Proposed Rules

Federal Register
Vol. 69, No. 114
Tuesday, June 15, 2004

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL TRADE COMMISSION

16 CFR Part 680

RIN 3084–AA94

Affiliate Marketing Rule

AGENCY: Federal Trade Commission (FTC).

ACTION: Proposed rule, request for comment.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is publishing for comment a proposed rule that is required by Section 214(b) of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), with respect to entities subject to its jurisdiction under Section 621(a) of the Fair Credit Reporting Act (FCRA). Section 214(a) of the FACT Act amends the FCRA by adding a new section 624, which the proposed regulations implement by providing for consumer notice and an opportunity to prohibit affiliates from using certain information to make or send marketing solicitations to the consumer. The FACT Act requires certain other federal agencies to publish similar rules, and mandates that the FTC and other agencies consult and cooperate so that their regulations implementing this provision are consistent and comparable with one another.

DATES: Comments must be received by July 20, 2004.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''FACT Act Affiliate Marketing Rule, Matter No. R411006'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to: Federal Trade Commission, Office of the Secretary, Room H–159 (Annex Q), 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form clearly labeled ''Confidential,'' and comply with the Commission Rule 4.9(c). 16 CFR 4.9(c). Any comment filed in paper form should be sent by courier or overnight service, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

An electronic comment can be filed by (1) clicking on *http://www.regulations.gov;* (2) selecting ''Federal Trade Commission'' at ''Search for Open Regulations;'' (3) locating the summary of this Notice; (4) clicking on ''Submit a Comment on this Regulation;'' and (5) completing the form. For a given electronic comment, any information placed in the following fields—''Title,'' ''First Name,'' ''Last Name,'' ''Organization Name,'' ''State,'' ''Comment,'' and ''Attachment''—will be publicly available on the FTC Web site. The fields marked with an asterisk on the form are required in order for the FTC to fully consider a particular comment. Commenters may choose not to fill in one or more of those fields, but if they do so, their comments may not be considered.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Federal Trade Commission. Comments should be submitted via facsimile to (202) 395–6974 because U.S. postal mail at the Office of Management and Budget is subject to lengthy delays due to heightened security precautions. Such comments should also be sent to the following address: Federal Trade Commission/Office of the Secretary, Room H–159 (Annex Q), 600 Pennsylvania Avenue, NW., Washington, DC 20580.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site at *http://www.ftc.gov* to the extent practicable. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

FOR FURTHER INFORMATION CONTACT: Toby M. Levin and Loretta Garrison, Attorneys, (202) 326–3224, Division of Financial Practices, Federal Trade Commission, 601 New Jersey Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA or Act), enacted in 1970, sets standards for the collection, communication, and use of information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is collected and communicated by consumer reporting agencies. 15 U.S.C. 1681–1681x. In 1996, the Consumer Credit Reporting Reform Act extensively amended the FCRA. Pub. L. 104–208, 110 Stat. 3009.

The FCRA, as amended, provides that a person may communicate to an affiliate or non-affiliated third party information solely as to transactions or experiences between the consumer and the person without becoming a consumer reporting agency.[1] In addition, the communication of such transaction or experience information among affiliates will not result in any affiliate becoming a consumer reporting agency. *See* FCRA §§ 603(d)(2)(A)(i) and (ii).

Section 603(d)(2)(A)(iii) of the FCRA provides that a person may communicate ''other'' information—that is, non-transaction or experience information that would otherwise be a ''consumer report''—among its affiliates without becoming a consumer reporting

[1] The FCRA creates substantial obligations for a person that meets the definition of a ''consumer reporting agency''(CRA) in section 603(f) of the statute. Most importantly, CRAs must make reports only to parties with permissible purposes listed in section 604, limit reporting of negative information that is older than the times set out in section 605, maintain reasonable procedures to ensure accuracy of reports as required by section 607(b), make file disclosures to consumers required by section 609, and reinvestigate disputes using the procedures set forth in section 611.

agency if the person has given the consumer a clear and conspicuous notice that such information may be communicated among affiliates and an opportunity to ''opt-out'' or direct that the information not be communicated, and the consumer has not opted out. The notice and opt-out provided in section 603(d)(2)(A)(iii) of the FCRA was the subject of a proposed rulemaking by the Federal banking agencies in October 2000.[2] 65 FR 63120 (Oct. 20, 2000). The Commission, which did not have FCRA rulemaking authority, shortly thereafter issued for public comment a proposed interpretation of the affiliate information sharing provisions that was parallel to the banking agencies' proposed rule. 65 FR 80202 (Dec. 22, 2000). The banking agencies and the Commission had not completed action in those proceedings when Congress enacted the FACT Act.

