August 16, 2004

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

To Whom It May Concern:

The American Financial Services Association appreciates this opportunity to comment on the Proposed Rule regarding the affiliate marketing provisions included in Section 214(a) of the FACT Act. AFSA is the national trade association for consumer credit providers. The credit products offered by AFSA's members include personal loans, first and second mortgage loans, home equity lines of credit, credit card accounts, retail sales financing and credit insurance.

The Fair and Accurate Transactions Act of 2003 modified the Fair Credit Reporting Act by creating a new section 624 that addresses the use of certain shared consumer information between affiliates for marketing purposes. Specifically, section 624 provides that information that otherwise would not be a consumer credit report under section 603(d) of FCRA cannot be used by an affiliate to make a solicitation for marketing purposes unless the consumer is first given notice of the use for solicitation purposes and an opportunity to opt out of such solicitations by such person.

AFSA is a member of the Coalition to Implement the FACT Act. As a member of the Coalition, we fully align ourselves with their submitted comments. AFSA offers these additional comments.

I. The Term "Pre-Existing Business Relationship" Should be Amended to Extend to a Limited Set of Affiliate Relationships.

Many AFSA members offer similar products to consumers through multiple corporations. In many instances, the formation and operation of multiple corporations are required to meet regulatory restrictions inherent in the financial services business. For example, in some states a lender will choose, or will be required for regulatory reasons, to operate its personal loan operations through a different corporation (or other business entity) than its

mortgage operations. However, both lenders share a common trade name; share common employees; operate out of the same physical location; and offer similar products.

In this and similar cases, consumer expectations would be met by allowing this limited set of affiliates to use eligibility information for solicitation purposes, regardless of whether a consumer has elected to "opt out."

Consumers would anticipate that a company offering a full range of related products or services under a common name, with shared employees out of a single location, would be able to discuss that full range of products or services with their customers. An opt out requirement in this particular scenario would be a triumph of form over substance.

The Proposed Rule would prevent consumers from learning about potentially beneficial options available to them regarding products or services of a type in which the consumer has already shown an interest. For example, in the lending context, a consumer might have a mortgage loan with a lender whose affiliate offers small loans out of the same location utilizing the same employees. If the consumer, who has opted out under the Proposed Rule, has need for additional funds and contacts the lender to refinance his or her mortgage loan, the lender would be prohibited from using eligibility information to suggest to the consumer that a small side loan might be a less costly alternative to refinancing the mortgage loan.

As another example, a lender who is aware that its personal loan customer has a large amount of high rate debt would be unable to discuss with that customer the option of consolidating that debt into a lower rate mortgage loan.

AFSA suggests that this limited exception be incorporated into the definition of "pre-existing business relationship," as follows:

(i) Pre-existing business relationship:
(1) A pre-existing business relationship means a relationship between a person and a consumer, based on—
(a) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by this part;
(b) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which a solicitation covered by this part is made or sent to the consumer; or
(c) An inquiry or application by the consumer regarding a product or service offered by that person during the 3-month period immediately preceding the date on which a solicitation covered by this part is made or sent to the consumer.
(2) If a pre-existing relationship exists with a person as a result of sections (1)(a) – (1)(c), above, it also exists with that person's affiliates so long as –

(a) The affiliates share a common trade name;

(b) The affiliates share the same employees or representatives;
(c) The affiliates operate out of the same physical location or locations; and
(d) The affiliates offer similar products.

II. Dealer Financing

We believe it is critical for the Commission to adopt rules addressing the application of the "pre-existing business relationship" exception in connection with the sale and financing of new automobiles[1] and recognizing the relationship among product manufacturers, their affiliated finance companies and the retailers who sell the products to the public and perform services for the manufacturer and the finance company.

In most states, an automobile manufacturer is prohibited by law from selling motor vehicles (cars and trucks) directly to consumers. This has led to the development of a well established and accepted network of manufacturer authorized or "franchised" dealers who, pursuant to agreements with manufacturers, sell motor vehicles to the general public and provide warranty and other servicing of the vehicles sold. Often, the manufacturer's affiliated or "captive" finance company acquires the financing for the vehicles from the originating dealerships by purchasing from the dealers the installment contracts between the dealers and the customers. The manufacturer, while not a direct seller of its product to the consumer, nevertheless has an ongoing relationship with the consumer well after the vehicle is first obtained from the franchised dealer. This relationship includes warranty obligations, recalls and other communications relevant to the safety and use of the vehicle whether carried out directly or through its franchised dealer. It should be noted that with regard to certain foreign automobile manufacturers, the vehicles are shipped to the United States and then distributed though U.S. based distributors. In those instances, the distributor would play the same role as the domestic manufacturer for purposes of this discussion.

