



August 12, 2004

Via Electronic Filing

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609

**Re: Proposed Rule: Limitations on Affiliate Marketing (Regulation S-AM);
Release Nos. 34-49985; IC-26494; IA-2259; File No. S7-29-04**

Dear Mr. Katz:

The Investment Counsel Association of America¹ appreciates the opportunity to comment on the Commission's proposed Regulation S-AM² implementing certain limitations on affiliate marketing, as mandated by the Fair and Accurate Credit Transactions Act of 2003 (FACT Act).³

The proposal would require that if federally registered investment advisers⁴ communicate "eligibility information"⁵ (also referred to as "information") of a consumer⁶ to

¹ The Investment Counsel Association of America, Inc. is a not-for-profit organization that represents the interests of SEC-registered investment advisory firms. Founded in 1937, the ICAA's membership today consists of about 350 federally registered advisory firms that collectively manage in excess of \$4 trillion for a wide variety of individual and institutional clients. Additional information about the ICAA is available on our web site: www.icaa.org.

² *Proposed Rule: Limitations on Affiliate Marketing (Regulation S-AM)*; Release Nos. 34-49985; IC-26494; IA-2259; File No. S7-29-04 (Jul. 8, 2004) (proposal), as published in 69 FR 42302 (Jul. 14, 2004) (Release).

³ Pub. L. No. 108-159, § 214, 117 Stat. 1952 (2003). The FACT Act amended the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681-1681x.

⁴ Proposed Regulation S-AM applies to brokers, dealers, investment companies, investment advisers registered with the Commission and transfer agents registered with the Commission. We comment only with respect to federally registered investment advisers.

⁵ "Eligibility information" incorporates the concept of "consumer report" in the FCRA and is defined as "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." Proposed 17 CFR 247.3(i); Release at 42318. It may include any information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, whether that information was obtained from a person's own transactions or experiences with the consumer (*e.g.*, information about a

the adviser's affiliate,⁷ the affiliate may not use the information to make or send marketing solicitations to the consumer, unless prior to such use by the affiliate: (1) the adviser provides clear and conspicuous notice to the consumer that the information may be communicated to and used by the adviser's affiliate to make or send marketing solicitations to the consumer about the affiliate's products and services; (2) the adviser provides the consumer a reasonable opportunity and a simple method to "opt out" of the affiliate's use of the information; and (3) the consumer has not chosen to opt out. The proposal provides for several exceptions from the opt-out notice requirements.⁸

The ICAA commends the Commission and its staff for issuing such a thorough proposal in the short time period provided by Congress. We support the Commission's effort to implement rules in compliance with the FACT Act to protect a consumer's right to restrict marketing solicitations made to them by the company's affiliate based on certain information received by the affiliate. However, we request that the Commission clarify and modify proposed Regulation S-AM: (A) to conform the definitions of "affiliate" and "consumer" to Regulation S-P's definitions; (B) to clarify that the opt-out notice is triggered only by the adviser's affiliate using the eligibility information of the adviser's consumers to make or send marketing solicitations; (C) to clarify the ability of an adviser to include affiliates' marketing solicitations in the adviser's periodic statements or other communications to consumers; (D) to permit the use of oral notice and opt-outs; and (E) to provide a 15-month compliance date for the rule.

consumer's account history with that person) or from other sources (*e.g.*, information received from credit bureau reports). Release at 42306.

⁶ "Consumer" is defined as "an individual." Proposed 17 CFR 247.3(f); Release at 42318.

⁷ An "affiliate" of an adviser is "any person that is related by common ownership or common corporate control with the" adviser. In addition, an adviser will be deemed an affiliate of a company if: (1) that company is regulated under Section 214 of the FACT Act 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 adviser as an affiliate of that company. *See* Proposed 17 CFR 247.3(a); Release at 42318. The term "person" under the proposal means "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." Proposed 17 CFR 247.3(o); Release at 42319. *See also* 15 U.S.C. 1681a(b) (same definition in the FCRA).

⁸ Under the proposal's exceptions, the notice and opt-out sections of Regulation S-AM do not apply if the affiliate uses eligibility information it receives from an adviser: (1) to make or send a marketing solicitation to a consumer with whom the affiliate has a pre-existing business relationship (as defined in the proposal); (2) to facilitate communications to an individual for whose benefit the affiliate provides employee benefits 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 for another affiliate; (4) in response to a communication initiated by the consumer orally, electronically, or in writing; (5) in response to an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a marketing solicitation; or (6) if the adviser's or affiliate's compliance with the notice and opt-out requirements would prevent it from complying with state insurance laws relating to unfair discrimination in any state in which the entity is doing business. Proposed 17 CFR 247.20(c); Release at 42319-20.

