)(2)(A)(iii)) where applicable.

§ 248.122 Scope and duration of opt out.

(a) *Scope of opt out.* (1) *In general.* Except as otherwise provided in this section, the consumer's election to opt out prohibits any affiliate covered by the opt out notice from using eligibility information received from another affiliate as described in the notice to make marketing solicitations to the consumer.

(2) *Continuing relationship.* (i) *In general.* If the consumer establishes a continuing relationship with you or your affiliate, an opt out notice may apply to eligibility information obtained in connection with:

(A) A single continuing relationship or multiple continuing relationships that the consumer establishes with you or your affiliates, including continuing relationships established subsequent to delivery of the opt out notice, so long as the notice adequately describes the continuing relationships covered by the opt out; or

(B) Any other transaction between the consumer and you or your affiliates as described in the notice.

(ii) *Examples of continuing relationships.* A consumer has a continuing relationship with you or your affiliate if the consumer:

(A) Opens a brokerage account or enters into an advisory contract with you or your affiliate;

(B) Obtains a loan for which you or your affiliate owns the servicing rights;

(C) Purchases investment company shares in his or her own name;

(D) Holds an investment through you or your affiliate; such as when you act or your affiliate acts as a custodian for securities or for assets in an individual retirement arrangement;

(E) Enters into an agreement or understanding with you or your affiliate whereby you or your affiliate undertakes to arrange or broker a home mortgage loan for the consumer;

(F) Enters into a lease of personal property with you or your affiliate; or

(G) Obtains financial, investment, or economic advisory services from you or your affiliate for a fee.

(3) *No continuing relationship.* (i) *In general.* If there is no continuing relationship between a consumer and you or your affiliate, and you or your affiliate obtain eligibility information about a consumer in connection with a transaction with the consumer, such as an isolated transaction or an application that is denied, an opt out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

(ii) *Examples of isolated transactions.* An isolated transaction occurs if:

(A) The consumer uses your or your affiliate's ATM to withdraw cash from an account at another financial institution; or

(B) A broker-dealer opens a brokerage account for the consumer solely for the purpose of liquidating or purchasing securities as an accommodation, *i.e.,* on a one-time basis, without the expectation of engaging in other transactions.

(4) *Menu of alternatives.* A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt out notice but not other types of affiliates covered by the notice, electing to prohibit marketing solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit marketing solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all marketing solicitations from all of the affiliates that are covered by the notice.

(5) *Special rule for a notice following termination of all continuing relationships.* (i) *In general.* A consumer must be given a new opt out notice if, after all continuing relationships with you or your affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with you or your affiliate(s) and the consumer's eligibility information is to be used to make a marketing solicitation. The new opt out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent with paragraph (b) of this section, the consumer's decision not to opt out after receiving the new opt out

notice would not override a prior opt out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt out notice applies to eligibility information obtained in connection with the terminated relationship.

(ii) *Example.* A consumer has an advisory contract with a company that is registered with the Commission as both a broker-dealer and an investment adviser, and that is part of an affiliated group. The consumer terminates the advisory contract. One year after terminating the advisory contract, the consumer opens a brokerage account with the same company. The consumer must be given a new notice and opportunity to opt out before the company's affiliates may make marketing solicitations to the consumer using eligibility information obtained by the company in connection with the new brokerage account relationship, regardless of whether the consumer opted out in connection with the advisory contract.

(b) *Duration of opt out.* The election of a consumer to opt out must be effective for a period of at least five years (the ''opt out period'') beginning when the consumer's opt out election is received and implemented, unless the consumer subsequently revokes the opt out in writing or, if the consumer agrees, electronically. An opt out period of more than five years may be established, including an opt out period that does not expire unless revoked by the consumer.

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

§ 248.123 Contents of opt out notice; consolidated and equivalent notices.

(a) *Contents of opt out notice.* (1) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(i) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC bank and securities companies and the XYZ insurance companies'';

(ii) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and securities companies and the XYZ insurance companies'';

(iii) A general description of the types of eligibility information that may be used to make marketing solicitations to the consumer;

(iv) That the consumer may elect to limit the use of eligibility information to make marketing solicitations to the consumer;

(v) That the consumer's election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires;

(vi) If the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, that the consumer who has chosen to limit marketing solicitations does not need to act again until the consumer receives a renewal notice; and

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

(2) *Joint relationships.* (i) If two or more consumers jointly obtain a product or service, a single opt out notice may be provided to the joint consumers. Any of the joint consumers may exercise the right to opt out.

(ii) The opt out notice must explain how an opt out direction by a joint consumer will be treated. An opt out direction by a joint consumer may be treated as applying to all of the associated joint consumers, or each joint consumer may be permitted to opt out separately. If each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the joint consumers and the joint consumers must be permitted to exercise their separate rights to opt out in a single response.

(iii) It is impermissible to require *all* joint consumers to opt out before implementing *any* opt out direction.

(3) *Alternative contents.* If the consumer is afforded a broader right to opt out of receiving marketing than is required by this subpart, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt out rights.