In addition, during the consumer's possession of the vehicle, the manufacturer often sends the consumer marketing materials about its products and services, as well as information relating to product use and safety such as recalls and other information. To provide information that is meaningful and relevant to the consumer, often those marketing plans are supplemented by information obtained from the manufacturer's captive finance company. This information may include experience or transactional information such as the amount of the customer's monthly payment and present status of the consumer's finance contract, allowing the manufacturer to tailor marketing offers that best meet the consumer's needs, including special plans or incentives through the captive finance company available to existing customers of the manufacturer. Because the consumer sought out the manufacturer's products, the consumer often welcomes the subsequent marketing campaigns that allow her to trade into a higher line vehicle or a newer model,

[1] While this section consistently refers to the sale of automobiles through dealers, our discussion and recommendation would apply equally to dealer financing of such items as lawn tractors, motorcycles, ATVs and other motorized items which are typically sold through dealerships.

all with discrete financial benefits for the consumer. In the case of a lease, the consumer must return the vehicle and seek a replacement at lease end. Receiving marketing solicitations from the vehicle's manufacturer near lease-end is well within the consumer's expectations.

The requirements of the proposed rule would considerably complicate the ability of manufacturers to provide such advantageous marketing offers to consumers with whom it has on ongoing business relationship. We wish to clarify that the relationship between the manufacturer and the consumer as described herein meets the definition of "existing business relationship" or alternatively that the relationship be recognized as an "existing business relationship" pursuant to authority granted in 624 (d)(1)(D).

The Commission's discussion in the Supplementary Information of proposed Section 680.3(i) recognizes that the "reasonable expectations of the consumer" should be taken into account in determining the scope of the "pre-existing business relationship". We believe that a consumer who acquires a new automobile from a franchised dealer and who finances that acquisition from the captive finance company fully expects, and in fact welcomes, information from that manufacturer about new products and financing arrangements to acquire new products, even if the consumer does not request information from or provide contact information to the captive's affiliated manufacturer.

We believe that proposed 16 C.F.R. Section 680.3(i) should include *the purchase, rental or lease of a manufacturer's goods through the franchised dealer method of selling those goods to consumers*, which is similar in concept to obtaining services from the "person's licensed agent" as stated in the statute.

The purchase, rental or lease of a manufacturer's goods from a franchised dealer creates a business relationship between the consumer and the dealer, as well as, a relationship between the consumer and the manufacturer. The relationship with the consumer continues throughout the term during which the manufacturer has obligations to the consumer (such as warranty obligations). In both cases the consumer fully expects to be dealing directly with the manufacturer of the goods after the retail transaction, such as is the case with a manufacturer. If the Commission believes that the "purchase, rental or lease" exception is not applicable in this context, we respectfully ask that the Commission create a new exception for sales and financing pursuant to section 624(d)(1)(D) for the reasons we have provided.

III. The Definition of a "Consumer" Should Be Narrowed

The Commission's Proposed Rule defines a consumer as "an individual." While this definition aligns itself with the Fair Credit Reporting Act, AFSA believes this definition is too broad because it does not take account of other FCRA sections that shape the definition of consumer. Rather, a definition of consumer drawn from the Gramm-Leach-Bliley Act would be more appropriate. The GLBA defines a consumer as "an individual who obtains, from a financial institution, financial products or services which are to be

used primarily for personal, family, or household purposes, and also means the legal representative of such an individual"[2].

Our particular concern here is that a broad definition could cause information not otherwise subject to the FCRA to be subject to this rule. The scope of the Fair Credit Reporting Act and its implementing regulations should be limited to consumer credit, consumer insurance and employment. It should not extend to commercial credit.

The FCRA defines a consumer report as:

"The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for —

(A) credit or insurance to be used **primarily for personal, family, or household purposes**,

(B) employment purposes; or

(C) other purposes authorized under section 604. (emphasis added)

Therefore the use of information that does not fall within that definition, like a Dunn & Bradstreet report obtained to evaluate a sole proprietor's application for business credit, would not be subject to the FCRA and should also not be subject to FCRA regulations.

In its Commentary on the FCRA, the Commission stated: **.62 Comment 604(3)(E) —2. Commercial Transactions**. The term "business transaction" in this section means a business transaction with a consumer primarily for personal, family, or household purposes. Business transactions that involve purely commercial purposes are not covered by the FCRA.

To eliminate possible ambiguity, we propose the following definition of "consumer": *Consumer* means an individual who has engaged in transactions with a person relating to credit or insurance used or to be used primarily for personal, family, or household purposes or employment.

