Comment #: 29

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Federal Trade Commission
Office of the Secretary
Room H-159 (Annex Q)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FACT Act Affiliate Marketing Rule, Matter No. R411006

Dear Sir or Madam:

Bank of America Corporation ("Bank of America") welcomes the opportunity to comment on the Proposed Rule ("Proposal") issued by the Federal Trade Commission ("Commission") regarding the affiliate marketing provisions included in Section 624 of Fair Credit Reporting Act ("FCRA") as amended by the Fair and Accurate Credit Transactions Act ("FACT Act"). Bank of America is one of the world's largest financial institutions, serving individual consumers, small businesses and large corporations with a full range of banking, investing, asset management and other financial and risk-management products and services. The company provides unmatched convenience in the United States, serving 33 million consumer relationships with 5,700 retail banking offices, more than 16,000 ATMs and award-winning online banking with more than ten million active users.

The FACT Act requires the Commission, the Federal Banking Agencies (the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision), the National Credit Union Administration and the Securities and Exchange Commission to prescribe regulations to implement Section 624 of the Fair Credit Reporting Act, as amended by the FACT Act. These agencies are required to consult and coordinate with each other, so that, to the extent possible, the regulations they issue are consistent and comparable. Bank of America is submitting this comment letter to the Commission to identify the primary concerns it has with the Proposal, but also intends to submit more detailed comments to the Federal Banking Agencies, to which comments are due August 16, 2004.

The Commission has asked for comments on whether it is appropriate to consider "constructive sharing" of information in connection with solicitations made by the affiliate that holds the information about a consumer, for another affiliate's products, where no information is shared with the affiliate for whose products the solicitation is made. The example sets forth a situation where the finance company affiliate provides eligibility criteria to its retail affiliate, so that the retail affiliate can include marketing materials to eligible customers on behalf of the finance company. The Commission argues that when the customer responds to the finance company affiliate, the consumer will effectively provide information (that he or she meets the eligibility criteria) to the finance company affiliate. As such, the Commission asks whether this "constructive sharing" should be subject to the opt out rule.

Bank of America believes that the plain language of the statute dictates that the scenario described above would not be subject to Section 624. Section 624 only restricts marketing solicitations. It does not restrict sharing of information among affiliates. The law states that "[a]ny person that receives from another person related to it by common ownership or affiliated by corporate control a communication of information that would be a consumer report, but for [Section 603(d)(2)(A) of the FCRA], may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless" the consumer receives a notice and opportunity to opt out. Therefore, there must be an exchange of "eligibility information" among the affiliates and the affiliate receiving that information (in the above example, the finance company affiliate) must use that information to make a solicitation in order for Section 624 to apply.

In this scenario, there is no exchange of "eligibility information" among the affiliates. The consumer actually provides the information that may reveal the eligibility criteria to the receiving affiliate. Information provided by the consumer about him or herself does not constitute a "consumer report" (or "eligibility information") under the FCRA. Even if there were an exchange of information between the two affiliates (which Bank of America does not agree has occurred), the receiving affiliate still did not use the information to make a solicitation. The solicitation was made by the retail affiliate, which had the customer relationship and information. Any receipt of the information by the finance company affiliate does not occur, if at all, until after the solicitation was made. Therefore, this situation of "constructive sharing" is not covered by Section 624 at all.

Another significant issue relates to the exception that permits an affiliate to use "eligibility information" from another affiliate in response to a communication initiated by the consumer. The Commission is interpreting this exception too narrowly by imposing a requirement that the use of the information must be directly responsive to the consumer's communication. Specifically, the Commission uses the example that if a consumer calls and asks about an affiliate's products and services, then solicitations related to those products and services would be responsive. However, we note that often

consumers do not know what to ask about and may call with questions or concerns that could be addressed by a product or service that the institution could offer.

In addition, the Proposal indicates that a consumer does not initiate a communication if an affiliate make the initial call and leaves a message for the consumer to call back and the consumer responds. This interpretation would not permit an affiliate that made a call for servicing purposes, where the customer was not at home and calls back, to use affiliate information to offer various solutions to that customer when he or she calls back. Bank of America does not believe that this narrow interpretation is consistent with good customer service or expectations that the company as a whole knows and understands the customer. Furthermore, it would be nearly impossible to determine whether a customer's call was in response to a prior call from the affiliate or initiated solely by the consumer. This interpretation is entirely too restrictive and is unworkable. In addition, it is not consistent with the statute, which merely says that the use of the information is "in response to a communication initiated by the consumer." The clear intent of that language was that the affiliate could use "eligibility information" from an affiliate to respond to a customer's communication. That does not require that it be narrowly responsive.

Bank of America encourages the Commission to consider extending the time for compliance with the rule for at least 6 months beyond the effective date of the rule. Congress clearly anticipated that companies might chose to provide the notice together with the Gramm-Leach-Bliley Act notices, and doing such would be the best option for consumers to avoid many additional notices. However, many institutions are tied into a schedule for providing those notices. Institutions we able to set the 12-month period for providing annual notices, but once set, must consistently follow that schedule. If mandatory compliance with this rule is set for March of 2005, most institutions will be unable to include this notice within the GLB Act notices and will be forced to expend significant resources to send millions of additional notices to consumers who do not wish to receive additional notices. This is clearly not the intent of Congress.

As mentioned above, Bank of America will provide additional detailed comments to the Federal Banking Agencies and will provide copies to the Commission at that time. Bank of America appreciates the opportunity to comment on the Proposal. If you have any questions regarding our comments, please contact Kathryn D. Kohler, Assistant General Counsel, at (704) 386-9644.

Very truly yours,

Kathryn D. Kohler

Kathryn D. Kohler
Assistant General Counsel