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HAND DELIVERED

July 20, 2004

*Before the*  
**Federal Trade Commission**

**FACT Act Affiliate Marketing Rule**

**Matter No. R411006**

**Comments of**

**Cendant Corporation**

Cendant Corporation ("Cendant") appreciates the opportunity to submit these comments on the Federal Trade Commission's ("FTC" or "Commission") Notice of Proposed Rulemaking implementing section 624 that is required by section 214(b) of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act). Section 214(a) of the FACT Act amends the FCRA by adding new section 624, which the proposed regulations implement by providing for the consumer notice and an opportunity to prohibit affiliates from using certain information to make or send marketing solicitations to the consumer.

#### **CENDANT OVERVIEW**

Cendant Corporation is a diversified global provider of business and consumer services within the hospitality, real estate, vehicle, financial and travel sectors.

Cendant's hospitality division is the world's leading franchisor of hotels through ownership of brand names that include Ramada®, Days Inn®, Howard Johnson®, Travelodge®, Knights Inn®, Super 8 Motel®, Wingate Inn®, Villager Lodge/Premier® and AmeriHost®, a leading operator of branded time share resorts (Fairfield®) and the world's leading time share exchange service (RCI®).

Cendant is also the leader in franchised residential real estate brokerage operations through its CENTURY 21®, Coldwell Banker®, Coldwell Banker Commercial®, Sotheby's International Realty® and ERA® brands, a leading residential mortgage company (Cendant Mortgage) and provider of employee relocation services (Cendant Mobility).

In vehicle services, Cendant owns and franchises the AVIS® and Budget® brands, some of the nation's largest car rental systems. Other Cendant subsidiaries provide vehicle fleet management services (PHH Arval and Wright Express).

The financial services division helps financial institutions enhance existing consumer products. Trilegiant Corporation is the premier membership-based provider of travel, shopping, health, entertainment, and consumer protection services.

Cendant provides services to the travel industry primarily through its Galileo®, Wizcom® reservations and global travel ticket distribution services as well as its on-line (Lodging.com and CheapTickets.com) and off-line (Cendant and Cheap Tickets) travel agencies.

## **I. Cendant Has Adopted Voluntary Opt Out Procedures**

Cendant recognizes the important privacy concerns raised when companies share and use a consumer's transactional and experience information with its corporate affiliates. Most Cendant business units have been proactive in the field of privacy. Cendant believes that consumers should have the right to not permit information about them or their purchases be shared, with nonaffiliated third parties or among the Cendant family of businesses. Therefore, the Cendant brands doing business directly with consumers generally offer the consumer at the point of initial contact, where it is most meaningful, the opportunity to opt out and with each additional communication (through newsletters, email and toll free numbers) an opportunity to opt out.

For example, within our Hotel Group, when an individual makes a hotel reservation on our website, the guest is presented with an opt out to receive email solicitations from (i) that particular hotel brand and (ii) Cendant affiliates. For walk-in guest to our hotels, the guest is presented with a registration card which contains the following opt out language at the bottom:

*"Please contact the Manager about any issues with your stay. [BRAND NAME] or affiliates may contact you about goods and services unless you call 877-227-3557 to opt out. View our [BRAND NAME] website about privacy.*

## **II. CONSTRUCTIVE SHARING OF ELIGIBILITY INFORMATION SHOULD NOT BE RESTRICTED BY SECTION 214 of FCRA**

Section 214 adds section 624 of FCRA to provide that a company that receives eligibility information that would otherwise constitute a consumer report<sup>1</sup> from an affiliate may not use the information to make a solicitation to the consumer about the company's products and services unless the consumer is notified that the information is being shared and the consumer is provided an opportunity to prohibit the affiliate from making the solicitation. The proposal suggests that the company responsible for providing this notice and opportunity to opt out is the affiliate company that acquired the consumer data that is being shared.

For example, if Avis receives eligibility information (i.e. transaction experience or personal characteristics of the consumer) from Cheap Tickets, Avis may not make or send solicitations to Cheap Tickets customers unless Cheap Tickets has provided the consumer with notice and an opt out opportunity.

The proposal states that the provisions of section 214 do not apply if a company merely asks its affiliate to send information about the company's products and services to the affiliate's customers. For example, if Avis asks Cheap Tickets to send information about an Avis promotion to Cheap Tickets customers' section 214 is not invoked (i.e. the right to opt out is not triggered), because Avis and Cheap Tickets never exchanged or exposed customer eligibility information with one another for the purpose of solicitation.

The FTC requests comment on whether section 214 should apply if the company engages in "constructive sharing" of eligibility information to conduct marketing. Constructive sharing of eligibility information may arise when a company asks its affiliate to send information to the affiliate's customers who possess certain characteristics. Cendant suggests that when such a customer responds to the information sent by the affiliate, this is implicitly revealing eligibility information to the company. Therefore, the concept of constructive sharing of eligibility information should not be restricted by section 214. To conclude otherwise would create an overly broad rule that restricts the efficiencies of e-commerce and creates a barrier to the consumer/business relationship.