A. Definitions

We support consistency in the proposal with Regulation S-P,⁹ which implemented Title V of the Gramm-Leach-Bliley Act of 1999¹⁰ and which has the same general policy goals as Regulation S-AM of protecting consumer information. The proposed definition of “clear and conspicuous”¹¹ is the same as the definition in Regulation S-P.¹² Entities subject to Regulation S-P, such as investment advisers, have significant experience with privacy notices, which enables them to understand how to satisfy the clear and conspicuous standard so that notices are understandable to consumers. In addition, the proposed definition of “control”¹³ is similar to the definition of control in Regulation S-P.¹⁴ Thus, we believe these proposed definitions are sufficient.

The proposed definition of “affiliate,”¹⁵ however, is not consistent with the definition of “affiliate” in Regulation S-P.¹⁶ Due to the fact that varying definitions of the same terms will cause unnecessary burdens and complexities, we strongly urge the Commission to ensure consistency to the maximum extent possible. Accordingly, we request the Commission amend the proposed definition of “affiliate” in Regulation S-AM to be more consistent with the definition of “affiliate” in Regulation S-P.¹⁷

⁹ See 17 CFR 248.1 - 248.30.

¹⁰ 15 U.S.C. 6801-6831 (GLB Act).

¹¹ The proposal defines clear and conspicuous as “reasonably understandable and designed to call attention to the nature and significance of the information presented.” Proposed 17 CFR 247.3(c); Release at 42318.

¹² See 17 CFR 248.3(c)(1). Moreover, Regulation S-P provides examples of “clear and conspicuous” after the definition. See 17 CFR 248.3(c)(2).

¹³ “Control” of a company is proposed to be defined as “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 the 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)).” Proposed 17 CFR 247.3(g); Release at 42318.

¹⁴ See 17 CFR 248.3(i).

¹⁵ *Supra* note 7.

¹⁶ See 17 CFR 248.3(a).

¹⁷ We recommend the Commission define “affiliate” of an adviser as “any person that controls, is controlled by, or is under common control with the . . .” adviser. See 17 CFR 248.3(a) (Regulation S-P definition of “affiliate”).

We further request that the Commission clarify the definition of “consumer” so that it more closely tracks the definition in Regulation S-P.¹⁸ The obligations for financial institutions to provide privacy notices and affiliate marketing opt-out notices should not differ based upon the definition of consumer. As proposed, consumer means an individual.¹⁹ However, to follow the definition in Regulation S-P more closely, the Commission could adopt a definition of consumer such as, “an individual whose eligibility information derives from accounts, products or services used for personal, family or household purposes, or that person’s legal representative.”²⁰ This definition would exclude, for example, sole proprietorships, which do not have the same characteristics as a natural person. In order to further standardize the definition, we recommend the Commission include the same examples that accompany the definition of consumer in Regulation S-P in its definition of consumer for Regulation S-AM.²¹

B. Triggering Event for Opt-Out Notice Requirements

The proposal generally makes clear that the triggering event for the opt-out notice requirement is the adviser’s affiliate using the eligibility information of the adviser’s consumer to make or send marketing solicitations to the consumer. The FACT Act and the proposed rule do not establish, nor should the final rule establish, opt-out notice requirements merely when an adviser shares eligibility information with its affiliates. This distinction is important because a financial institution may share information related to its customers with its affiliates for any number of important business reasons other than for marketing purposes. For example, a financial institution may share information with an affiliate in order to: conduct research and analysis about products, services, or customers; evaluate demographic information about customers; and better understand customers to become a more efficient provider of financial services.

¹⁸ Under Regulation S-P, “consumer means an individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family, or household purposes, or that individual’s legal representative.” 17 CFR 248.3(g)(1).

¹⁹ Proposed 17 CFR 247.3(f); Release at 42318.

²⁰ The FACT Act defines “consumer” to have the same meaning as in Section 603 of the FCRA, which defines consumer as an individual. However, the FACT Act specifically authorizes the Commission to “prescribe regulations to implement section 624” of the FCRA, as amended by the FACT Act. In crafting rules pursuant to this specific authority, the Commission has proposed definitions that contain minor, non-substantive changes from various legislative provisions. In doing so, the Commission has recognized that such changes are necessary to achieve consistency and to avoid confusion. For example, although the FACT Act defined “affiliate” to mean persons that are related by common ownership or affiliated by common control, the Commission proposed a more lengthy and detailed definition in Regulation S-AM. See Pub. L. No. 108-159, § 214, 117 Stat. 1952 (2003); Proposed 17 CFR 247.3(a); Release at 42318. In addition, the Commission proposed a definition of marketing solicitation that “tracks the definition in Section 624 of the FCRA, [but] it does not follow the statute exactly.” Release at 42306. The Commission noted that, “[m]odifications are intended to prevent confusion in the context of the federal securities laws.” *Id.* We submit that the modifications we have requested are necessary for the same reasons.

