Comptroller of the Currency, Treasury

§ 41.21 Affiliate marketing opt-out and exceptions.

(a) Initial notice and opt-out requirement. (1) In general. A bank may not use eligibility information about a consumer that it receives from an affiliate to make a solicitation for marketing purposes to the consumer, unless—

(i) It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that the bank may use eligibility information to make solicitations for marketing purposes to the consumer;

(ii) The consumer is provided a reasonable opportunity and a reasonable and simple method to "opt out," or prohibit the bank from using eligibility information to make solicitations for marketing purposes to the consumer; and

(iii) The consumer has not opted out.

(2) Example. A consumer has a homeowner's insurance policy with an insurance company. The insurance company furnishes eligibility information about the consumer to its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its home equity loan products. The depository institution does not have a pre-existing business relationship with the consumer.
and none of the other exceptions apply. The depository institution is prohibited from using eligibility information received from its insurance affiliate to make solicitations to the consumer about its home equity loan products unless the consumer is given a notice and opportunity to opt out and the consumer does not opt out.

(3) Affiliates who may provide the notice. The notice required by this paragraph must be provided:

(i) By an affiliate that has or has previously had a pre-existing business relationship with the consumer; or

(ii) As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or has previously had a pre-existing business relationship with the consumer.

(b) Making solicitations. (1) In general. For purposes of this subpart, a bank makes a solicitation for marketing purposes if—

(i) The bank receives eligibility information from an affiliate;

(ii) The bank uses that eligibility information to do one or more of the following:

(A) Identify the consumer or type of consumer to receive a solicitation;

(B) Establish criteria used to select the consumer to receive a solicitation; or

(C) Decide which of the bank’s products or services to market to the consumer or tailor the bank’s solicitation to that consumer; and

(iii) As a result of the bank’s use of the eligibility information, the consumer is provided a solicitation.

(2) Receiving eligibility information from an affiliate including through a common database. A bank may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that the bank may access.

(3) Receipt or use of eligibility information by a bank’s service provider. Except as provided in paragraph (b)(5) of this section, a bank receives or uses an affiliate’s eligibility information if a service provider acting on the bank’s behalf (whether an affiliate or a non-affiliated third party) receives or uses that information in the manner described in paragraphs (b)(1)(i) or (b)(1)(ii) of this section. All relevant facts and circumstances will determine whether a person is acting as a bank’s service provider when it receives or uses an affiliate’s eligibility information in connection with marketing the bank’s products and services.

(4) Use by an affiliate of its own eligibility information. Unless a bank has used eligibility information that it receives from an affiliate in the manner described in paragraph (b)(1)(ii) of this section, the bank does not make a solicitation subject to this subpart if the bank’s affiliate:

(i) Uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market the bank’s products or services to the consumer; or

(ii) Directs its service provider to use the affiliate’s own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market the bank’s products or services to the consumer, and the bank does not communicate directly with the service provider regarding that use.

(5) Use of eligibility information by a service provider. (i) In general. A bank does not make a solicitation subject to Subpart C of this part if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that the bank may access) receives eligibility information from the bank’s affiliate that the bank’s affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market the bank’s products or services to the consumer, so long as—

(A) The bank’s affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market the bank’s products or services);

(B) The bank’s affiliate establishes specific terms and conditions under which the service provider may access information from the bank’s affiliate;
and use the affiliate's eligibility information to market the bank's products and services (or those of affiliates generally) to the consumer, such as the identity of the affiliated companies whose products or services may be marketed to the consumer by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) The bank's affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the bank's affiliate relating to the marketing of the bank's products or services;

(D) The bank's affiliate is identified on or with the marketing materials provided to the consumer; and

(E) The bank does not directly use its affiliate's eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) Writing requirements. (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between the bank's affiliate and the service provider; and

(B) The specific terms and conditions established by the bank's affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(6) Examples of making solicitations. (i) A consumer has a deposit account with a depository institution, which is affiliated with an insurance company. The insurance company receives eligibility information about the consumer from the depository institution. The insurance company uses that eligibility information to identify the consumer to receive a solicitation about insurance products, and, as a result, the insurance company provides a solicitation to the consumer about its insurance products. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer.

