Comment #: 50

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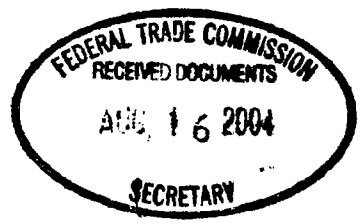

August 16, 2004

Via Hand Delivery

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex Q)
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: "FACT Act Affiliate Marketing Rule, Matter No. R411006"
69 *Federal Register* 114, 33324-33341 (June 15, 2004)

Ladies and Gentlemen:

SBC Communications Inc. ("SBC"), on behalf of its operating subsidiaries, respectfully submits the following Comments to the Federal Trade Commission ("FTC" or "Commission") with regard to the proposed FACT Act Affiliate Marketing Rule, proposed 16 C.F.R. Part 680, 69 Fed. Reg. 33324 (June 15, 2004).[1] As described in the Summary and Supplementary Information sections of the Notice of Proposed Rule-Making ("NPRM"), the Commission has proposed this Rule to implement Section 214(b) of the Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952 ("FACT Act"), which was signed into law on December 4, 2003. Section 214 of the FACT Act, *inter alia*, added a new Section 624 to the Fair Credit Reporting Act ("FCRA" or "Act"), 15 U.S.C. §§ 1681-1681x.

The Commission described the purpose of FCRA § 624 in the NPRM as follows:

> New section 624 of the FCRA generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about *its* products or

[1] The original deadline for public comments on the proposed rule of July 20, 2004 was extended by the Commission to August 16, 2004, see, 69 Fed.Reg. 43546 (July 21, 2004).

> services, unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and the consumer does not opt out. Section 624 governs the use of information by an affiliate, not the sharing of information with or among affiliates. 69 Fed. Reg. at 33325, emphasis added.

SBC agrees with this assessment of the general purpose of FCRA § 624. The Rule proposed by the Commission is generally consistent with that statement of purpose and, for the most part, tracks the statutory language. In two significant areas, however, the NPRM and the proposed Rule are inconsistent with the statutory language of the FCRA, as amended by the FACT Act. SBC submits these comments regarding those two areas.

First, FCRA Section 624(a)(1) prohibits a person who receives information concerning a consumer (what the proposed Rule describes as "eligibility information") from an affiliate from using that information to solicit the consumer to promote *its own* products or services, unless there is compliance with the provisions of Section 624 concerning consumer notice and opportunity to opt out. While it is not entirely clear, the Rule as proposed by the Commission does not appear to be so limited. Rather, it could be understood to prohibit the receiving affiliate from marketing *any* products or services, including those of the affiliate from which it received the eligibility information. Such a prohibition is overbroad and not supported by the language of the statute.

Second, in the NPRM, the Commission has requested comment on whether Section 680.20 of the proposed Rule ("Use of Eligibility Information By Affiliates For Marketing") should be interpreted to apply to what the Commission describes as the "constructive sharing" of eligibility information. 69 Fed. Reg. at 33328. Under this concept of constructive sharing, the prohibitions of the section would apply, even if there had not been an actual communication of

eligibility information by one affiliate to another. SBC submits that such an interpretation and application of the proposed Rule is inconsistent with the statutory language and legislative intent of the FACT Act.

Discussion

As a result of the passage of the FACT Act, FCRA Section 624 provides, in relevant part, as follows:

§ 624. Affiliate Sharing

(a) SPECIAL RULE FOR SOLICITATION FOR PURPOSES OF MARKETING

(1) NOTICE

Any 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 clauses (i), (ii), and (iii) of section 603(d)(2)(A) [15 U.S.C.§ 1681a(d)(2)(A)], may not use the information to make a solicitation for marketing purposes to a consumer about *its* products or services, unless—

(A) it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons for purposes of making such solicitations to the consumer; and

(B) the consumer is provided an opportunity and a simple method to prohibit the making of such solicitations to the consumer by such person.

(2) CONSUMER CHOICE

(A) IN GENERAL

> The notice required under paragraph (1) shall allow the consumer the opportunity to prohibit all solicitations referred to in such paragraph, and may allow the consumer to choose from different options when electing to prohibit the sending of such solicitations, including options regarding the types of entities and information covered, and which methods of delivering solicitations the consumer elects to prohibit. (Emphasis added).