IV. The Final Rule Should Not Address "Constructive Sharing"

[2] Public Law 106-102 Section 509(9)

The Commission specifically requests comments on whether the Proposed Rule should apply "if affiliated companies seek to avoid providing notice and opt-out by engaging in the 'constructive sharing' of eligibility information to conduct marketing."[3] "Constructive sharing" occurs when an entity uses its own information to make marketing solicitations to its own customers concerning an affiliate's products or services, but the customers' responses provide the affiliate with discernible eligibility information about the customers. AFSA believes that neither the letter nor the purpose of section 624 of the FCRA applies to so-called "constructive sharing" and, as a result, the final rule should not address constructive sharing.

First, section 624 does not address the sharing of information. Section 624 addresses only the use of information after it has been shared. In effect, section 624, like the Commission's telemarketing rule, gives consumers the ability to opt out of certain marketing practices—in the case of section 624, the use of certain information that Congress deemed sensitive for direct marketing initiated by affiliated companies. As such, the terms of section 624 are much narrower than the focus of general privacy legislation, such as the privacy provisions of title V of the Gramm-Leach-Bliley Act, that restrict the disclosure, as opposed to the use, of information.

Section 624 of the FCRA applies only if four elements are present:

(1) An entity receives information from an affiliate;
(2) This information would be a consumer report if the exceptions to the definition of consumer report in the FCRA for transactions and experience information and information shared with affiliates did not apply;
(3) The entity uses this information to make marketing solicitations to consumers; *and*
(4) The marketing solicitations are for the products or services of the entity receiving the information and making the solicitations.[4]

If any one of these four elements is not present, section 624 does not require notice and opt out before an entity can make a marketing solicitation to a consumer based on eligibility information. As a result, the plain language of section 624 of the FRCA does not prohibit an entity from using eligibility information or its own information to solicit its own customers for the products or services of a third party, including an affiliate.

As noted above, section 624 of the FCRA applies only when an entity uses eligibility information ***received from an affiliate*** to make a marketing solicitation to a consumer. If an entity uses its own information to market an affiliate's products or services, the entity has not used eligibility information received from an affiliate. If an entity does not receive eligibility information from an affiliate, before the marketing solicitation is made, section 624 does not apply, and the entity may make the solicitation to a consumer without the consumer receiving notice and an opportunity to opt out. In "constructive

[3] 69 Fed. Reg. 33,324, 33,328 (June 15, 2004).
[4] FCRA § 624(a)(1).

sharing," an entity does not receive eligibility information from an affiliate; it receives the information from a consumer's response after the solicitation has been made. As a result, section 624 does not apply to constructive sharing.

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.[5] 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. This is clear at the beginning of subparagraph 624(a)(1) in which "it" is also used to refer to the entity receiving information from an affiliate. Accordingly, if an entity is marketing an affiliate's products or services, 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 to constructive sharing.

If the absence of these required factors in constructive sharing was disregarded, section 624 of the FCRA still would not apply to constructive sharing because one or more exceptions in section 624 would apply. 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."[6] The pre-existing business relationship exception is not limited to the institution's own products or services. A statement by Chairman Oxley of the House Financial Services Committee underscores this result by clarifying that "[a]n entity that has a pre-existing business relationship with the consumer can send a marketing solicitation to that consumer on its own behalf or on behalf of another affiliate."[7] As a result, 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 its consumers.[8] In constructive sharing, the pre-existing business relationship exception applies because an entity makes solicitations to its own customers with whom the entity has a pre-existing business relationship. In addition, if the bank's customer responds to the solicitation, section 624 would not apply to any use of eligibility information in response to a communication initiated by the consumer because that use is covered by yet another exception in section 624.

Not only does the plain language of section 624 of the FCRA not apply to constructive sharing, but the policy of section 624 does not support applying 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

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[5] *Id.*

[6] FCRA § 624(a)(4)(A).

[7] 149 Cong. Rec. E2515 (daily ed. Dec. 8, 2003).

[8] The limitation in the servicing exception prohibiting a servicer from making solicitations on behalf of an affiliate that would not be permitted to make the solicitations on its own behalf due to an opt out would not prohibit the retailer from making solicitations on behalf of the finance company because the retailer is covered by a wholly separate exception—the pre-existing business relationship exception. FCRA § 624(a)(4)(C).

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 that customer relationship and will take care not to jeopardize that relationship by over aggressively marketing its products or services. Section 624 does not distinguish between solicitations that are subject to notice and opt out and those that are not based on the specific type of product offered. Whether notice and opt out applies depends on who markets the product not what the product is.