(ii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that after using the eligibility information to identify the consumer to receive a solicitation about insurance products, the insurance company asks the depository institution to send the solicitation to the consumer and the depository institution does so. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer because it used eligibility information about the consumer that it received from an affiliate to identify the consumer to receive a solicitation about its products or services, and, as a result, a solicitation was provided to the consumer about the insurance company's products.

(iii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that eligibility information about consumers that have deposit accounts with the depository institution is placed into a common database that all members of the affiliated group of companies may independently access and use. Without using the depository institution's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the depository institution. The depository institution reviews eligibility information about its own consumers using the selection criteria provided by the insurance company to determine which consumers should receive the insurance company's marketing materials and sends marketing materials about the insurance company's products to those consumers. Even though the insurance company has received eligibility information through the common database as provided in paragraph (b)(2) of this section, it did not use that information to identify consumers or establish selection criteria; instead, the depository institution used its own eligibility information. Therefore, pursuant to paragraph (b)(4)(i) of this section, the insurance company has not made a solicitation to the consumer.

(iv) The same facts as in the example in paragraph (b)(6)(iii) of this section, except that the depository institution
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provides the insurance company’s criteria to the depository institution’s service provider and directs the service provider to use the depository institution’s eligibility information to identify depository institution consumers who meet the criteria and to send the insurance company’s marketing materials to those consumers. The insurance company does not communicate directly with the service provider regarding the use of the depository institution’s information to market its products to the depository institution’s consumers. Pursuant to paragraph (b)(4)(ii) of this section, the insurance company has not made a solicitation to the consumer.

(v) An affiliated group of companies includes a depository institution, an insurance company, and a service provider. Each affiliate in the group places information about its consumers into a common database. The service provider has access to all information in the common database. The depository institution controls access to and use of its eligibility information by the service provider. This control is set forth in a written agreement between the depository institution and the service provider. The written agreement also requires the service provider to establish reasonable policies and procedures designed to ensure that the service provider uses the depository institution’s eligibility information in accordance with specific terms and conditions established by the depository institution relating to the marketing of the products and services of all affiliates, including the insurance company. In a separate written communication, the depository institution specifies the terms and conditions under which the service provider may use the depository institution’s eligibility information to market the products and services to the depository institution’s consumers. The specific terms and conditions are: A list of affiliated companies (including the insurance company) whose products or services may be marketed to the depository institution’s consumers by the service provider; the specific products or types of products that may be marketed to the depository institution’s consumers by the service provider; the categories of eligibility information that may be used by the service provider in marketing products or services to the depository institution’s consumers; the types or categories of the depository institution’s consumers to whom the service provider may market products or services of depository institution affiliates; the number and/or types of marketing communications that the service provider may send to the depository institution’s consumers; and the length of time during which the service provider may market the products or services of the depository institution’s affiliates to its consumers. The depository institution periodically evaluates the service provider’s compliance with these terms and conditions. The insurance company asks the service provider to market insurance products to certain consumers who have deposit accounts with the depository institution. Without using the depository institution’s eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the service provider. The service provider uses the depository institution’s eligibility information from the common database to identify the depository institution’s consumers to whom insurance products will be marketed. When the insurance company’s marketing materials are provided to the identified consumers, the name of the depository institution is displayed on the insurance marketing materials, an introductory letter that accompanies the marketing materials, an account statement that accompanies the marketing materials, or the envelope containing the marketing materials. The requirements of paragraph (b)(5) of this section have been satisfied, and the insurance company has not made a solicitation to the consumer.

(vi) The same facts as in the example in paragraph (b)(6)(v) of this section, except that the terms and conditions permit the service provider to use the depository institution’s eligibility information to market the products and services of other affiliates to the depository institution’s consumers whenever the service provider deems it appropriate to do so. The service provider
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uses the depository institution’s eligi-

bility information in accordance with

the discretion afforded to it by the

terms and conditions. Because the

terms and conditions are not specific,

the requirements of paragraph (b)(5) of

this section have not been satisfied.

