Comment #: 33

August 16, 2004

ELECTRONIC DELIVERY
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 Sirs and Madams:

The Mortgage Bankers Association ("MBA") appreciates the opportunity to comment on the FTC's Proposed Rule and Request for Comment ("RFC")[1] under Section 214 of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"),[2] which creates a new Section 624 of the Fair Credit Reporting Act ("FCRA") that addresses the use of "consumer report" information obtained from affiliates.[3] Under Section 214, if a company receives from an affiliate "a communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A)" [of FCRA], the company "may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless" the consumer is given the opportunity to opt out of the company's use of the information for marketing.[4]

EXECUTIVE SUMMARY

The MBA believes that the regulations implementing new Section 624 should take into account the important benefits that consumers receive from the sharing of consumer information, including information obtained from an affiliate. As Assistant Treasury Secretary Wayne Abernethy has noted:

> [T]he sharing of information, within secure parameters reinforced by uniform national standards, has increased the access of more consumers to a wider variety of financial services, at lower costs, than ever before.

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1 69 Fed. Reg. 33324 (June 15, 2004).
2 P.L. 108-159 (Dec. 4, 2003).
3 The prior FCRA Section 624, along with several other FCRA provisions, was renumbered by FACTA. *See* FACTA § 214(a)(1).
4 *Id.*

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> Today, you can walk into a bank almost anywhere in the country, and 9 times out of 10, or maybe even 19 times out of 20, the answer is already "yes," you can get the loan. The application process serves to discover just what minor adjustments are necessary to price your particular risk properly. The banker may never have seen you before, never known you, but because of information sharing through the uniform standards of [FCRA], the banker knows a million people like you and already has been able to price your risk and can offer you a product that very day that meets the needs of you and your family. Because of modern financial information sharing in America, millions of people have been brought into the financial mainstream. That is a tremendous achievement, found nowhere else on earth.[5]

The use of information from affiliates is an important component of our highly successful and efficient system of using information about consumers to deliver appropriate products and services to them. By using information from an affiliate that may already be contained in a diversified company's common databases, a company not only saves its own costs of obtaining the information elsewhere, but it also can provide its products to consumers more quickly and efficiently than otherwise.

In enacting Section 624, Congress set out specific standards that balance these acknowledged benefits of affiliate marketing against the desire of some consumer advocates for more restrictions on affiliate information-sharing. Although the proposed rules generally reflect that balance, there are several areas in which the proposal goes beyond the specific statutory language in ways that we believe would burden our industry without providing a concomitant consumer benefit. This letter sets forth significant areas of concern in the proposed rule that the FTC should consider when reviewing and revising the final rules. The MBA notes, in particular, the following issues:

- FACTA requires that, before a company may use information obtained from an affiliate in marketing, the consumer must receive a disclosure that the affiliate may use the information in marketing and be offered an opportunity to opt-out from such use. The FTC's proposed regulations would place responsibility for making the disclosure on the company that shares the information and has a current business relationship with the customer (although it could arrange for the receiving company to act as its agent in providing the notice). This requirement is not supported by the statute and could make it difficult to make a single disclosure to all customers of a

[5] Remarks of Treasury Assistant Secretary for Financial Institutions Wayne A. Abernathy to the Exchequer Club of Washington, Washington, D.C., Mar. 19, 2003, available at http://www.ustreas.gov/press/releases/js140.htm (last visited Aug. 3, 2004).

corporate family. It would create particular problems for those of our members that have only a brief relationship with the customer, ending when the loan is sold at or soon after closing, who would have to provide the opt-out notice at closing. Moreover, the need to compensate the company making the disclosures could create problems under Sections 23A and 23B of the Federal Reserve Act and RESPA. The FTC appears to be concerned that a consumer might not open and read a disclosure with a return address from a company with which he or she does not have a current business relationship, but this concern can be addressed through content and format requirements rather than by attempting to place legal responsibility for making the disclosure on the sharing company.

- FACTA provides for a five-year opt-out period on use by a company of information received from an affiliate, which the consumer may extend for five years. The proposed regulations provide that, if the consumer's relationship with the sharing entity terminates, the opt-out continues indefinitely. There is no basis in the statute for extending the opt-out indefinitely in this way. Whether the consumer has a relationship with the sharing entity is irrelevant under the statute as to whether an affiliate can use the information. As noted above, the entity with which the consumer had an initial contact should not form the basis of the obligations under the statute. Similarly, as long as the notice is provided to the consumer, it should make no difference whether the consumer maintains a relationship with an entity or not.

- The proposed regulations provide a framework for electronic disclosures that runs the risk of leading to conflicting or unclear requirements. The proposed regulations would allow companies to comply with either Section 101 of the Electronic Signatures in Global and National Commerce Act ("ESIGN") or with special rules for electronic disclosures set out in the regulations, which include requirements that the consumer consent to and acknowledge the receipt of electronic disclosures. But because Section 624 does not require written disclosures, the ESIGN Act does not require consumer consent for electronic delivery of these disclosures. The consent procedure and acknowledgement procedures would be operationally burdensome and expose industry to litigation over technical failures to comply. Because the acknowledgment requirement imposes a greater burden on disclosures made electronically than on written disclosures, it is also not permitted under the ESIGN Act. Although the FTC recognizes in the proposed regulations' preamble that the ESIGN Act does not require consent, the proposed regulations nevertheless provide alternative consent procedures. The MBA believes that this provision should be deleted or revised to be consistent with ESIGN and to provide clear guidance to the industry.

