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August 16,2004

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Office of Thrift Supervision
1700 G Street, *NW*
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Robert Feldman
Executive Secretary
Federal Deposit Insurance Corporation
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Becky Baker
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314

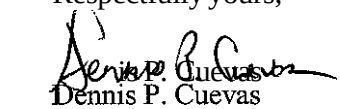
RE: OCC Docket No. 04-16: Federal Reserve Docket No. R-1203: FDIC RIN 3064-AC73; OTS No. 2004-31; and NCUA RIN 1550-AB90.

Dear Sir or Madam:

The Attorneys General of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Guam, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Washington, and Wyoming wish to submit the following comments in the above-mentioned matter.

If you have any questions, please do not hesitate to contact me, at (202) 326-6019. Thank you in advance for your attention to this matter.

Respectfully yours,



Dennis P. Cuevas
Consumer Protection
Project Manager and Counsel

cc: OCC
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Enclosure

COMMENTS OF STATE ATTORNEYS GENERAL FROM ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO CONNECTICUT, DISTRICT OF COLUMBIA, FLORIDA, GUAM, IDAHO, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VERMONT, WASHINGTON, AND WYOMING ON AGENCIES' PROPOSED FAIR CREDIT REPORTING AFFILIATE MARKETING REGULATIONS 69 F.R. 42502, July 15,2004

Office of the Comptroller of the Currency, Docket Number 04-16
Federal Reserve System Board of Governors, Docket No. R-1203
Federal Deposit Insurance Corporation, RIN 3064-AC73
Office of Thrift Supervision, Number 2004-31
National Credit Union Administration, RIN 1550-AB90

These comments are submitted to the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and National Credit Union Administration (collectively "the Agencies") by the undersigned State Attorneys General ("the States") in response to the request for comment on proposed regulations to implement the affiliate marketing provisions in § 214 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act). Section 214, which added new § 624 to the Fair Credit Reporting Act, generally prohibits using specified information obtained from an affiliate to make marketing solicitations unless the consumer has been given notice and an opportunity to opt out of such solicitations.

We commend the Agencies for their efforts in developing a strong and workable rule. At the same time, we believe some modifications would make the rule more effective and better ensure that consumers have real choice and control over the solicitations they receive, as intended by the FACT Act. Experience with similar measures in our states, the complaints consumers send to our office, and the overwhelming public response to the Federal Trade Commission's and our own states' do-not-call lists provide ample evidence that consumers want and need simple and effective means of limiting solicitations, particularly those that come into their homes by telephone, mail, or electronically. We believe the proposed rule, with the modifications suggested here, will result in a final rule that meets this need.

DEFINITIONS(§ --.3)

"Pre-existing Business Relationship" (§ --.3(m))

The Agencies solicit comment on whether there are circumstances other than those listed in the proposed rule that should be included within the definition of "pre-existing relationship." We strongly urge the Agencies to adopt this provision of the rule

as proposed, and to not add any exceptions. As Written, § 624 and the proposed rule allow a business to send solicitations to a former customer for as long as 18 months after the customer relationship has ended, and as long as three months after a simple inquiry, even where the consumer has opted out. We believe these exceptions provide adequate leeway for businesses, and are unaware of any circumstances that would require adding more exceptions to the rule with respect to pre-existing business relationships.

"Solicitation" (§ --.3(n))

Section 624 and the proposed rule provide that "solicitation" does not include communications that are directed at the general public and distributed without the use of eligibility information from an affiliate. The Agencies seek comment on whether there are other communications they should determine do not meet the definition of "solicitation." We do not believe there are any such communications and that none should be added to the proposed rule.

Comment is also requested on whether, and to what extent, tools used in Internet marketing, such as pop-up ads, are solicitations and whether further guidance is needed to address Internet marketing. We believe that such advertisements must be treated as solicitations if they are based on any eligibility information received from an affiliate.