(4) *Model notices.* Model notices are provided in the Appendix to this subpart.

(b) *Coordinated and consolidated notices.* A notice required by this subpart may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law by the entity providing the notice, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the FCRA (15 U.S.C. 1681a(d)(2)(A)(iii)) and the GLBA privacy notice.

(c) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, satisfies the requirements of this section.

§ 248.124 Reasonable opportunity to opt out.

(a) *In general.* You must not use eligibility information that you receive from an affiliate to make marketing solicitations to a consumer about your products or services unless the consumer is provided a reasonable opportunity to opt out, as required by § 248.121(a)(1)(ii).

(b) *Examples of a reasonable opportunity to opt out.* The consumer is given a reasonable opportunity to opt out if:

(1) *By mail.* The opt out notice is mailed to the consumer. The consumer is given 30 days from the date the notice is mailed to elect to opt out by any reasonable means.

(2) *By electronic means.* (i) The opt out notice is provided electronically to the consumer, such as by posting the notice at an Internet Web site at which the consumer has obtained a product or

service. The consumer acknowledges receipt of the electronic notice. The consumer is given 30 days after the date the consumer acknowledges receipt to elect to opt out by any reasonable means.

(ii) The opt out notice is provided to the consumer by e-mail where the consumer has agreed to receive disclosures by e-mail from the person sending the notice. The consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* The opt out notice is provided to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction. There is a simple process that the consumer may use to opt out at that time using the same mechanism through which the transaction is conducted.

(4) *At the time of an in-person transaction.* The opt out notice is provided to the consumer in writing at the time of an in-person transaction. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, and is not permitted to complete the transaction without making a choice. There is a simple process that the consumer may use during the course of the in-person transaction to opt out, such as completing a form that requires consumers to write a ''yes'' or ''no'' to indicate their opt out preference or that requires the consumer to check one of two blank check boxes—one that allows consumers to indicate that they want to opt out and one that allows consumers to indicate that they do not want to opt out.

(5) *By including in a privacy notice.* The opt out notice is included in a GLBA privacy notice. The consumer is allowed to exercise the opt out within a reasonable period of time and in the same manner as the opt out under that privacy notice.

§ 248.125 Reasonable and simple methods of opting out.

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a marketing solicitation to the consumer about your products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by § 248.121(a)(1)(ii).

(b) *Examples.* (1) *Reasonable and simple opt out methods.* Reasonable and simple methods for exercising the opt out right include:

(i) Designating a check-off box in a prominent position on the opt out form;

(ii) Including a reply form and a self-addressed envelope together with the opt out notice;

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

(iv) Providing a toll-free telephone number that consumers may call to opt out; or

(v) Allowing consumers to exercise all of their opt out rights described in a consolidated opt out notice that includes the GLBA privacy, FCRA affiliate sharing, and FCRA affiliate marketing opt outs, by a single method, such as by calling a single toll-free telephone number.

(2) *Opt out methods that are not reasonable and simple.* Reasonable and simple methods for exercising an opt out right *do not* include:

(i) Requiring the consumer to write his or her own letter;

(ii) Requiring the consumer to call or write to obtain a form for opting out, rather than including the form with the opt out notice; or

(iii) Requiring the consumer who receives the opt out notice in electronic form only, such as through posting at an Internet Web site, to opt out solely by paper mail or by visiting a different Web site without providing a link to that site.

(c) *Specific opt out means.* Each consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for that consumer.

§ 248.126 Delivery of opt out notices.

(a) *In general.* The opt out notice must be provided so that each consumer can reasonably be expected to receive actual notice. For opt out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in this subpart or 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 reasonable expectation of actual notice.* A consumer may reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Hand-delivers a printed copy of the notice to the consumer;

(2) Mails a printed copy of the notice to the last known mailing address of the consumer;

(3) Provides a notice by e-mail to a consumer who has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(4) Posts the notice on the Internet Web site at which the consumer obtained a product or service electronically and requires the consumer to acknowledge receipt of the notice.

(c) *Examples of no reasonable expectation of actual notice.* A consumer may not reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Only posts the notice on a sign in a branch or office or generally publishes the notice in a newspaper;

(2) Sends the notice by e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(3) Posts the notice on an Internet Web site without requiring the consumer to acknowledge receipt of the notice.

§ 248.127 Renewal of opt out elections.

(a) *Renewal notice and opt out requirement.* (1) *In general.* After the opt out period expires, you may not make marketing solicitations to a consumer who previously opted out, unless:

(i) The consumer has been given a renewal notice that complies with the requirements of this section and §§ 248.124 through 248.126, and a reasonable opportunity and a reasonable and simple method to renew the opt out, and the consumer does not renew the opt out; or

(ii) An exception in § 248.121(c) applies.

(2) *Renewal period.* Each opt out renewal must be effective for a period of at least five years as provided in § 248.122(b).

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By the affiliate that provided the previous opt out notice, or its successor; or

(ii) As part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt out notice.

