

FTC Issues Affiliate Marketing Rule Under FACTA; Compliance Required by October 2008

On October 23, 2007, the Federal Trade Commission (“FTC”) issued a new rule under the Fair and Accurate Credit Transactions Act (“FACTA”) regulating the use of certain specified information shared by affiliates and used for marketing purposes.¹

Specifically, under the Rule, a company may not use “eligibility information” received from an “affiliate” to “make” a “solicitation” to a consumer unless the consumer has received (or constructively received) a notice of such use and a “reasonable” period to exercise an opportunity to opt out. The Rule takes effect on January 1, 2008. The compliance date is October 1, 2008.

KEY DEFINITIONS — WHAT IS COVERED?

Determining whether the Rule applies to a particular business starts with understanding the Rule’s key definitions:

- **Affiliate:** Companies that are “related by common ownership or common corporate control” are “affiliates.”²
- **Eligibility Information:** As defined, “eligibility information” includes: (1) information that meets one of seven criteria for a “consumer report” (credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living); and (2) transaction or experience information, provided that either type of information is used or expected to be used or is collected in whole or in part for determining eligibility for credit, insurance, or employment.³
- **Makes:** A company “makes” a solicitation when:
 - The company receives “eligibility information” from an affiliate;
 - The company uses that information to: (a) identify the consumer or type of consumer who will receive an offering; (b) establish criteria to select a type of consumer to receive an offering; or (c) decide which products or services to market; and
 - The consumer receives a solicitation.⁴
- **Solicitation:** Marketing of a product or service initiated by a business to a consumer based on eligibility information obtained from an affiliate, and intended to encourage a consumer to purchase the product or service, is a “solicitation.”⁵

WHAT ARE THE RULES?

If these definitions are triggered, companies must comply by October 1, 2008, with specific notice and opt-out requirements before they use consumer “eligibility information” obtained from an affiliate for marketing solicitation purposes, unless they have a preexisting business relationship with the consumer. Compliance with the Rule requires a business to provide

¹ See FTC, Press Release, *FTC Approves Affiliate Marketing Rule Regarding Use of Consumer Information* (Oct. 23, 2007), at <http://www.ftc.gov/opa/2007/10/affiliate.shtm>. Section 214 of FACTA added a new section 624 to the Fair Credit Reporting Act giving consumers the right to restrict the use of information from affiliates for solicitation.

² Affiliate Marketing Rule, 72 Fed. Reg. 61,424, 61,456 (Oct. 30, 2007) (to be codified at 16 C.F.R. § 680.3(b)).

³ *Id.* (to be codified at 16 C.F.R. § 680.3(h)).

⁴ *Id.* at 61,457 (to be codified at 16 C.F.R. § 680.21(b)(1)).

⁵ *Id.* (to be codified at 16 C.F.R. § 680.3(k)).

consumers with clear and conspicuous disclosure of an affiliate's use of eligibility information, and a reasonable opportunity and simple method for consumers to opt out. Additionally, the business must honor any opt-out requests received from consumers for at least 5 years.

WHAT IS THE PENALTY FOR FAILURE TO COMPLY?

We anticipate that the FTC will initiate a compliance sweep shortly after the October 2008 compliance deadline. If the FTC initiates an investigation into a business's failure to comply with the Rule and concludes that there is a rule violation, the business could be exposed to injunctive relief, damages (if there are any), and civil penalties up to \$11,000 per each violation (which the FTC often calculates for each day of non-compliance). Additionally, consumers have a private right of action under the FCRA. A detailed analysis of the Rule follows.

Scope and Application of the Rule

The Rule only applies to a business if: (1) it is an "affiliate"; (2) the information used by the affiliate is "eligibility information"; and (3) the information is used to make a solicitation. Further, if a "pre-existing business relationship" exists between the business and the consumer, that communication is exempt from this Rule.⁶

When is a Business an "Affiliate"?

A business is an "affiliate" if it is "related by common ownership or common corporate control with another company."⁷ The Rule explains this ownership and control structure, construing businesses as "affiliates" when one company can: (1) vote 25 percent or more of the outstanding shares of any voting security of

another company; (2) control the election of a majority of the directors, trustees, or general partners of another company; or (3) exercise a controlling influence over the management or policies of another company.

Under the Rule, companies also are affiliates when a person has this ownership or control over two other companies. For example, if Person A can vote at least 25 percent of the outstanding shares of voting stock of both Company B and Company C, those companies are affiliates.

Further, while the language used to define "affiliate" under FACTA and the Gramm-Leach-Bliley Act ("GLBA") is not identical, the FTC has stated its view that there is no substantive difference between the definitions.⁸ Thus, in the FTC's view, companies that are affiliates under the GLBA also would be considered affiliates subject to this Rule if their practices involve solicitations based on eligibility information received from affiliates.⁹

What Information Qualifies as "Eligibility Information"?

