

(d) *Commission* means the Securities and Exchange Commission.

(e) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(f) *Concise*—(1) *In general*. The term “concise” means a reasonably brief expression or statement.

(2) *Combination with other required disclosures*. A notice required by this subpart may be concise even if it is combined with other disclosures required or authorized by Federal or State law.

(g) *Consumer* means an individual.

(h) *Control* of a company means the power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of any company is presumed to control the company. Any person who does not own more than 25 percent of the voting securities of any company will be presumed not to control the company. Any presumption regarding control may be rebutted by evidence, but, in the case of an investment company, will continue until the Commission makes a decision to the contrary according to the procedures described in section 2(a)(9) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(9)).

(i) *Dealer* has the same meaning as in section 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(5)). A “dealer” does not include a dealer registered by notice with the Commission under section 15(b)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(11)).

(j) *Eligibility information* means any information the communication of which would be a consumer report if the exclusions from the definition of “consumer report” in section 603(d)(2)(A) of the FCRA did not apply. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(k) *FCRA* means the Fair Credit Reporting Act (15 U.S.C. 1681, *et seq.*).

(l) *GLBA* means the Gramm-Leach-Bliley Act (15 U.S.C. 6801, *et seq.*).

(m) *Investment adviser* has the same meaning as in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)).

(n) *Investment company* has the same meaning as in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3) and includes a separate series of the investment company.

(o) *Marketing solicitation*—(1) *In general*. The term “marketing solicitation” means the marketing of a product or service 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 subpart; and

(ii) Intended to encourage the consumer to purchase or obtain such product or service.

(2) *Exclusion of marketing directed at the general public*. A marketing solicitation does not include marketing communications that are directed at the general public. For example, television, general circulation magazine, billboard advertisements and publicly available Web sites that are not directed to particular consumers would not constitute marketing solicitations, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications.

(3) *Examples of marketing solicitations*. A marketing solicitation would include, for example, a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a particular consumer that is based on eligibility information received from an affiliate.

(p) *Person* means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(q) *Pre-existing business relationship*—(1) *In general*. The term “pre-existing business relationship” means a relationship between a person, or a person’s licensed agent, and a consumer based on:

(i) 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 subpart;

(ii) 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 the consumer is sent a solicitation covered by this subpart; or

(iii) An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart.

(2) *Examples of pre-existing business relationships.* (i) If a consumer has a brokerage account with a broker-dealer that is currently in force, the broker-dealer has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(ii) If a consumer has an investment advisory contract with a registered investment adviser, the investment adviser has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(iii) If a consumer was the record owner of securities issued by an investment company, but the consumer redeems these securities, the investment company has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date the consumer redeemed the investment company's securities.

(iv) If a consumer applies for a margin account offered by a broker-dealer, but does not obtain a product or service from or enter into a financial contract or transaction with the broker-dealer, the broker-dealer has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliates to make solicitations to the

consumer about its products or services for three months after the date of the application.

(v) If a consumer makes a telephone inquiry to a broker-dealer about its products or services and provides contact information to the broker-dealer, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the broker-dealer has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(vi) If a consumer makes an inquiry by e-mail to a broker-dealer about one of its affiliated investment company's products or services but does not obtain a product or service from, or enter into a financial contract or transaction with the broker-dealer or the investment company, the broker-dealer and the investment company both have a pre-existing business relationship with the consumer and can therefore use eligibility information they receive from their affiliates to make solicitations to the consumer about their products or services for three months after the date of the inquiry.

(vii) If a consumer who has a pre-existing business relationship with an investment company that is part of a group of affiliated companies makes a telephone call to the centralized call center for the affiliated companies to inquire about products or services offered by a broker-dealer affiliated with the investment company, and provides contact information to the call center, the call constitutes an inquiry to the broker-dealer. In these circumstances, the broker-dealer has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from the investment company to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(3) *Examples where no pre-existing business relationship is created.* (i) If a consumer makes a telephone call to a centralized call center for a group of affiliated companies to inquire about the

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consumer's existing account at a broker-dealer, the call does not constitute an inquiry to any affiliate other than the broker-dealer that holds the consumer's account and does not establish a pre-existing business relationship between the consumer and any affiliate of the account-holding broker-dealer.

(ii) If a consumer who has an advisory contract with a registered investment adviser makes a telephone call to an affiliate of the investment adviser to ask about the affiliate's retail locations and hours, but does not make an inquiry about the affiliate's products or services, the call does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate. Also, the affiliate's capture of the consumer's telephone number does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate.