We suggest that the Agencies consider whether to clarify the proposed rule with respect to the provision that a "solicitation" means marketing "to a particular consumer." While we think it is clear that mass mailings of the same or similar marketing materials to a large group of consumers fall within the definition of a "solicitation," so long as the marketing is based on eligibility information received from an affiliate, the use of the term "particular" might be construed by some to require some more individualized approach. We, therefore, recommend the Agencies consider clarifying this portion of the proposed rule.

AFFILIATE USE OF ELIGIBILITY INFORMATION FOR MARKETING (§ --.20)

Applicability of the Proposed Rule to "Constructive Sharing" (§ --.20(a)(1))

Paragraph (a) of section --.20 generally requires that notice and opt out be provided where eligibility information is communicated to an affiliate that uses the information in making or sending solicitations. The Agencies invite comment on whether this paragraph should apply if affiliates seek to avoid the notice and opt-out requirement by engaging in "constructive sharing." An example is given of an insurance company with which a consumer has no relationship providing eligibility criteria to its affiliated bank for purposes of the bank making solicitations on behalf of the insurance company to bank customers who meet the criteria. In addition, it is assumed that the

insurance company would be able to identify consumers who were responding to the solicitation, and would, therefore, be aware that such consumers meet the eligibility criteria.

We think it is clear that both the letter and spirit of § 624 require such a practice be subject to the notice and opt out requirement. To find otherwise would create a significant and unwarranted exception to the basic requirement that consumers be given the opportunity to opt out of marketing solicitations where eligibility information regarding a consumer has been provided to an affiliate for use in making or sending solicitations.

It could not seriously be argued that where a mailing house sends out solicitations on behalf of a business, the mailing house and not the business is "making" the solicitation. Thus, in the example provided by the Agencies, the solicitation is, in reality, made by the insurance affiliate, even though the solicitation is mailed by the bank. So long as there is any means for the insurance affiliate to determine whether a consumer is responding to the offer sent out by the bank, then eligibility information has been communicated and used in making a marketing solicitation, and the proposed rule must apply. We, therefore, urge the Agencies to make clear that the notice and opt out must be provided in instances of "constructive sharing," as well as more direct sharing.

Rules of Construction for Providing Notice and Opt Out (§ --.20(a)(2))

The Agencies invite comment on whether a receiving affiliate should be allowed to give notice solely on its own behalf. As the Agencies correctly point out, a receiving affiliate is unlikely to be an entity from which the consumer would expect to receive such an important communication. A choice that is not properly communicated is really no choice at all. A receiving affiliate, therefore, should not be permitted to give notice solely on its own behalf.

We request that the Agencies consider clarifying section --.20(a)(2)(i). That provision allows the required notice to be given either in the name of an entity with which the consumer currently does <u>or previously has done</u> business, or a common corporate name shared by a group of companies that includes the name used by that entity. We are concerned that without further clarification or guidance, the underscored portion of this provision will result in less effective notices.

Under the exception for a pre-existing business relationship, a person may make solicitations to a former customer for as long as 18 months after the customer relationship ends, without having to provide the opportunity to opt out of such solicitations. Given that the notice and opt-out requirement will not apply until 18 months after the customer relationship ends, we question whether there is any need to permit a notice to be provided in the name of a person with which a consumer "previously has done business." We

believe the Agencies' careful crafting of the proposed rule so as to ensure that notices will be provided in a name that will mean something to a consumer, thereby increasing the likelihood that a consumer will become aware of his/her opt-out right, will be rendered partially ineffective by permitting this important notice to be given by a company that a consumer may not have done business with for more than a year and a half. We, therefore, suggest the Agencies consider striking the phrase "or previously has done business" from section --.20(a)(2)(i).

We believe the Agencies should consider clarifying other provisions regarding the name in which the notice is given. Section --.20(a)(2)(B)(2) allows a person to give notice in its name or a common name or names used by the family of companies; section --.20(a)(2)(C) permits a person to provide a joint notice with one or more affiliates, or under a common name or names used by the family of companies. We believe it is intended that where a person provides a notice under a common name or names used by a family of companies, that common name must be one that includes the name used by that person. We are concerned, however, that this is not sufficiently clear and, therefore, suggest that this requirement be made explicit in sections --.20(a)(2)(B)(2) and (a)(2)(C).

