Comment #: 47

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August 13, 2004

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1-5
Washington, DC 20219

Re: Fair Credit Reporting Act - Affiliate Marketing Regulations; Docket No. 04-16

Ladies and Gentlemen:

This comment letter is submitted on behalf of MBNA America Bank, N.A. ("MBNA") in response to the notice of proposed rulemaking ("Proposed Rule") and request for public comment issued by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of Thrift Supervision (collectively, the "Agencies"), published in the Federal Register on July 15, 2004. Pursuant to the Fair Credit Reporting Act ("FCRA"), as amended by the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), the Proposed Rule would prescribe regulations to implement section 624 of the FCRA concerning affiliate marketing. MBNA appreciates the opportunity to comment on this important topic.

Background

The FCRA permits financial institutions to share transaction and experience data between affiliated entities without limitation, and to share information that otherwise would be considered a consumer report with affiliates if customers are provided notice and an opportunity to opt out prior to any sharing. However, section 624 of the FCRA, as amended by section 214 of the FACT Act, limits the ability of financial institutions to use certain information by providing that "eligibility information" received by one affiliate from another cannot be used for marketing purposes unless the consumer is provided notice and an opportunity to opt out.

The Proposed Rule would implement section 624 of the FCRA, but would impose requirements that differ in nature and structure from the requirements of section 624 of the FCRA, as well as the privacy provisions of the Gramm-Leach-Bliley Act ("GLBA"), and raise questions as to the scope and operation of the affiliate marketing provisions in section 624.

The Financial Institution Sharing Eligibility Information with an Affiliate Should Not Have Any Notice Obligation

The Proposed Rule provides that if a financial institution shares "eligibility information" with an affiliate, the affiliate may not use this information for consumer marketing purposes unless the financial institution first provides to consumers notice and an opportunity to opt out, and the consumers do not opt out.

We believe the final rules issued by the Agencies ("Final Rule") should not impose a notice obligation on the financial institution that shares eligibility information with an affiliate. Section 624 of the FCRA does not establish a general restriction on the sharing of information with or among affiliates; it provides only that an affiliate that receives eligibility information may not use it for marketing purposes (absent an applicable exception) unless and until the consumer has been given notice and an opportunity to opt out. The Agencies recognize this point in the Supplementary Information, which states that section 624 "governs the *use* of information by an affiliate, not the *sharing* of information with or among affiliates", and that the section "is drafted as a prohibition on the affiliate that receives [eligibility] information from using such information to send solicitations, rather than as an affirmative duty imposed on the affiliate that sends or communicates that information." While affiliated companies might decide, for operational and other reasons, to have the "sharing affiliate" provide the notice, the statute does not impose such an obligation on that entity.

The only reasonable and practical way to address the affiliate marketing limitation in section 624 is to impose the notice and proper use requirements on the affiliate using the information, as reflected in the statute itself. Moreover, since section 624 does not limit the ability of financial institutions to share eligibility information with affiliates, the Proposed Rule goes beyond the requirements of section 624 in imposing duties on financial institutions that share eligibility information, and would expose them to civil liability based on the use of this information by their affiliates. The Proposed Rule is not consistent with the statutory language of section 624 nor with the legislative intent behind this provision. While the FCRA does not specify which entity must provide the opt-out notice, this lack of specification does not override the clear language of section 624(b) that the affiliate using eligibility information received from an affiliate to make a marketing solicitation may provide the notice. Section 624(b) of the FCRA specifically contemplates that the affiliate receiving and using eligibility information for marketing purposes could be the person who provides the notice.

The Final Rule Should Not Require a Specific Entity to Provide the Notice

Further to our position that a financial institution sharing eligibility information with an affiliate should not be required to provide the opt-out notice to the consumer, we believe the Final Rule should not require that any specific entity provide the notice. Rather, the only requirement should be that consumers receive a notice before an affiliate may make a solicitation based on eligibility information received from another affiliate. The identity of the entity that actually provides the notice should be irrelevant.