The statute also defines the term "solicitation." For purposes of FCRA § 624, "solicitation" is defined to mean:

> . . . 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 subsection (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 determined not to be a solicitation by the regulations prescribed under this section. FCRA § 624(d)(2), emphasis added.

The statutory definition of "solicitation" carefully limits the marketing activity included in such term by referring only to "marketing ... that is based upon an exchange of information described in subsection (a)." Subsection (a) of Section 624, by its terms, only prohibits an affiliate (the "receiving affiliate") which receives eligibility information from an affiliate (the "communicating affiliate") from using that information to market "its" (that is, the receiving affiliate's) products or services, unless the consumer has been afforded the notice and opportunity to opt out of such use which Section 624 prescribes.

The statute's linkage of the prohibitory provision (§ 624(a)) with the statutory definition (§ 624(d)(2)) expressly incorporates in the definition the scope of the marketing activity described in FCRA § 624(a), *i.e.*, the marketing by the receiving affiliate of its own products and services. Stated differently, it is the provision by the communicating affiliate to the receiving

affiliate of eligibility information that the receiving affiliate intends to use to market the receiving affiliate's products or services that triggers the required consumer notice and opportunity to opt out.

That this is the correct understanding of the statutory structure is borne out by the legislative history of Section 214 of the FACT Act.[2] The relevant Senate Report, in its sectional analysis of what became Section 214 of the FACT Act, states that the "section is not intended to limit the solicitation for marketing purposes of persons or entities with whom consumers have pre-existing business relationships .... S. Rep. No. 108-166 (Oct. 17, 2003), at p.19. As it may be anticipated that it is the communicating affiliate which has the "pre-existing business relationship" with the consumer, it is appropriate for the statute's prohibitory section and definition of "solicitation" to be limited to solicitations by the receiving affiliate for its own products and services.

The proposed Rule's definition of "solicitation" does not accurately mirror the statutory definition's content. The proposed Rule defines the term as follows:

> (j) Solicitation. (1) In general. Solicitation means marketing initiated by a person to a particular consumer that is
>
> (i) Based on eligibility information communicated to that person by its affiliate as described in this part; and
>
> (ii) Intended to encourage the consumer to purchase such product or service. Proposed 16 C.F.R.§ 680.3(j), 69 Fed. Reg. 33337 (June 15, 2004).

[2] Although the FACT Act resulted from a House bill (H.R. 2622), the affiliate information sharing issue was not addressed in the bill originally passed by the House. Rather, Section 214 of the FACT Act is derived from Section 214 of the Senate bill, S. 1753. The Report of the Senate Committee on Banking, Housing and Urban Affairs on S. 1753 is the authoritative legislative history of new Section 624 of the FCRA.

Although subsection (j)(1)(i) of the proposed Rule's definition implies that the "person" referred to in its preamble is a receiving affiliate (through the reference to "eligibility information *communicated to that person by its affiliate*", emphasis supplied), because of the absence of any reference to either Section 624(a) of the FCRA or to its surrogate, Section 680.20(a)(1) of the proposed Rule, the effective limitation of the term to marketing of products or services of the receiving affiliate is lost. Instead, subsection (j)(1)(ii) of the proposed Rule's definition contains an indefinite reference to "*such* product or service" (emphasis supplied) which has no antecedent in the subsection. Unlike its use in the statute, the phrase "such product or service" in the proposed Rule does not relate back to a previous description of a product or service of the receiving affiliate, as referenced in FCRA § 624(a). Accordingly, the regulatory definition does not limit the substantive requirements of the proposed Rule to only the solicitation of the products or services of the receiving affiliate.

The substantive provision of the proposed Rule, Section 680.20(a)(l), similarly fails to limit the notice requirement to situations involving the intended use by the receiving affiliate of the eligibility information for making a solicitation of the consumer regarding *the receiving affiliate's products or services*. Under its definition of "solicitation" and its substantive provision for notice and opportunity to opt out, the proposed Rule would appear to require the opt-out notice whenever the receiving affiliate intends to use the information for *any* marketing purpose whatsoever, not just to market its own products or services. As drafted, the proposed Rule would appear to prohibit, for example, the marketing by the receiving affiliate of products or services offered by the *communicating* affiliate, from which it is likely that the consumer has

already made a purchase or has a "pre-existing business relationship", as defined in FCRA § 624(d)(l).