The most complex aspect of the Rule is determining whether a given marketing solicitation based on information received from an affiliate is covered. Under the Rule, eligibility information includes traditional consumer report information, *and* an affiliate's transaction or experience information (which is exempted under the FCRA), *provided* that either type of information is used or was collected for purposes of credit, insurance, or employment. While transaction or experience information is not defined, it may include information such as identification of the specific charges made on a consumer's credit card. Eligibility information does *not* include anonymous or aggregate

⁶ The Rule also includes exemptions for: (1) communication related to an employee benefit plan; (2) communication made by a service provider; (3) a business's response to a consumer's communication about the goods or services; (4) a business's response to a consumer's request to receive solicitations; and (5) situations when the Rule prevents a business from complying with state insurance laws on unfair discrimination.

⁷ Affiliate Marketing Rule, 72 Fed. Reg. 61,424, 61,456 (Oct. 30, 2007) (to be codified at 16 C.F.R. § 680.3(b)).

⁸ Affiliate Marketing Rule, 72 Fed. Reg. 61,424, 61,426 (Oct. 30, 2007).

⁹ Note that even if companies are not affiliates under the FACTA affiliate marketing rule, they still may be subject to other information-sharing restrictions, such as the GLBA privacy rule regarding information sharing with nonaffiliated third parties.

information that lacks personal identifiers, such as names, addresses, or account numbers.

This Rule does not impose a general opt-out requirement for all marketing by companies using information obtained from affiliates. Rather, it *only* imposes a notice and opt-out requirement when:

- The information used for marketing would constitute a “consumer report” under the FCRA, except that the Rule adds transaction or experience information to the list of seven characteristics (credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living¹⁰); and
- The information was collected or is used or expected to be used for purposes of determining eligibility for credit, insurance, or employment.

What Communications with Consumers Qualify as “Making a Solicitation”?

Additionally, the Rule outlines a three-step test to determine if the communication is a solicitation. A business makes a solicitation if: (1) the business receives eligibility information from an affiliate; (2) the business uses that information to: (a) identify the consumer or type of consumer that will receive an offering; (b) establish criteria to select a type of consumer to receive an offering; or (c) decide which products or services to market; and (3) the consumer receives an offering.

Further, the Rule provides that even if a company has access to an affiliate’s eligibility information through a shared database, it is not a solicitation if the company independently develops its own customer selection criteria without using the eligibility information, and provides those criteria and marketing materials to the affiliate with the pre-existing business relationship. The affiliate can then use the company’s criteria to determine which of the affiliate’s customers should receive the company’s materials, and send those consumers the marketing materials.

When Does the “Pre-Existing Business Relationship” Exception to the Rule Apply?

Finally, even if the above criteria are met, the business will be exempt from the Rule’s requirements if it has a pre-existing business relationship with the individual it intends to solicit. For this exception to apply: (1) there must be a financial contract in force between the consumer and the business; (2) the consumer has purchased, rented, or leased goods or services, or engaged in a financial transaction with the business during the 18-month period before the solicitation; or (3) the consumer makes an inquiry to the business about an offered product or service during the three-month period before the solicitation.

Obligations Under the Rule

If the Rule applies to a business’s practices, the business must comply with certain notice and opt-out procedures before it can use eligibility information for solicitation purposes. Specifically, the business must: (1) provide to the consumer (a) a concise notice that clearly and conspicuously discloses that an affiliate may use the consumer’s eligibility information to make a solicitation, and (b) a reasonable opportunity and simple method to opt out of having his or her eligibility information shared for such purposes; and (2) honor any opt-out requests by the consumer in response to such notice. This notice must be delivered to the consumer *by the affiliate with the pre-existing business relationship* in a way that can reasonably be expected to provide consumers with actual notice. Additionally, the opt-out request by the consumer must be honored for at least five years.

The Rule also provides examples of required content for the opt-out notices, as well as examples of what the FTC considers a reasonable *opportunity* to opt out, a reasonable *method* of opting out, and methods of *proper delivery* of the required notice. These examples address opting out by mail, online posting, email, privacy notice, and at the time of transaction through mechanisms including a check-off box, postal and

¹⁰ Fair Credit Reporting Act, 15 U.S.C. § 1681a (d)(1).

online reply forms, a toll-free telephone number, and consolidation with other notices.¹¹ Finally, the Rule identifies additional requirements for renewal notices that are sent once the initial opt-out term expires.

**For more information about this
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¹¹ Affiliate Marketing Rule, 72 Fed. Reg. 61,424, 61,461-62 (Oct. 30, 2007) (to be codified at 16 C.F.R. §§ 680.24-.25), at <http://frwebgate1.access.gpo.gov/cgi-bin/waisgate.cgi?WAIISdocID=780233184601+0+0+0&WAIISaction=retrieve>.