The Agencies interpret the requirement that the notice disclose to the consumer that "information may be communicated" among affiliates for the purpose of making solicitations as meaning that the entity communicating the eligibility information must provide the notice. This statement, however, simply informs the consumer that an entity may make consumer marketing solicitations based on information received from an affiliate. Section 624 provides only that the consumer may opt out of the use, and not the sharing, of eligibility information.

The Agencies also seek justification for the Proposed Rule in the FACT Act requirement that they consider existing affiliate sharing notification practices and provide for coordinated and consolidated notices. Again, this provision does not imply that the entity sharing eligibility information with an affiliate must provide the notice. Congress was seeking only to ensure that the notice requirement would be consistent with existing disclosure practices and could be coordinated with other disclosures required by law.

We believe the Final Rule should not require that any specific entity provide the opt-out notice, but should require only that before a marketing solicitation is made to the consumer, the consumer receive an opt-out notice. This approach would promote flexibility by allowing any affiliate to provide the notice.

The Final Rule Should Not Address Constructive Sharing

The Agencies request comment on whether the Proposed Rule should apply if affiliated companies in "constructive sharing" of eligibility information to conduct marketing. As described by the Agencies, "constructive sharing" occurs when a financial institution uses its own information to make marketing solicitations to its own customers concerning an affiliate's products or services, and the responses provide the affiliate with discernible eligibility information about those consumers. We believe that neither the letter nor the purpose of section 624 of the FCRA encompasses such practices and, that, the Final Rule should not limit what the Agencies call "constructive sharing."

Section 624 Does not Cover Constructive Sharing

Section 624 addresses only the use of information after it has been shared, not the sharing of information itself, and applies only if (a) an entity has received from an affiliate information that would be a consumer report if the FCRA exemption for transaction and experience information and other information shared with affiliates did not apply; (b) the entity uses this information to make marketing solicitations to consumers; *and* (c) the marketing solicitations are for the products or services of the entity receiving the information and making the solicitations. Section 624, by its terms, does not prohibit an entity from using its own information to solicit its own customers for the products or services of a third party, including an affiliate.

In "constructive sharing," the entity making the solicitation does not receive eligibility information from an affiliate, and the entity on whose behalf the solicitation is made only receives information from a consumer's response after the solicitation has been made. Section 624 should not apply in such situations.

In addition, section 624 of the FCRA applies only when an institution uses eligibility information *received from an affiliate* to make a marketing solicitation concerning "its" products

or services. The word "its" in "about its products or services" is not ambiguous and clearly refers to the entity that makes the solicitations and not the affiliate communicating the eligibility information. If an entity is marketing the products or services of its affiliate, the entity would not be marketing its own products or services and, as a result, section 624 would not require notice and opt out. In constructive sharing, an entity does not market its own products or services, and as a result, section 624 does not apply.

Section 624 Excepts Constructive Sharing

Moreover, section 624 expressly excludes from the notice and opt-out requirement any person who uses information to send marketing solicitations to a consumer with whom the person has a pre-existing business relationship, and this exception is not limited to marketing of the institution's own products or services. The notice and opt-out requirement does not apply when an entity makes marketing solicitations for an affiliate's products or services to its own customers, because the entity has a pre-existing business relationship with those customers. In constructive sharing, the pre-existing business relationship exception applies because an entity makes solicitations to its own customers, i.e. persons with whom, by definition, the entity has a pre-existing business relationship (see p.5, infra).

Constructive Sharing is Consistent with the Purposes of Section 624

Neither the language of, nor the policy behind, section 624 supports application of the notice and opt-out requirement to constructive sharing. The use of eligibility information by an entity to market an affiliate's products to its own customers is not the equivalent of an affiliate using the same information to market to another entity's customers. An entity that makes marketing solicitations to its own customers has a strong incentive to maintain those customer relationships and will take care not to jeopardize those relationships by over aggressively marketing its products or services. In contrast, an affiliate that lacks a current customer relationship might see less risk or downside from aggressive marketing practices. The scheme of section 624 - limiting the marketing practices of an affiliate without a customer relationship, but not limiting the marketing practices of the institution with a customer relationship - is based on this distinction. The determination whether the section 624 notice and opt-out requirement applies should depend on *which entity markets the product*, not what the product is or whose product it is. Solicitations for the same product are treated differently, depending on who makes those solicitations, and the distinguishing characteristic is each party's marketing incentive.