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<sup>1</sup> The FTC uses the term "eligibility information" to refer to information that would be a consumer report if the exclusions from the definition of "consumer report" in 603(d)(2)(A) of the FCRA did not apply. As a result, the disclosure to an affiliate of information that is experience and transaction information or certain other information that relates to the consumer's personal characteristics would trigger the requirements of 214 if the affiliate wishes to use the information to market to the consumer.

For example, Cheap Tickets.com and Lodging.com are leading and growing online airline and hotel reservation travel sites. The websites provide consumers with the ability to book airline tickets and discounted hotel rooms all at one easy location. Visitors to either site will see prominent links, enabling them to search and ultimately purchase air travel or hotel accommodations directly from the site's homepage. Once purchase is complete the consumer may receive a special offer attached to their receipt confirmation/reservation from a Cendant affiliate such as Avis. If the consumer chooses to take advantage of the Avis offer the consumer will authorize the car rental transaction by submitting his/her eligibility information. At this point, it is clear to the consumer that they have directly authorized the second transaction with Avis. Therefore, to extend an opt-out would be redundant and confusing to the consumer and overly burdensome and cost prohibitive to the business.

The above example of constructive sharing of consumer eligibility information for targeted marketing purposes by companies such as Cendant that operate through many affiliates illustrates the enhanced benefits that such practices provide to consumers. Consumers are made aware of other products or services that compliment the purchase decision they have just made in a format that permits them to conveniently purchase the additional product or service – if they desire to do so. It is important to emphasize that only after the consumer decides to purchase the additional product or service is the consumer's information to complete the transaction provided to the affiliate company.

To require an opt out under section 214 for constructive sharing of consumer eligibility information will dramatically limit consumer choices and convenience but will do nothing to enhance the consumer's control over the use of his/her data by affiliates since there is no data sharing unless a purchase is authorized by the consumer. Cendant urges the Commission to make clear that when a consumer who has received the targeted solicitation authorizes a purchase, the consumer implicitly authorizes that his/her eligibility information be provided to the company that will be supplying the desired products or services. Therefore, the concept of constructive sharing of eligibility information should not be restricted by section 214.

### **III. The Commission Should Provide For A Coordinated and Consolidated Gramm-Leach-Bliley (GLB) and FCRA Notice.**

Cendant operations that are classified as financial institutions under GLB currently provide privacy notices. Cendant financial institutions may in the future wish to share consumer information to its affiliated companies in order to provide greater value to the customer. Currently, consumers have a legal right under federal law to opt out of information sharing under GLB<sup>2</sup>. To add the affiliate sharing opt out under FCRA to the

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<sup>2</sup> In 1999, Congress passed and the President signed into law the Gramm-Leach-Bliley Act (GLB). GLB made several fundamental changes to the laws governing the financial system, including easing the limits on the types of financial institutions that may be affiliated with one another. GLB also established some

current GLB opt out notice would be more productive. In light of the expanding array of fields in which financial institutions, as defined by GLB, may now have affiliates it would be more prudent to combine the privacy notice requirement under GLB with the current proposed opt out requirement. This approach would provide greater clarity to the consumer and facilitate the use of a single notice.

Rather than have a consumer receive many additional pieces of paper it is more efficient to have a single notice that combines affiliate marketing opt out notice and a privacy notice under the GLB. Providing the notice in a GLB Act privacy notice and allowing the consumer to opt out within a reasonable time period and in the same manner as the opt out under the GLB should be considered reasonable and therefore an acceptable practice to be employed by companies.

#### **IV. The Entity Communicating Information About the Consumer To Its Affiliate Should Be Responsible For Satisfying The Notice Requirement.**

We concur with the Commission's suggestion that the entity communicating information about a consumer to its affiliate should be responsible for satisfying the notice requirement. The company providing the information has the relationship with the consumer and communicates information to affiliates therefore the communicating entity is in a better position to provide the required notice.

#### **V. Pre-Existing Business Relationship Exemption**

The Commission notes that the pre-existing business relationship exemption ("PBRE") is substantially similar to the established business relationship exemption ("EBR") under the Do Not Call rules. There is a significant difference however in the application of the rule "the reasonable expectations of the consumer." The Commission indicates that the reasonable expectations of the consumer should be considered when determining the scope of the PBRE - unfortunately the Commission does not use the same flexibility as with the EBR regarding the "transfer" of the exemption to an affiliate. The PBRE would only extend to an affiliate if the consumer requests the information or provides contact information to the affiliate. The Do Not Call rules however, allow transfer of an EBR if a consumer would reasonably expect to receive such a call based on the name of the affiliate and the type of goods or services to be offered. Consistency between these rules would allow for easier and more effective compliance by businesses.

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baseline rules governing the circumstances under which financial institutions may disclose personal information about consumers with whom they do business. GLB generally requires that a financial institution provide a clear and conspicuous notice of its privacy practices and explanation of how the consumer can "opt out" before sharing their non-public information with unaffiliated third parties.

Cendant appreciates the opportunity to comment on the FTC's proposal. Cendant remains committed to working cooperatively with the FTC in finding feasible solutions to the concerns set forth herein.

Thank you for considering our views,

A handwritten signature in cursive script that reads "Kimberly Hunter Turner". The signature is written in black ink and is positioned below the text "Thank you for considering our views,".

Respectfully submitted,