²¹ See 17 CFR 248.3(g)(2). For example, under Regulation S-P, an individual is not a consumer solely because he or she is a beneficiary of a trust for which an adviser is a trustee. See 17 CFR 248.3(g)(2)(vii).

However, language in the proposal and the proposed rule seem to suggest that an adviser sharing eligibility information with an affiliate, without the affiliate using it to make or send marketing solicitations, may trigger the opt-out notice requirements. Accordingly, we request the Commission adopt clarifying language in the following areas.

First, the proposal states, “[t]he requirements of notice and opt-out would only apply if a receiving affiliate uses eligibility information for marketing purposes.”²² However, the following sentence notes that, “[t]hus, the requirements [to send notice by the adviser (the entity with whom the consumer has the relationship)] would not apply if no eligibility information is communicated to affiliates, or if no receiving affiliate uses eligibility information to make marketing solicitations.”²³ This could imply that the notice and opt-out requirements *would* apply if eligibility information were simply communicated to an affiliate, without the affiliate using the information to make marketing solicitations. We request the Commission clarify this inconsistency in the final adopting release.

Second, and more importantly, we request the language in the proposed rule itself be clarified. Specifically, we request the Commission to revise the proposed “rules of construction” described in proposed 17 CFR 247.20(a)(2)(ii)²⁴ to align the rules more closely with the intent of the FACT Act. We suggest the following clarifying language:

(ii) *Avoiding duplicate notices.* If Affiliate A communicates eligibility information about a consumer to Affiliate B, and Affiliate B communicates that same information to Affiliate C who plans to make marketing solicitations, Affiliate B does not have to give an opt-out notice to the consumer prior to Affiliate C’s use, so long as Affiliate A’s notice is broad enough to cover Affiliate C’s use of the eligibility information to make marketing solicitations to the consumer.

This language would more closely align that section with the example rule of construction contained in 17 CFR 247.20(a)(2)(iii), which provides that “the rules of construction would (A) Permit B to *use the information to make marketing solicitations . . .*” (emphasis added).²⁵

C. Advisers Providing Affiliate Marketing Information

As discussed above, the FACT Act does not prohibit the sharing of eligibility information among affiliates. The statute is intended to cover direct marketing communications by an affiliate that does not have a direct relationship with the consumer.

²² Release at 42307.

²³ *Id.*

²⁴ Proposed 17 CFR 247.20(a)(2)(ii) (*Avoiding duplicate notices*) provides that, “If Affiliate A communicates eligibility information about a consumer to Affiliate B, and Affiliate B communicates that same information to Affiliate C, Affiliate B does not have to give an opt-out notice to the consumer *when it provides eligibility information to Affiliate C*, so long as Affiliate A’s notice is broad enough to cover Affiliate C’s use of the eligibility information to make marketing solicitations to the consumer.” (emphasis added).

²⁵ Release at 42319.

Section 214 of the FACT Act states that the affiliate “may not use the [eligibility] information [it received] to make a solicitation for marketing purposes to a consumer about its products or services”²⁶ without providing the notice and opt-out. Accordingly, we do not believe the proposed opt-out notice requirements should apply if an adviser includes an affiliate’s marketing material along with the adviser’s periodic statements or other communications (e.g., web sites, newsletters, etc.).²⁷ This activity is not covered or contemplated by the FACT Act. Thus, Regulation S-AM should not prohibit any marketing of the products or services of an adviser’s affiliate merely because it may be included in the adviser’s periodic statements or other communications. As discussed above, the triggering event for Regulation S-AM requirements, as mandated by the FACT Act, is an *affiliate’s* making or sending marketing solicitations on the basis of the consumer-specific eligibility information that the affiliate received. Implementing a different rule would be inconsistent with the FACT Act and the intent of Congress.

The Commission seeks comment on whether, and to what extent, various tools used in Internet marketing, such as pop-up ads, could constitute marketing solicitations as opposed to communications directed at the general public.²⁸ An adviser’s or its affiliate’s advertisement on the adviser’s Internet web site that “pops up” alongside the display of information about the consumer’s relationship with the adviser is being provided by the adviser, much in the same manner that the adviser may choose to place information about its affiliate’s product as a “statement stuffer.” In this case, the adviser would be providing a service to its clients regarding the adviser’s or its affiliate’s available products and services. This is distinguishable from an affiliate using the consumer’s eligibility information to make or send a marketing solicitation directly to the consumer. Moreover, the definition of “marketing solicitation” requires the marketing be “initiated by” the adviser’s affiliate.²⁹ Therefore, marketing conducted by the adviser is not governed by Section 214 of the FACT Act and should not be covered by the proposed rules.