These deficiencies in the proposed Rule should be cured. Various methods to do so could be suggested, including the use in the proposed Rule of the concepts of "receiving affiliate" and "communicating affiliate," which were used by the Commission in the NPRM. See, 69 Fed. Reg. at 33328, 33329. Another, which would more closely parallel the construction of FCRA § 624, would be to revise the proposed Rule's definition of "solicitation" and substantive notice provision to emphasize the link between them. Under such an approach, the definition of "solicitation" would be revised to read:

> (j) Solicitation. (1) In general. Solicitation means marketing initiated by a person to a particular consumer that is
>
> (i) Based on eligibility information communicated to that person by its affiliate as described in this part; and
>
> (ii) Intended to encourage the consumer to purchase [delete: such] product*s* or service*s of that person as described in section 680.20(a)(1) of this part*. (underscoring in original).

Section 680.20(a)(1) of the proposed Rule would be amended to read, in pertinent part:

> (a) General duties of a person communicating eligibility information to an affiliate. (1) Notice and opt-out. If you communicate eligibility information about a consumer to your affiliate, your affiliate may not use the information to make or send solicitations *about its products or services* to the consumer, unless prior to such use by the affiliate—
>
> (i) You provide a clear and conspicuous notice to the consumer . . . . (underscoring in original).

The second area of concern to SBC pertains to the NPRM's request for comment on the concept of "constructive sharing" of eligibility information. The NPRM states:

> The Commission invites comment on whether, given the policy objectives of section 214 of the FACT Act, proposed paragraph (a) [of proposed § 680.20] 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. For example, the Commission requests commenters to consider the applicability of paragraph (a) in the following circumstance. A consumer has a relationship with a retailer, and the retailer is affiliated with a finance company. The finance company provides the retailer with specific eligibility criteria, such as consumers having a credit limit in excess of $3,000, for the purpose of having the retailer make solicitations on behalf of the finance company to consumers that meet those criteria. Additionally, the consumer responses provide the finance company with discernible eligibility information, such as a response form that is coded to identify the consumer as an individual who meets the specific eligibility criteria. 69 Fed. Reg. at 33328 (June 15, 2004).

Constructive sharing is a term created by the Commission which is not used or defined in the FACT Act. No statutory language supports the creation of a rule to prohibit the conduct described in the quoted example.

As quoted above, FCRA §624(a)(1) applies to any "person that *receives from*" its affiliate eligibility information regarding a consumer. FCRA §624(a)(1), emphasis supplied. Similarly, the consumer notice and opt-out provision of FCRA § 603(d)(2)(A)(iii) applies to "*communication* of other [non-experience] information *among* persons related by common ownership or affiliated by corporate control...." FCRA § 603(d)(2)(A)(iii), emphasis supplied. In each instance, the statutory language requires communication of specified information by one affiliate to another.

The hypothetical facts in the Commission's example present a mixed picture under the FCRA. The consumer is stated to have a "pre-existing business relationship" (although the

statutory phrase is not used) with the retailer. It therefore may reasonably be assumed that the retailer has information based not only on its own experience with the consumer, but also "other" information, perhaps from the consumer's responses on the retailer's credit application, or a credit bureau report ordered by the retailer.

If the retailer uses this information[3] to identify those of its customers meeting criteria supplied by the finance company affiliate, and itself solicits its customers so identified on behalf of the finance company *without communicating either the information or the resulting list of customers to the finance company*, its actions would appear to be consistent with FCRA § § 603(d)(2)(A)(iii) and 624, and would not require a notice and opportunity to opt out under either section. In such a case, the retailer would not have communicated any information regarding consumers to the finance company. Such an analysis responds to the first two sentences of the Commission's description of the hypothetical facts quoted above.

The third sentence of the Commission's description of the hypothetical facts, however, introduces a complication under the FCRA. In that sentence, the Commission suggests that a consumer response form "is coded to identify the consumer as an individual who meets the specific eligibility criteria." 69 Fed. Reg. at 33338 (June 15, 2004). The Commission's hypothetical thus suggests, but does not state, that the retailer coded the forms so as to identify the consumers receiving them as being among its selected customers satisfying the finance company's criteria, and furnished the forms as part of its solicitation on behalf of the finance

[3] A separate issue would potentially be presented if the retailer used information derived from a credit bureau report for a purpose beyond that certified by the retailer at the time of requesting the report.

company affiliate. It also implies, but does not affirmatively state, that the response forms are directed to the finance company.