- The FTC requests comment on whether oral disclosures should be permitted and how they can be "clear and conspicuous." The MBA believes that oral disclosures are permitted by FACTA, can be "clear and conspicuous," and should be permitted by the final regulations.

- The FTC should also revise the definition of "consumer" to restrict application of Section 624 and the proposed regulations to information that is shared for personal, family, or household purposes.

- As required by FACTA, the proposed regulation would allow a company to include a "statement-stuffer" promoting an affiliate's products, in which the customers who receive the material are not selected using "eligibility information" that is covered by the rule. The FTC requests comment on whether this type of promotion should be allowed where the material includes a code that reveals eligibility information to the affiliate when the customer responds to the offer, allowing what the FTC refers to as "constructive sharing" of the information by the affiliate without the opportunity for the consumer to opt-out. MBA believes that this practice is not covered, and should not be covered, by the opt-out requirement of Section 624. The affiliate only uses the information in response to a customer inquiry, a situation that is excluded from the opt-out requirement by the statute and the proposed regulation. Coding the material does not defeat the purposes of Section 624, because consumers cannot be selected to receive the solicitation based on eligibility information, and therefore the information is never "used" for marketing.

DISCUSSION

This section of the MBA's letter provides a more in-depth analysis of the issues raised above, and raises issues that the MBA may wish to consider when determining how best to comment on the FTC's proposed regulations.

1) Responsibility for Providing Notice and an Opportunity to Opt Out (16 C.F.R. § 680.20(a)

The FTC has taken the position that the entity having the relationship with the consumer should be responsible for providing the consumer with notice that information may be shared with the affiliates, and for providing the consumer with the opportunity to "opt-out" from the information sharing. 16 C.F.R. § 680.20(a). The statute does not support this interpretation. FACTA does not identify which entity must provide the notice but simply states, using the passive voice, that "it [must be] clearly and conspicuously disclosed to the consumer" that the information may be shared, and "the consumer [must be] provided" the opportunity to opt-out. Although the FTC asserts that this language is ambiguous,[6] the MBA believes that the use of the passive voice represents a conscious and unambiguous Congressional choice not to affix legal responsibility to any particular entity. The existing affiliate opt-out provision, Section 603(d)(2)(iii), contains very similar language, and many companies have been sending notices from a central source (not necessarily the company with the relationship with the customers) since that provision was enacted in 1996.

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[6] 69 Fed. Reg. 33328 ("The statute is ambiguous because it does not specify which affiliate must provide the opt-out notice to the consumer.")

Assigning this responsibility to the entity that has the relationship with the consumer may be an attempt to ensure that the consumer does not ignore the Section 624 notice as a piece of "junk mail" coming from an unfamiliar company. We think we understand the FTC's intent, but requiring that a specific entity take responsibility for providing the notice will not achieve that goal and will, we believe, create significant difficulties for the mortgage industry.

First, this requirement will make it difficult to provide a single notice for all affiliates within a holding company, since different entities will have customer relationships with different consumers and no single entity will have a relationship with all of them that will allow it to send a single notice. This will, of necessity, require each affiliate to have its own notice, even if the notices are physically sent by one affiliate. Preventing a combined, company-wide notice is inconsistent with Section 624(b) of FCRA, added by Section 214 of FACTA, which specifically states that the required opt-out notice may be combined "with any other notice required to be issued under any other provision of law."

Second, the requirement creates particular difficulties under federal banking law for mortgage companies that want to use information from banking affiliates in marketing, by creating unintended interactions with other regulations. For example, suppose that a mortgage company asks an affiliated bank to send opt-out notices to the mortgage company's customers, so that the mortgage company may use information from the bank to market mortgage loans to bank customers who do not object to such marketing. Under Section 23B(a)(1) of the Federal Reserve Act and its implementing Regulation W, the mortgage company must compensate the bank for *at least* the fair market value of this service.[7] By contrast, under Section 8 of the Real Estate Settlement Procedures Act ("RESPA"), the ("RESPA"), the compensation paid by the mortgage company to the bank *may not exceed* an amount that bears a reasonable relationship to the market value of the services required.[8] Thus, if the mortgage company pays too little for the service, it risks violating Section 23B, while if it pays too much, the excess amount may be viewed as a referral fee prohibited under RESPA.

One solution, which is not clearly permitted under the proposal as drafted, is for a non-misleading opt-out notice to be provided either by the mortgage company itself or by a non-banking affiliate that is not subject to Section 23B. As noted below, the FTC appears to acknowledge that the real issue is not which entity provides the disclosure (which the consumer will not know in any case) but whether the consumer is reasonably likely to read the notice and consider whether he or she wishes to opt out of data-sharing programs.

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[7] 12 U.S.C. § 371c-1(a)(1); 12 C.F.R. § 223.52(a)(3). Although this requirement applies to national banks and state member banks of the Federal Reserve, similar restrictions are placed on other insured depository institutions. *See* 12 U.S.C. §§ 1468(a) (insured savings associations) and 1828(j) (insured state non-member banks). While these restrictions are intended to ensure financial institutions' safety and soundness by requiring intra-organization payment to reflect market realities, these other regulatory requirements may affect the ultimate structure of corporate compliance with the FTC's proposed regulations.

[8] 12 U.S.C. § 2607(c); 24 C.F.R. § 3500.14(g)(2).