Constructive Sharing is Beyond the Scope of Section 624 Rulemaking

The FACT Act requires the Agencies to prescribe regulations to "implement section 624" of the FCRA, i.e., to write rules to implement the notice and opt-out requirement. If the Agencies prescribe rules that limit conduct not addressed by section 624, such as by limiting the ability of an entity to market its own customers the products or services of its affiliate, those rules would not "implement section 624", unless the language of that section was ambiguous or would lead to an absurd result, which is not the case. The general limitation of section 624 expressly refers to an institution making solicitations for "its products or services," while the pre-existing business relationship exception has no such reference. Similarly, Section 624 defines a "solicitation" as "the marketing of a product or service initiated by a person to a particular consumer that is based on an exchange of information described in [section 624(a)], and is intended to encourage the consumer to purchase such product or service . . .". This definition is not rendered ambiguous simply because it does not indicate which party's products or services

are marketed since, as noted above, section 624(a)(1) specifically states that a solicitation covered by section 624 concerns *the solicitor's* products or services. Because the notice and opt-out requirement applies only with respect to solicitations for the solicitor's own products and services, the definition does not need to restate whose products or services are at issue. The section applies only to solicitations that concern one entity's products or services—those of the solicitor.

Exceptions to the Notice and Opt-Out Requirement

The Proposed Rule provides several exceptions to the notice and opt-out requirement that generally track the statutory exceptions in section 624(a)(4), and provide that the requirement does not apply when an entity uses eligibility information received from an affiliate: (1) to make or send solicitations to consumers with whom the entity has a pre-existing business relationship; (2) to perform services on behalf of an affiliate; (3) to respond to a communication initiated by a consumer; and (4) to respond to an affirmative authorization or request by the consumer. We believe that the Agencies should make clear in the Final Rule that the notice and opt-out requirement is not applicable if any exception applies.

Pre-Existing Business Relationship ("PBR")

The Proposed Rule would provide an exception for a person that makes or sends a solicitation to a consumer with whom the person has a PBR, i.e., a relationship between a consumer and a person that is based on any one of three factors:

1. A relationship based on a financial contract in force on the date that a solicitation is made or sent to the consumer. The Final Rule should clarify that a "financial contract" includes any in-force contract relating to a financial product or service covered by Title V of GLBA, such as a credit card account as to which charging privileges are in effect or a balance is outstanding.

2. A relationship based on a consumer's purchase, rental or lease of the person's products or services, or a financial transaction with the person (including holding an active credit card or other account or an in-force policy) during the 18 months preceding the date that a solicitation is made or sent to the consumer. The Final Rule should clarify that the 18-month period does not begin until all contractual responsibilities under the purchase, rental, lease or financial transaction have expired. In addition, any account with outstanding contractual responsibilities on either side should be considered an active account for PBR purposes, regardless of whether or not individual transactions occur during the 18 month period.

3. A relationship based on a consumer's inquiry or application regarding the person's products or services during the 3 months preceding the date on which a solicitation is made or sent to the consumer. The Agencies indicate that "an inquiry includes any affirmative request by a consumer for information, such that the consumer would reasonably expect to receive information from the affiliate about its products or services", and take the position that a consumer would not reasonably expect to receive information from the affiliate if the consumer does not both request

information and provide contact information. The Agencies' proposal would severely, and unreasonably, limit the inquiries and applications that would establish a PBR, contrary to section 624(d)(1)(C) of the FCRA, which contains no such limitations.