(c) Exceptions. The provisions of this

subpart do not apply to a bank if it

uses eligibility information that it re-

ceives from an affiliate:

(1) To make a solicitation for mar-

keting purposes to a consumer with

whom the bank has a pre-existing busi-

ness relationship;

(2) To facilitate communications to

an individual for whose benefit the

bank provides employee benefit or

other services pursuant to a contract

with an employer related to and aris-

ing out of the current employment re-

lationship or status of the individual as

a participant or beneficiary of an em-

ployee benefit plan;

(3) To perform services on behalf of

an affiliate, except that this subpara-

graph shall not be construed as permit-

ting the bank to send solicitations on

behalf of an affiliate if the affiliate

would not be permitted to send the so-

licitation as a result of the election of

the consumer to opt out under this sub-

part;

(4) In response to a communication

about the bank’s products or services

initiated by the consumer;

(5) In response to an authorization or

request by the consumer to receive so-

licitations; or

(6) If the bank’s compliance with this

subpart would prevent it from com-

plying with any provision of State in-

surance laws pertaining to unfair dis-

crimination in any State in which the

bank is lawfully doing business.

(d) Examples of exceptions. (1) Example

of the pre-existing business relationship

exception. A consumer has a deposit ac-

count with a depository institution. The

consumer also has a relationship with

the depository institution’s securities

affiliate for management of the

consumer’s securities portfolio. The de-

pository institution receives eligibility

information about the consumer from

its securities affiliate and uses that in-

formation to make a solicitation to the

consumer about the depository institu-

tion’s wealth management services.

The depository institution may make

this solicitation even if the consumer

has not been given a notice and oppor-

tunity to opt out because the deposi-

tory institution has a pre-existing

business relationship with the con-

sumer.

(2) Examples of service provider excep-

tion. (i) A consumer has an insurance

policy issued by an insurance company.

The insurance company furnishes eligi-

bility information about the consumer

to its affiliated depository institution.

Based on that eligibility information,

the depository institution wants to

make a solicitation to the consumer

about its deposit products. The deposi-

tory institution does not have a pre-ex-

isting business relationship with the

consumer and none of the other excep-

tions in paragraph (c) of this section

apply. The consumer has been given an

opt-out notice and has elected to opt

out of receiving such solicitations. The

depository institution asks a service

provider to send the solicitation to the

consumer on its behalf. The service

provider may not send the solicitation

on behalf of the depository institution

because, as a result of the consumer’s

opt-out election, the depository insti-

tution is not permitted to make the so-

licitation.

(ii) The same facts as in paragraph

(d)(2)(i) of this section, except the con-

sumer has been given an opt-out no-

tice, but has not elected to opt out.

The depository institution asks a serv-

ice provider to send the solicitation to

the consumer on its behalf. The service

provider may send the solicitation on

behalf of the depository institution

because, as a result of the consumer’s not

opting out, the depository institution

is permitted to make the solicitation.

(3) Examples of consumer-initiated com-

munications. (i) A consumer who has a

deposit account with a depository in-

stitution initiates a communication

with the depository institution’s credit

card affiliate to request information

about a credit card. The credit card af-

filiate may use eligibility information

about the consumer it obtains from the

depository institution or any other af-

filiate to make solicitations regarding

credit card products in response to the

consumer-initiated communication.
(ii) A consumer who has a deposit account with a depository institution contacts the institution to request information about how to save and invest for a child's college education without specifying the type of product in which the consumer may be interested. Information about a range of different products or services offered by the depository institution and one or more affiliates of the institution may be responsive to that communication. Such products or services may include the following: Mutual funds offered by the institution’s mutual fund affiliate; section 529 plans offered by the institution, its mutual fund affiliate, or another securities affiliate; or trust services offered by a different financial institution in the affiliated group. Any affiliate offering investment products or services that would be responsive to the consumer’s request for information about saving and investing for a child’s college education may use eligibility information to make solicitations to the consumer in response to this communication.