Application of Section 624 to Example of Constructive Sharing

The Supplementary Information to the Proposed Rule presents the following example of constructive sharing: A finance company provides an affiliated retailer with specific eligibility criteria for the purpose of having the retailer make solicitations on behalf of the finance company to its consumers that meet those criteria; in addition, a consumer's response provides the finance company with discernible eligibility information, such as a response form that is coded to identify the consumer as meeting the eligibility criteria.[9]

Applying the above analysis of section 624 to this hypothetical leads to a conclusion that a notice and opt out requirement would not apply because the retailer is not using eligibility information received from an affiliate in order to make solicitations. The retailer receives eligibility criteria from the affiliate finance company, but this is not eligibility information. Section 624 does not prohibit an entity from using its own information to make solicitations; it only regulates the use of eligibility information received from an affiliate. Section 624 also would not apply because the retailer would not be marketing its own products or services but would be marketing an affiliate's products or servicers. Even if the retailer used eligibility information received from another affiliate in order to make solicitations on behalf of the finance company, section 624 still would not apply because the retailer would be covered by the pre-existing business relationship exception.[10]

Section 624 of the FCRA also would not apply to the finance company because the finance company is not using eligibility information received from an affiliate in order to make solicitations. If the retailer's customer responds to the solicitation by returning the solicitation to the finance company, the notice and opt-out requirement would not apply to the receipt and use of eligibility information from that point by the finance company because the finance company would be covered by the pre-existing business relationship exception. By responding to the solicitation, the retailer's customer would then establish a business relationship with the finance company, and the finance company could use any eligibility information subsequently received from an affiliate in connection with its marketing to the customer. In addition, if the retailer's customer responds to the solicitation, section 624 also would not apply to any use of eligibility information in

[9] 69 Fed. Reg. at 33,328.

[10] The pre-existing business relationship exception would not require that the retailer send solicitations in its own name. This exception only requires that the retailer have an existing business relationship with the consumers receiving the solicitation.

response to a communication initiated by the consumer because that use is covered by another exception in section 624.

CONSTRUCTIVE SHARING IS BEYOND THE SCOPE OF SECTION 624 RULEMAKING

Section 214(b) of the FACT Act requires the Commission to "prescribe regulations to implement section 624 of the" FCRA. The Commission is authorized and directed to write rules to implement the notice and opt-out requirement. If the Commission prescribes rules to limit conduct that is not addressed by section 624, such as by limiting the ability of an entity to market its affiliate's products or services to its own customers, those rules likely would not be viewed as implementing section 624 unless the language of section 624 was ambiguous or if the language of the section would lead to an absurd result. As discussed above, the plain language of section 624 is not ambiguous, and it would not lead to an absurd result.

For example, the pre-existing business relationship exception in section 624 is not ambiguous. 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.[11] Similarly, the definition of "solicitation" is not ambiguous on this point. 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, but does not include communications that are directed at the general public" or provided for in the Agencies' regulations.[12] This definition is not rendered ambiguous because it does not indicate which party's products or services are marketed. As noted above, section 624(a)(1) specifically states that a solicitation concerns the solicitor's products or services. Because the notice and opt-out requirement only applies with respect to solicitations for the solicitor's products and services, the definition does not need to restate whose products or services are at issue. The section only applies to solicitations that concern one entity's products or services, those of the solicitor.

V. The Commission Should Delay the Mandatory Compliance Date for this Regulation Until Late 2005, Because Many Organizations Will Send their Opt-Out Notices to Consumers in Annual Privacy Notices Mailed Throughout the Year.

We request that the Commission delay the mandatory compliance date for this regulation until late 2005, because many larger organizations will require a significant amount of time to comply with the opt-out requirements contained in the Proposed Rule. While our members appreciate the flexibility that they have under the Proposed Rule to include these notices in their annual Gramm-Leach-Bliley privacy notices ("GLB Notices"), our larger organizations send out these notices on a rolling basis throughout the year. As a

[11] FCRA § 624(a)(1).
[12] FCRA § 624(d)(2).

result, these companies will not be able to comply with this rule using their GLB Notices until late 2005.

We recognize that the underlying statute places some limitations on the Commission in this regard. The FACT Act requires the Commission to issue final rules in this regard by September 4, 2004, with an effective date no later than six (6) months thereafter. The rule could therefore become effective around March 2005. However, we urge the Commission to consider ways to delay mandatory compliance until late 2005 due to the limitations that an earlier compliance date would place on our members' ability to incorporate this opt-out notice into their GLB Notices.

* * *

Conclusion

We appreciate the opportunity to comment on the Proposal and again thank the Commission for their efforts. Should you have any questions about this letter, please do not hesitate to contact the undersigned at (202) 466-8606.

Respectfully submitted,

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