It might be suggested that the return of a coded form by a consumer under such circumstances would be an indirect communication by the retailer of a portion of the list of its customers satisfying the finance company's criteria. This appears to be the intent of the Commission's request for comment.

Such an approach would not be an appropriate construction of the FCRA sections for at least two reasons. First, as noted above, the statutory language of both Sections 603(d)(2)(A)(iii) and 624(a)(1) requires a communication by one affiliate to another. On the explicit facts stated in the Commission's hypothetical, there has been no communication of any information by one affiliate to another.

Second, the concept of constructive sharing suggested in the Commission's hypothetical is not consistent with the legislative history of the FACT Act, which the proposed Rule is intended to implement. In its hypothetical, the Commission states that it is "consumer *responses*" which contain the consumer information derived from the retailer's records. This implies that the consumer has actually responded to the retailer's solicitation on behalf of the finance company. In other words, the consumer has taken action to request additional information concerning the product or service being offered. The Senate Report, in discussing what became Section 214 of the FACT Act, stated that the section "is not intended ... to restrict contact with consumers in situations where the consumers themselves are requesting information or service." S.Rep. No. 108-166 (Oct. 17, 2003), at p.19.

In addition, one of the principal stated purposes of the FACT Act is to prevent identify theft. (See, Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 108-396 (Nov. 21, 2003), at p.65). The risk of such identify theft may be expected to increase if credit information is exposed to third-party interception or inadvertent disclosure during transfer from one affiliate to another. The purpose of safeguarding consumer information is better served if the number of affiliates to which it is communicated is limited, ideally to perhaps a single affiliate where it is centrally stored.

The telecommunications industry in general, and many of the services offered by various entities within SBC, are subject to extensive regulation at both the state and federal levels. That regulation includes requirements to operate certain types of telecommunications businesses through separate affiliates. For example, Section 272 of the Telecommunications Act of 1996, 47 U.S.C. Section 272, requires[4] that certain activities be conducted by "Bell Operating Companies" (such as SBC) through separate affiliates, including:

- equipment manufacturing (Section 272(a)(2)(A)).
- originating of interLATA telecommunications services (Section 272(a)(2)(B)) – with certain exceptions.
- provision of interLATA information services (Section 272(a)(2)(C)).

In addition, Section 274(b) of the Telecommunications Act, 47 U.S.C. Section 274(b), requires that a separate affiliate or joint venture for electronic publishing operate independently from the Bell Operating Company.

[4] Section 272(f) provided for certain "sunset" dates on the separate affiliate requirements of Sections 272(a)A) and 272(a)(2)(C), respectively, which have occurred.

Finally, among the conditions approved by the FCC in connection with the proposed merger of Ameritech and SBC was one for the provision of "advanced services" through an affiliate separate from the local exchange service company.[5]

These separate affiliate requirements and other restrictions were intended to prevent a Bell Operating Company from cross-subsidizing or discriminating in favor of its own operations. But for these separate affiliate requirements (established for reasons unrelated to the statutory purposes of the FACT Act), many telecommunications services offered by companies such as SBC would not necessarily be sold or provided through separate affiliates. SBC submits that adoption of the "constructive sharing" concept identified in the NPRM would arbitrarily impose additional marketing restrictions on certain telecommunications providers beyond those intended by Congress in the FACT Act as a result of requirements for separate affiliates which implement regulatory policies wholly unrelated to the purposes of the FACT Act.

Conclusion

SBC appreciates this opportunity to comment on the Commission's proposal. SBC respectfully urges the Commission (a) to revise the proposed Rule's definition of "solicitation" and substantive notice and opportunity for opt-out provision to conform to the statutory

[5] In re Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control of Corporations Holding Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules. Memorandum Opinion and Order, CC Docket 98-141 (October 8, 1999).

language, as discussed above, and (b) not to incorporate or use the concept of "constructive sharing" in its application and implementation of the proposed Rule.

Respectfully submitted,

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