(iii) A credit card issuer makes a marketing call to the consumer without using eligibility information received from an affiliate. The issuer leaves a voice-mail message that invites the consumer to call a toll-free number to apply for the issuer’s credit card. If the consumer calls the toll-free number to inquire about the credit card, the call is a consumer-initiated communication about a product or service and the credit card issuer may now use eligibility information it receives from its affiliates to make solicitations to the consumer.

(iv) A consumer calls a depository institution to ask about retail locations and hours, but does not request information about products or services. The institution may not use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services because the consumer-initiated communication does not relate to the depository institution’s products or services. Thus, the use of eligibility information received from an affiliate would not be responsive to the communication and the exception does not apply.

(v) A consumer calls a depository institution to ask about certificates of deposit because such solicitations would respond to the consumer-initiated communication about products or services.

Examples of consumer authorization or request for solicitations. (i) A consumer who obtains a mortgage from a mortgage lender authorizes or requests information about homeowner’s insurance offered by the mortgage lender’s insurance affiliate. Such authorization or request, whether given to the mortgage lender or to the insurance affiliate, would permit the insurance affiliate to use eligibility information about the consumer it obtains from the mortgage lender or any other affiliate to make solicitations to the consumer about homeowner’s insurance.

(ii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer’s online application contains a blank check box that the consumer may check to authorize or request information from the credit card issuer’s affiliates. The consumer checks the box. The consumer has authorized or requested solicitations from the card issuer’s affiliates.

(iii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer’s online application contains a pre-selected check box indicating that the consumer authorizes or requests information from the issuer’s affiliates. The consumer does not deselect the check box. The consumer has not authorized
or requested solicitations from the card issuer's affiliates.

(iv) The terms and conditions of a credit card account agreement contain preprinted boilerplate language stating that by applying to open an account the consumer authorizes or requests to receive solicitations from the credit card issuer's affiliates. The consumer has not authorized or requested solicitations from the card issuer's affiliates.

(e) Relation to affiliate-sharing notice and opt-out. Nothing in this subpart limits the responsibility of a person to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the Act where applicable.

§ 41.22 Scope and duration of opt-out.

(a) Scope of opt-out. (1) In general. Except as otherwise provided in this section, the consumer's election to opt out prohibits any affiliate covered by the opt-out notice from using eligibility information received from another affiliate as described in the notice to make solicitations to the consumer.

(2) Continuing relationship. (i) In general. If the consumer establishes a continuing relationship with a bank or its affiliate, an opt-out notice may apply to eligibility information obtained in connection with—

(A) A single continuing relationship or multiple continuing relationships that the consumer establishes with the bank or its affiliates, including continuing relationships established subsequent to delivery of the opt-out notice, so long as the notice adequately describes the continuing relationships covered by the opt-out; or

(B) Any other transaction between the consumer and the bank or its affiliates as described in the notice.

(ii) Examples of continuing relationships. A consumer—

(A) Opens a deposit or investment account with the bank or its affiliate;

(B) Obtains a loan for which the bank or its affiliate owns the servicing rights;

(C) Purchases an insurance product from the bank or its affiliate;

(D) Holds an investment product through the bank or its affiliate, such as when the bank acts or its affiliate acts as a custodian for securities or for assets in an individual retirement arrangement;

(E) Enters into an agreement or understanding with the bank or its affiliate whereby the bank or its affiliate undertakes to arrange or broker a home mortgage loan for the consumer;

(F) Enters into a lease of personal property with the bank or its affiliate;

(G) Obtains financial, investment, or economic advisory services from the bank or its affiliate for a fee.

(3) No continuing relationship. (i) In general. If there is no continuing relationship between a consumer and a bank or its affiliate, and the bank or its affiliate obtains eligibility information about the consumer in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, an opt-out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

(ii) Examples of isolated transactions. An isolated transaction occurs if—

(A) The consumer uses a bank's or its affiliate's ATM to withdraw cash from an account at another financial institution; or

(B) A bank or its affiliate sells the consumer a cashier's check or money order, airline tickets, travel insurance, or traveler's checks in isolated transactions.

(4) Menu of alternatives. A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice, electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all solicitations from