The current proposal addresses a new notice and opt-out provision that applies to the use of certain information by one member of a business family, when received from an affiliate, to make or send marketing solicitations for its products and services to consumers. Although there is a certain degree of overlap between the two opt-outs, the two opt-outs are distinct and serve different purposes. Therefore, nothing in this proposal regarding the opt-out for affiliate marketing supersedes or replaces the affiliate sharing opt-out contained in section 603(d)(2)(A)(iii) of the Act.[3]

The Fair and Accurate Credit Transactions Act of 2003

The Fair and Accurate Credit Transactions Act of 2003 (FACT Act) was signed into law on December 4, 2003. Pub. L. 108–159, 117 Stat. 1952. The FACT Act amends the FCRA to enhance the ability of consumers to combat identity theft, to increase the accuracy of consumer reports, to allow consumers to exercise greater control regarding the type and amount of solicitations they receive, and to restrict the use and disclosure of sensitive medical information. To promote increasingly efficient national credit markets, the FACT Act establishes uniform national standards in key areas of regulation regarding consumer report information. Finally, to bolster efforts to improve financial literacy among consumers, the FACT Act creates a new Financial Literacy and Education Commission empowered to take appropriate actions to improve the financial literacy and education programs, grants, and materials of the Federal government.

Section 214 of the FACT Act adds a new section 624 of the FCRA. This new provision gives consumers the right to restrict a person from using certain information about a consumer obtained from an affiliate to make solicitations to that consumer. That section also requires the Commission and various federal agencies charged with regulating financial institutions,[4] in consultation and coordination with each other, to issue regulations in final form implementing section 214 not later than 9 months after the date of enactment. These rules must become effective not later than 6 months after the date on which they are issued in final form.

II. Explanation of the Proposed Regulations

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 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. As such, the new opt-out right contained in section 624 is distinct from the existing FCRA opt-out right for affiliate sharing under section 603(d)(2)(A)(iii), although these opt-out rights and the information subject to these opt-outs overlap to some extent. As noted above, the FCRA allows some information (transaction or experience information) to be shared among affiliates without giving the consumer notice and an opportunity to opt out, and provides that ''other'' information may not be shared among affiliates without giving the consumer notice and an opportunity to opt out. The new opt-out right for affiliate marketing generally applies to both transaction or experience information and ''other'' information.

The Commission seeks comment on these proposed regulations implementing section 624 of the FCRA, including in particular the matters discussed below, especially from (1) Consumers and (2) companies who believe they face considerations not applicable to institutions regulated by federal financial agencies.

Responsibility for Providing Notice and an Opportunity To Opt Out

Section 624 does not specify which affiliate must give the consumer notice and an opportunity to opt out of the use of the information by an affiliate for marketing purposes. Under one view, the person that receives certain consumer information from its affiliate and wants to use that information to make or send solicitations to the consumer could be responsible for giving the notice because the statute is drafted as a prohibition on the affiliate that receives the information from using such information to send solicitations, rather than as an affirmative duty imposed on the affiliate that sends or communicates that information. On the other hand, section 624(a)(1)(A) provides that the disclosure must state that the information ''may be communicated'' among affiliates for purposes of making solicitations, suggesting that the affiliate that sends or communicates information about a consumer should be responsible for providing the notice. In addition, section 214(b)(2) of the FACT Act requires the Commission to consider existing affiliate sharing notification practices and provide for coordinated and consolidated notices. Similarly, section 214 allows for the combination of affiliate marketing opt-out notices with other notices required by law, which may include Gramm-Leach-Bliley Act (GLB Act) privacy notices. Thus, the provisions of section 214 suggest that the person communicating information about a consumer to its affiliate should give the notice because that is the person that would likely provide the affiliate sharing opt-out notice under section 603(d)(2)(A)(iii) of the FCRA and other disclosures required by law.