(b) *Contents of renewal notice.* The renewal notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate it is being provided by multiple companies with the ABC name

or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and securities companies and the XYZ insurance companies'';

(2) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and securities companies and the XYZ insurance companies'';

(3) A general description of the types of eligibility information that may be used to make marketing solicitations to the consumer;

(4) That the consumer previously elected to limit the use of certain information to make marketing solicitations to the consumer;

(5) That the consumer's election has expired or is about to expire;

(6) That the consumer may elect to renew the consumer's previous election;

(7) If applicable, that the consumer's election to renew will apply for the specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires; and

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

(c) *Timing of the renewal notice.* (1) *In general.* A renewal 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 marketing solicitations that would have been prohibited by the expired opt out are made to the consumer.

(2) *Combination with annual privacy notice.* If you provide an annual privacy notice under the GLBA, providing a renewal notice with the last annual privacy notice provided to the consumer before expiration of the opt out period is a reasonable period of time before expiration of the opt out in all cases.

(d) *No effect on opt out period.* An opt out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt out period, even if the consumer does not renew the opt out.

§ 248.128 Effective date, compliance date, and prospective application.

(a) *Effective date.* This subpart is effective September 10, 2009.

(b) *Mandatory compliance date.* Compliance with this subpart is required not later than January 1, 2010.

(c) *Prospective application.* The provisions of this subpart do not prohibit you from using eligibility information that you receive from an affiliate to make a marketing solicitation to a consumer if you receive such information prior to January 1, 2010. For purposes of this section, you are deemed to receive eligibility information when such information is placed into a common database and is accessible by you.

Appendix to Subpart B—Model Forms

a. Although you and your affiliates are not required to use the model forms in this Appendix, use of a model form (if applicable to each person that uses it) complies with the requirement in section 624 of the FCRA for clear, conspicuous, and concise notices.

b. Although you may need to change the language or format of a model form to reflect your actual policies and procedures, any such changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Acceptable changes include, for example:

1. Rearranging the order of the references to ''your income,'' ''your account history,'' and ''your credit score.''

2. Substituting other types of information for ''income,'' ''account history,'' or ''credit score'' for accuracy, such as ''payment history,'' ''credit history,'' ''payoff status,'' or ''claims history.''

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as ''the [ABC] group of companies.''

4. Substituting other types of affiliates covered by the notice for ''credit card,'' ''insurance,'' or ''securities'' affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt out period, the notice may omit information about the renewal notice.

6. Adding a statement informing the consumer how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: ''If you previously opted out, you do not need to do so again.''

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address.

10. Adding disclosures regarding the treatment of opt-outs by joint consumers to comply with § 248.123(a)(2), if applicable.

A–1—Model Form for Initial Opt Out Notice (Single-Affiliate Notice)

A–2—Model Form for Initial Opt Out Notice (Joint Notice)

A–3—Model Form for Renewal Notice (Single-Affiliate Notice)

A–4—Model Form for Renewal Notice (Joint Notice)

A–5—Model Form for Voluntary ''No Marketing'' Notice

A–1—Model Form for Initial Opt Out Notice (Single-Affiliate Notice)—[Your Choice to Limit Marketing]/[Marketing Opt Out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You may limit our affiliates in the [ABC] group of companies, such as our [investment adviser, broker, transfer agent, and investment company] affiliates, from marketing their products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].

• Your choice to limit marketing offers from our affiliates will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.—.com*

• By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

☐ Do not allow your affiliates to use my personal information to market to me.

A–2—Model Form for Initial Opt Out Notice (Joint Notice)—[Your Choice to Limit Marketing]/[Marketing Opt Out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You may limit the [ABC] companies, such as the [ABC investment companies, investment advisers, transfer agents, and broker-dealers] affiliates, from marketing their products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].

• Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from the [ABC] companies, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.—.com*

• By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

☐ Do not allow any company [in the ABC group of companies] to use my personal information to market to me.

A–3—Model Form for Renewal Notice (Single-Affiliate Notice)—[Renewing Your Choice to Limit Marketing]/[Renewing Your Marketing Opt Out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You previously chose to limit our affiliates in the [ABC] group of companies, such as our [investment adviser, investment company, transfer agent, and broker-dealer] affiliates, from marketing their products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].

• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.—.com*

• By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

☐ Renew my choice to limit marketing for [x] more years.

A–4—Model Form for Renewal Notice (Joint Notice)—[Renewing Your Choice to Limit Marketing]/[Renewing Your Marketing Opt Out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You previously chose to limit the [ABC] companies, such as the [ABC investment adviser, investment company, transfer agent, and broker-dealer] affiliates, from marketing their products or services to you based on your personal information that they receive from other ABC companies. This information includes your [income], your [account history], and your [credit score].

• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.—.com*

• By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

☐ Renew my choice to limit marketing for [x] more years.

A–5—Model Form for Voluntary ''No Marketing'' Notice—Your Choice to Stop Marketing

• [Name of Affiliate] is providing this notice.

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

• [Your choice to stop marketing from us and our affiliates will apply until you tell us to change your choice.]

To stop all marketing, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.—.com*

• By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

☐ Do not market to me.

Dated: August 4, 2009.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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