(iii) If a consumer makes a telephone call to a broker-dealer in response to an advertisement offering a free promotional item to consumers who call a toll-free number, but the advertisement does not indicate that the broker-dealer's products or services will be marketed to consumers who call in response, the call does not create a pre-existing business relationship between the consumer and the broker-dealer because the consumer has not made an inquiry about a product or service offered by the institution, but has merely responded to an offer for a free promotional item.

(r) *Transfer agent* has the same meaning as in section 3(a)(25) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(25)).

(s) *You* means:

(1) Any broker or dealer other than a broker or dealer registered by notice with the Commission under section 15(b)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(11));

(2) Any investment company;

(3) Any investment adviser registered with the Commission under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1, *et seq.*); and

(4) Any transfer agent registered with the Commission under section 17A

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of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1).

§ 248.121 Affiliate marketing opt out and exceptions.

(a) *Initial notice and opt out requirement*—(1) *In general.* You may not use eligibility information about a consumer that you receive from an affiliate to make a marketing solicitation 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 you may use eligibility information about that consumer received from an affiliate to make marketing solicitations to the consumer;

(ii) The consumer is provided a reasonable opportunity and a reasonable and simple method to “opt out,” or the consumer prohibits you from using eligibility information to make marketing solicitations to the consumer; and

(iii) The consumer has not opted out.

(2) *Example.* A consumer has a brokerage account with a broker-dealer. The broker-dealer furnishes eligibility information about the consumer to its affiliated investment adviser. Based on that eligibility information, the investment adviser wants to make a marketing solicitation to the consumer about its discretionary advisory accounts. The investment adviser does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The investment adviser is prohibited from using eligibility information received from its broker-dealer affiliate to make marketing solicitations to the consumer about its discretionary advisory accounts 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 marketing solicitations*—(1) *In general.* For purposes of this subpart, you make a marketing solicitation if:

(i) You receive eligibility information from an affiliate;

(ii) You use that eligibility information to do one or more of the following:

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

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

(C) Decide which of your products or services to market to the consumer or tailor your marketing solicitation to that consumer; and

(iii) As a result of your use of the eligibility information, the consumer is provided a marketing solicitation.

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

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

(4) *Use by an affiliate of its own eligibility information.* Unless you have used eligibility information that you receive from an affiliate in the manner described in paragraph (b)(1)(ii) of this section, you do not make a marketing solicitation subject to this subpart if your 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 your products or services to the affiliate's 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 your products or services to the consumer, and you do not communicate directly with the service provider regarding that use.

(5) *Use of eligibility information by a service provider*—(i) *In general.* You do not make a marketing solicitation subject to this subpart if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that you may access) receives eligibility information from your affiliate that your affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market your products or services to that affiliate's consumer, so long as:

(A) Your 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 your products or services);

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

(C) Your affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses your affiliate's eligibility information in accordance with the terms and conditions established by your affiliate relating to

the marketing of your products or services;

(D) Your affiliate is identified on or with the marketing materials provided to the consumer; and

(E) You do not directly use your 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 your affiliate and the service provider; and

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

(6) *Examples of making marketing solicitations.* (i) A consumer has an investment advisory contract with a registered investment adviser that is affiliated with a broker-dealer. The broker-dealer receives eligibility information about the consumer from the investment adviser. The broker-dealer uses that eligibility information to identify the consumer to receive a marketing solicitation about brokerage products and services, and, as a result, the broker-dealer provides a marketing solicitation to the consumer about its brokerage services. Pursuant to paragraph (b)(1) of this section, the broker-dealer has made a marketing 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 marketing solicitation about brokerage products and services, the broker-dealer asks the registered investment adviser to send the marketing solicitation to the consumer and the investment adviser does so. Pursuant to paragraph (b)(1) of this section, the broker-dealer has made a marketing 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 marketing solicitation about its products or services, and, as a result, a marketing solicitation was provided to the consumer about the broker-dealer's products and services.

(iii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that eligibility information about consumers who have an investment advisory contract with a registered investment adviser is placed into a common database that all members of the affiliated group of companies may independently access and use. Without using the investment adviser's eligibility information, the broker-dealer develops selection criteria and provides those criteria, marketing materials, and related instructions to the investment adviser. The investment adviser reviews eligibility information about its own consumers using the selection criteria provided by the broker-dealer to determine which consumers should receive the broker-dealer's marketing materials and sends the broker-dealer's marketing materials to those consumers. Even though the broker-dealer 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 investment adviser used its own eligibility information. Therefore, pursuant to paragraph (b)(4)(i) of this section, the broker-dealer has not made a marketing solicitation to the consumer.