The Commission proposes that the person communicating information about a consumer to its affiliate should be responsible for satisfying the notice requirement, if applicable. A rule of construction provides flexibility to allow the notice to be given by the person that communicates information to its affiliate, by the person's agent, or

[2] The banking agencies are the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision. The National Credit Union Administration proposed a virtually identical rule to apply to institutions subject to its jurisdiction immediately thereafter. 65 FR 64168 (Oct. 26, 2000)

[3] The proposed regulations would implement the restrictions on the use of consumer information under Section 624 of the amended FCRA, but do not address the provisions of Section 603(d)(3) regarding the sharing of medical information among affiliates. Although Section 604(g)(3)(C) grants the Commission the authority to make a rule with respect to the sharing by affiliates of medical information, it is not doing so at this time.

[4] The ''Agencies'' are the Federal banking agencies (see note 2), the National Credit Union Administration, and the Securities and Exchange Commission.

through a joint notice with one or more other affiliates. This approach provides flexibility and facilitates the use of a single notice. At the same time, it ensures that the notice is not provided solely by the affiliate that receives and uses the information to make or send solicitations, which may be a person from which the consumer would not expect to receive important notices regarding the consumer's opt-out rights. The Commission invites comment on whether the affiliate receiving the information should be permitted to give the notice solely on its own behalf. The Commission specifically solicits comment on whether a receiving affiliate could provide notice without making or sending any solicitations at the time of the notice and on whether such a notice would be effective.

Scope of Coverage

The statute specifies certain circumstances, which are included in the proposed regulations, when the provisions of this part do not apply. New section 624(a)(4) provides that the requirements and prohibitions of that section do not apply, for example, when: (1) The affiliate receiving the information has a pre-existing business relationship with the consumer; (2) the information is used to perform services for another affiliate (subject to certain conditions); (3) the information is used in response to a communication initiated by the consumer; or (4) the information is used to make a solicitation that has been authorized or requested by the consumer. The Commission has incorporated each of these statutory exceptions into the proposed rule.

The proposal uses the term ''eligibility information'' to describe the type of information that the statute allows consumers to bar affiliates from using to send marketing solicitations. The formula that defines the term in the proposal is designed to precisely reflect section 624(a)(1) of the Act—any information the communication of which would be a ''consumer report'' if the statutory exclusions from the definition of ''consumer report'' in section 603(d)(2)(A) of the FCRA (for transaction or experience information and for ''other'' information that is subject to the affiliate-sharing opt-out) did not apply. Under section 603(d)(1) of the FCRA, a ''consumer report'' means any written, oral, or other communication of any information by a consumer reporting agency bearing on the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes, employment purposes, or any other purpose authorized in section 604 of the FCRA. The term ''eligibility information'' is designed to facilitate discussion, and not to change the scope of information covered by section 624(a)(1) of the Act. The Commission invites comment on whether the term ''eligibility information,'' as defined, appropriately reflects the scope of coverage, or whether the regulation should track the more complicated language of the statute regarding the communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A) of the FCRA.

Duration of Opt-Out

Section 624 provides that a consumer's election to prohibit marketing based on shared information shall be effective for at least 5 years. Accordingly, the proposal provides that a consumer's opt-out election is valid for a period of at least 5 years (the opt-out period), beginning as soon as reasonably practicable after the consumer's opt-out election is received, unless the consumer revokes the election in writing, or if the consumer agrees, electronically, before the opt-out period has expired. When a consumer opts out, an affiliate that receives eligibility information about that consumer from another affiliate may not make or send solicitations to the consumer during the opt-out period based on that information, unless an exception applies or the opt-out is revoked.

To avoid the cost and burden of tracking consumer opt-outs over 5-year periods with varying start and end dates and sending out extension notices in 5-year cycles, some companies may choose to treat the consumer's opt-out election as effective for a period longer than 5 years, including in perpetuity, unless revoked by the consumer. A company that chooses to honor a consumer's opt-out election for more than 5 years would not violate the proposed regulations.