Servicing

The Proposed Rule provides an exception for a person that uses eligibility information to perform services on behalf of an affiliate, but states that this exception would not permit a bank to market on its own behalf or on behalf of an affiliate if the bank or the affiliate could not make or send the solicitation as a result of the consumer opt in/out. This limitation does not track the language of the FCRA, and the Agencies should clarify that it does not determine whether any other exception applies.

Consumer-Initiated Communications

The Proposed Rule provides an exception for a person that uses eligibility information in response to a communication initiated by a consumer, and indicates that the exception applies only if the eligibility information is used in a way that is responsive to the consumer's communication. We believe this represents an unreasonably narrow interpretation of this exception, since a consumer may not be familiar with all the products or services available from the financial institution or know which affiliate offers a specific product or service. A financial institution should not be limited in its ability to use eligibility information obtained from an affiliate to respond to a consumer-initiated communication.

Consumer Affirmative Authorization or Request

The Proposed Rule provides an exception for a person that uses eligibility information in response to a consumer's affirmative authorization or request to receive a solicitation. This proposed exception is not consistent with section 624 of the FCRA, which does not require that the consumer's authorization or request be "affirmative." A request or authorization can be manifested many ways, and adding the requirement that a request or authorization be affirmative will only artificially limit viable options and inject uncertainty into the process.

Effect of the Opt Out

The Commission explains in the Supplementary Information that the opt-out is tied to the consumer, not to the information. Thus, if a consumer initially elects to opt out, but does not extend the opt-out upon expiration of the opt-out period, a receiving affiliate may use all eligibility information it has received about the consumer from its affiliate, including eligibility information that it received during the opt-out period. However, if the consumer subsequently opts out again some time after the initial opt-out period has lapsed, a receiving affiliate may not use any eligibility information about the consumer it has received from an affiliate on or after the mandatory compliance date for the [Final Rule], including information it received during the period in which not opt-out election was in effect.

With the exception of the applicability of the non-retroactivity provision in relation to the mandatory compliance date discussed above, we agree with the general concept espoused by the Commission with one important revision. While the Commission is correct that the opt out is not tied to the information, we believe that the opt out should not be tied broadly to the consumer. Rather, companies should be allowed to implement a consumer's opt-out directions on an account-by-account basis, i.e., the consumer's opt out would be tied to a particular *account*. This approach is consistent with the approach taken under GLBA and with the statutory language that companies be permitted to provide options to the consumer with respect to "the types of...information covered" (*e.g.*, information relating to specific accounts) by the consumer's opt out. Indeed, it would be difficult if not impossible for many companies to implement an opt out that follows the consumer when the consumer may have a variety of relationships with multiple companies in a single corporate family.

The Final Rule Should Extend the Compliance Date

We believe the Final Rule should allow an additional six months beyond the effective date of the regulations for compliance with respect to new accounts, *i.e.*, financial institutions would have twelve months after the Final Rule is issued to begin complying with the notice and opt-out requirement. This additional compliance time would assist financial institutions that will have to make significant changes to business practices and procedures in order to comply with the Final Rule. Financial institutions cannot design comprehensive compliance programs before the rules are issued in final form due to uncertainty surrounding the final form of the rules.

In addition, we believe many institutions will coordinate the affiliate marketing notice with their annual GLBA privacy notice, a coordination that was contemplated by the effective dates for this provision incorporated into section 624. However, in practice, the transition dates in section 624 are inadequate, since many GLBA notices are mailed after March of each year. We believe the Agencies should allow financial institutions that choose to consolidate the affiliate marketing notice with the GLBA notice to existing customers to begin complying with the Final Rule at the time those institutions provide their next GLBA notice following the mandatory compliance date or December 31, 2005, whichever is earlier. This "roll-out" would allow many financial institutions to coordinate and consolidate the affiliate marketing notice with their "next" GLBA privacy notice, if the institutions so choose, consistent with the statutory directive that the affiliate marketing notice be coordinated with any other legally required notices.

MBNA appreciates the opportunity to comment on these important issues. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact the undersigned.

Sincerely,
MBNA America Bank, N.A.

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