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

(v) An affiliated group of companies includes an investment company, a principal underwriter for the investment company, a retail broker-dealer,

and a transfer agent that also acts as 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 investment company controls access to and use of its eligibility information by the service provider. This control is set forth in a written agreement between the investment company 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 investment company's eligibility information in accordance with specific terms and conditions established by the investment company relating to the marketing of the products and services of all affiliates, including the principal underwriter and the retail broker-dealer. In a separate written communication, the investment company specifies the terms and conditions under which the service provider may use the investment company's eligibility information to market the retail broker-dealer's products and services to the investment company's consumers. The specific terms and conditions are: a list of affiliated companies (including the retail broker-dealer) whose products or services may be marketed to the investment company's consumers by the service provider; the specific products or services or types of products or services that may be marketed to the investment company'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 investment company's consumers; the types or categories of the investment company's consumers to whom the service provider may market products or services of investment company affiliates; the number and types of marketing communications that the service provider may send to the investment company's consumers; and the length of time during which the service provider may market the products or services of the investment company's affiliates to its consumers. The investment company periodically evaluates the service provider's compliance with these terms

and conditions. The retail broker-dealer asks the service provider to market brokerage services to certain of the investment company's consumers. Without using the investment company's eligibility information, the retail broker-dealer develops selection criteria and provides those criteria, its marketing materials, and related instructions to the service provider. The service provider uses the investment company's eligibility information from the common database to identify the investment company's consumers to whom brokerage services will be marketed. When the retail broker-dealer's marketing materials are provided to the identified consumers, the name of the investment company is displayed on the retail broker-dealer's 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 retail broker-dealer has not made a marketing 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 investment company's eligibility information to market the products and services of other affiliates to the investment company's consumers whenever the service provider deems it appropriate to do so. The service provider uses the investment company's eligibility 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 you if you use eligibility information that you receive from an affiliate:

(1) To make a marketing solicitation to a consumer with whom you have a pre-existing business relationship;

(2) To facilitate communications to an individual for whose benefit you provide employee benefit or other services pursuant to a contract with an employer related to and arising out of the

current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;

(3) To perform services on behalf of an affiliate, except that this paragraph shall not be construed as permitting you to send marketing solicitations on behalf of an affiliate if the affiliate would not be permitted to send the marketing solicitation as a result of the election of the consumer to opt out under this subpart;

(4) In response to a communication about your products or services initiated by the consumer;

(5) In response to an authorization or request by the consumer to receive solicitations; or

(6) If your compliance with this subpart would prevent you from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which you are lawfully doing business.

(d) *Examples of exceptions*—(1) *Example of the pre-existing business relationship exception.* A consumer has a brokerage account with a broker-dealer. The consumer also has a deposit account with the broker-dealer's affiliated depository institution. The broker-dealer receives eligibility information about the consumer from its depository institution affiliate and uses that information to make a marketing solicitation to the consumer about the broker-dealer's college savings accounts. The broker-dealer may make this marketing solicitation even if the consumer has not been given a notice and opportunity to opt out because the broker-dealer has a pre-existing business relationship with the consumer.

(2) *Examples of service provider exception.* (i) A consumer has a brokerage account with a broker-dealer. The broker-dealer furnishes eligibility information about the consumer to its affiliate, a registered investment adviser. Based on that eligibility information, the investment adviser wants to make a marketing solicitation to the consumer about its advisory services. The investment adviser does not have a pre-existing business relationship with the consumer and none of the other exceptions 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 marketing solicitations. The investment adviser asks a service provider to send the marketing solicitation to the consumer on its behalf. The service provider may not send the marketing solicitation on behalf of the investment adviser because, as a result of the consumer's opt out election, the investment adviser is not permitted to make the marketing solicitation.

(ii) The same facts as in paragraph (d)(2)(i) of this section, except the consumer has been given an opt out notice, but has not elected to opt out. The investment adviser asks a service provider to send the solicitation to the consumer on its behalf. The service provider may send the marketing solicitation on behalf of the investment adviser because, as a result of the consumer's not opting out, the investment adviser is permitted to make the marketing solicitation.

(3) *Examples of consumer-initiated communications.* (i) A consumer who is the record owner of shares in an investment company initiates a communication with an affiliated registered investment adviser about advisory services. The affiliated investment adviser may use eligibility information about the consumer it obtains from the investment company or any other affiliate to make marketing solicitations regarding the affiliated investment adviser's services in response to the consumer-initiated communication.

(ii) A consumer who has a brokerage account with a broker-dealer contacts the broker-dealer to request information about how to save and invest for a child's college education without specifying the type of savings or investment vehicle in which the consumer may be interested. Information about a range of different products or services offered by the broker-dealer and one or more of its affiliates may be responsive to that communication. Such products, services, and investments may include the following: investments in affiliated investment companies; investments in section 529 plans offered by the broker-dealer; or trust services offered by a different financial institution in the affiliated group. Any affiliate offering