Oral Notice

The Agencies solicit comment on whether there are circumstances where it is necessary and appropriate to allow oral notice and opt out, and how an oral notice can satisfy the statutory requirement for a clear and conspicuous notice. We do not believe an oral notice would meet the statutory requirement for a "clear, conspicuous, and concise" notice. A consumer is much less likely to receive and comprehend the information s/he needs to make an informed decision where the notice and opt out are oral. In addition, enforcement of the rule will be made more difficult if oral notice and opt out are allowed. For these reasons, we strongly urge the Agencies to require a written notice and opt out.

Exceptions to the Proposed Rule (§ --.20(c))

The proposed rule incorporates the statutory exception for use of eligibility information received from an affiliate "in response to a communication initiated by the consumer" (section --.20(c)(4)). The Agencies' section-by-section analysis of the proposed rule notes that, in order to come within this exception, "use of eligibility information must be responsive to the communication initiated by the consumer." This is an appropriate clarification of the exception, and is so important that we believe it should be incorporated into the rule itself.

The Agencies also note in the section-by-section analysis that the time period during which solicitations remain responsive to a consumer inquiry will depend on the facts and circumstances. Although we agree generally with this statement, we believe

some outer time limit should be placed on making solicitations under this exception. We, therefore, suggest that sections (c)(4) and (c)(5) of the proposed rule be modified to provide that in no event may such solicitations be made for a period of more than 30 days after the consumer communication or request. We do not believe such a limitation will frustrate an entity's ability to respond to a consumer's application for or inquiry concerning a specific product or service offered by that entity because of the exception for a pre-existing business relationship.

Mandatory Compliance Date (§ --.20(e))

The FACT Act requires that the regulations become effective not later than six months after the date on which they are issued in final form. The Agencies request comment on whether the mandatory compliance date should be different from the effective date of the final regulations.

There should be no delay in implementing these important rights for consumers, and we urge that the compliance date be no later than the effective date. While we recognize that entities subject to the proposed rule will need some time to comply, it should be noted that § 624 was enacted approximately eight months ago. The statute itself sets forth the basic requirements; consequently, entities subject to the rule have already had considerable time to prepare to comply with the notice and opt-out requirements.

CONTENTS OF OPT-OUT NOTICE (§ --.21)

The proposed rule includes several model notices, and the section-by-section analysis provides the Flesch reading ease scores and Flesch-Kincaid grade level scores for each of the notices. We commend the Agencies for providing these scores and strongly urge that the proposed rule be modified to require that any notice used must obtain scores at least as good as those assigned to the model notices. Although we think a strong argument can be made for a mandatory form, we recognize that the Agencies wish to provide businesses with the flexibility to fashion their own notices. We see no reason, however, why those notices should not achieve the same level of readability as the model notices.

REASONABLE OPPORTUNITY TO OPT OUT (§ --.22)

The proposed rule requires that consumers be given a "reasonable opportunity" to opt out following delivery of the opt-out notice. The Agencies note they believe this provision should be construed as a general test that avoids setting a mandatory waiting period. We must respectfully disagree. We believe consumers should be given at least 45 days from date of mailing or other transmission of the notice to exercise their right to opt out of marketing solicitations. It is important to recognize that consumers do not

always receive or have time to consider and act on notices in a matter of days, or even weeks. Consumers may be ill or away from home, or may handle all bills and business correspondence only once a month. A mandatory waiting period of 45 days is the minimum that is fair and effective. Given the exceptions to the notice and opt-out requirement provided in the statute and the proposed rule that make it workable for businesses, we do not believe those businesses will be harmed by a 45-day waiting period.

EXTENSION OF OPT OUT (§ --.26)

The proposed rule provides that a consumer's election to opt out will remain in effect at least five years; but even after that period expires, a person may not make solicitations using eligibility information from an affiliate unless the person has given the consumer an extension notice and reasonable opportunity to extend the opt out. For the reasons set forth in the preceding paragraph, we believe this "reasonable opportunity" should be at least 45 days.

We appreciate this opportunity to comment on the proposed rule, and thank you for your consideration of our views.

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