In addition, the Commission seeks comment on whether certain Internet marketing tools could constitute marketing solicitations as opposed to communications to the general public.³⁰ The rules governing electronic, Internet communications with a consumer should not vary dramatically from those governing written communications. Thus, pop-up

²⁶ *Supra* note 3.

²⁷ The Commission notes that, “Proposed paragraph (a) would not apply if, for example, a financing company affiliated with a broker-dealer asks the broker-dealer to include financing-company marketing materials in periodic statements sent to consumers by the broker-dealer without regard to eligibility information.” Release at 42307.

²⁸ Release at 42306.

²⁹ Marketing solicitation means marketing initiated by an adviser’s affiliate to a particular consumer that is: (i) based on eligibility information communicated to the affiliate by the adviser; and (ii) intended to encourage the consumer to purchase or obtain a product or service. Proposed 17 CFR 247.3(n); Release at 42319.

³⁰ Release at 42306.

advertisements should be considered “marketing solicitations” only if they fall into the proposed definition.³¹

D. Oral Notice and Opt-Out

The proposal permits the opt-out notice to be provided to a consumer in writing or, if the consumer agrees, electronically.³² The Commission requests comment on whether oral notice and opt-out should be permitted.³³ The ICAA believes that oral notice and opt-out should be permitted for affiliate marketing notices.³⁴ The goals sought by the requirements governing written or electronic requirements could be satisfied by an adviser using a standard script and/or a “frequently asked questions” (FAQ) script to provide the requisite notice to the consumer and permit him or her to opt-out at that time. A script and/or FAQ could meet the definition of “clear and conspicuous” as long as it is reasonably understandable and calls attention to the nature and significance of the information presented in person or on a telephone call. A one-on-one meeting or telephone call between a consumer and an adviser’s representative may be even more likely to assist a consumer in understanding the substance of the affiliate marketing rules because the consumer has the ability to ask questions and provide verbal responses. Any methods used by the adviser to track oral opt-outs could be easily implemented in way similar to those methods used to track written or electronic opt-outs.

E. Effective Date and Mandatory Compliance Date

The Commission seeks comment on “what the mandatory compliance date should be and whether it should be different from the effective date of the final rules in order to permit institutions to incorporate the affiliate marketing notice into their next annual GLB Act privacy notice.”³⁵ We believe the Commission should allow for a longer compliance period than the effective date in order to help institutions incorporate their affiliate marketing notices into their next privacy notices and to reduce costs. We respectfully request the Commission implement a compliance date that is at least 15 months after the regulation’s publication date. For Regulation S-P, the Commission implemented a compliance date 12 months after the publication date, which was reasonable given that Regulation S-P required financial institutions to implement their notice requirements for the first time and coordination with other federally mandated notices was not necessary. However, for Regulation S-AM, some advisers undoubtedly will have already delivered their privacy notices by the time the final Regulation S-AM is published this year. Moreover, other advisers may be mailing their annual privacy notice shortly after the publication date of Regulation S-AM and would not have a meaningful opportunity to incorporate their affiliate marketing notice into their privacy

³¹ Marketing solicitation does not include communications that are directed at the general public without regard to eligibility information. Release at 42306.

³² Release at 42308.

³³ *Id.*

³⁴ We recommend that such provisions and examples be added to Proposed 17 CFR 247.22(b), 17 CFR 247.23(a), and 17 CFR 247.24(b).

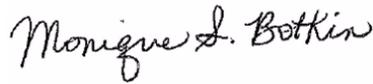
³⁵ Release at 42309.

notice. With only a one-year compliance date, the affiliate marketing compliance date would expire by the time the next privacy notice would be due under the adviser's normal schedule. Thus, advisers would need a period longer than one year to coordinate their affiliate marketing notice into their next privacy notice.

* * *

For all of these reasons, we respectfully request that the Commission clarify and/or modify the proposal as discussed. We appreciate your consideration of our comments and would be pleased to work with the Commission to implement our suggestions or to provide additional information. Please do not hesitate to contact the undersigned or ICAA General Counsel Karen Barr to discuss any questions the Commission or its staff may have.

Sincerely,



Monique S. Botkin
ICAA Counsel

cc: The Hon. William H. Donaldson
The Hon. Cynthia A. Glassman
The Hon. Harvey J. Goldschmid
The Hon. Paul S. Atkins
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