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

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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.

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 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.

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306 See Coalition Letter.

307 See Proposing Release at 69 FR 42322.

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

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308 See Proposing Release at 69 FR 42312.

309 See ICBA Letter.

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"

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[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.

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

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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.

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 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

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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.

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

(continued)

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 x $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 x $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 x $40).[318]

We received one comment on the cost-benefit analysis, which stated that the estimates

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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.

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

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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.

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 x $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 of $256,[324] with an estimated total cost of $10,073,088 (39,348 x $256) in the first year. We also estimate that each of the 2,186 Covered Persons will

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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 x .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.

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.

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 x $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

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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.

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

329 See Proposing Release at 69 FR 42314-16.

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

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.

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 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

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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).

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.

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

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[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.

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

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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.

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 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

338 Pub. L. No. 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.

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.

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[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.

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.

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

[343] See § 248.123(a).

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,

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

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

345 15 USC 78w(a)(2).

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

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346 See Joint Rules and FTC rule.

347 15 USC 78c(f).

348 15 USC 80a-2(c).

349 See Proposing Release at 69 FR 42318.

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:

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.

2. The heading for part 248 is revised to read as follows:

Part 248 – REGULATIONS S-P AND S-AM

3. In part 248, 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.

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350 Pub. L. No. 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.

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".

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

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

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 by adding the heading to read as set forth above.

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

Appendix B to Subpart A – Sample Clauses

11. Appendix A to part 248 is redesignated as Appendix B to subpart A and the heading is revised to read as set forth above.

12. New Appendix A to Subpart A is added and reserved to read as follows:

Appendix A to Subpart A – Forms

[Reserved]

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

248.101 Purpose and scope.

248.102 Examples.

248.103 – 248.119 [Reserved]

248.120 Definitions.

248.121 Affiliate marketing opt out and exceptions.

248.122 Scope and duration of opt out.

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

248.124 Reasonable opportunity to opt out.

248.125 Reasonable and simple methods of opting out.

248.126 Delivery of opt out notices.

248.127 Renewal of opt out elections.

248.128 Effective date, compliance date, and prospective application.

Appendix to Subpart B – Model Forms

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, Pub. L. No. 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, Pub. L. No. 108-159, 117 Stat. 1952 (2003), by a government regulator other than the Commission; and

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

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

78o(b)(11)).

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

(d) Commission means the Securities and Exchange Commission.

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

(f) 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 [Insert date 30 days after publication in the

Federal Register].

(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 send me marketing material.

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: August 4, 2009