Key Definitions

Section 624 allows eligibility information shared with an affiliate to be used by that affiliate in making solicitations in certain circumstances, including where the affiliate has a pre-existing business relationship with the consumer. The terms ''solicitation'' and ''pre-existing business relationship'' are defined in the statute and the proposed regulation, and discussed in detail below in the Section-by-Section Analysis. The Commission has the authority to prescribe by regulation circumstances other than those specified in the statute that would constitute a ''pre-existing business relationship'' or would not constitute a ''solicitation.'' The Commission seeks comment on whether there are additional circumstances that should be deemed a ''pre-existing business relationship'' or other types of communications that should not be deemed a ''solicitation.''

The Commission solicits comment on all aspects of the proposal, including but not limited to items discussed in the Section-by-Section Analysis below.

III. Section-by-Section Analysis

Section 680.1—Purpose, Scope, and Effective Dates

Proposed § 680.1 sets forth the purpose and scope of the proposed regulations.

Section 680.2—Examples

Proposed § 680.2 describes the use of examples in the proposed regulations. In particular, the examples in this part are not exclusive. However, compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

Section 680.3—Definitions

Proposed § 680.3 contains definitions for the following terms: ''affiliate'' (as well as the related terms ''company'' and ''control''); ''clear and conspicuous''; ''communication''; ''consumer''; ''eligibility information''; ''person''; ''pre-existing business relationship''; and ''solicitation.''

Affiliate

Several FCRA provisions apply to information sharing with persons ''related by common ownership or affiliated by corporate control,'' ''related by common ownership or affiliated by common corporate control,'' or ''affiliated by common ownership or common corporate control.'' *E.g.,* FCRA, sections 603(d)(2), 615(b)(2), and 624(b)(2). Section 2 of the FACT Act defines the term ''affiliate'' to mean ''persons that are related by common ownership or affiliated by corporate control.''

The FCRA, the FACT Act, and the GLB Act contain a variety of approaches to the term ''affiliate.'' Proposed

paragraph (b) simplifies the various FCRA and FACT Act formulations by defining ''affiliate'' to mean any person that is related by common ownership or common corporate control with another person.[5] The Commission believes it is important to harmonize the various treatments of ''affiliate'' as much as possible and construe them to mean the same thing. Comment is solicited on whether there is any meaningful difference between the FCRA, FACT Act, and GLB Act definitions. In addition, the proposal uses a definition of ''control'' that applies exclusively to the control of a ''company,'' and defines ''company'' to include any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization. *See* proposed paragraphs (d) (''company'') and (f) (''control'')

Clear and Conspicuous

Proposed paragraph (c) defines the term ''clear and conspicuous'' to mean reasonably understandable and designed to call attention to the nature and significance of the information presented. Companies retain flexibility in determining how best to meet the clear and conspicuous standard.

Companies may wish to consider a number of methods to make their notices clear and conspicuous. A notice or disclosure may be made reasonably understandable through methods that include but are not limited to: using clear and concise sentences, paragraphs, and sections; using short explanatory sentences; using bullet lists; using definite, concrete, everyday words; using active voice; avoiding multiple negatives; avoiding legal and highly technical business terminology; and avoiding explanations that are imprecise and are readily subject to different interpretations. Various methods may also be used to design a notice or disclosure to call attention to the nature and significance of the information in it, including but not limited to: using a plain-language heading; using a typeface and type size that are easy to read; using wide margins and ample line spacing; using boldface or italics for key words. Companies that provide the notice on a web page may use text or visual cues to encourage scrolling down the page if necessary to view the entire notice, and take steps to ensure that other elements on the web site (such as pop-up ads, text, graphics, hyperlinks, or sound) do not distract attention from the notice.

When a notice or disclosure is combined with other information, methods for designing the notice or disclosure to call attention to the nature and significance of the information in it may include using distinctive type sizes, styles, fonts, paragraphs, headings, graphic devices, and groupings or other devices. It is unnecessary, however, to use distinctive features, such as distinctive type sizes, styles, or fonts, to differentiate an affiliate marketing opt-out notice from other components of a required disclosure, for example, where a privacy notice under the GLB Act includes several opt-out disclosures in a single notice. Nothing in the clear and conspicuous standard requires the segregation of an affiliate marketing opt-out notice when it is combined with a privacy notice under the GLB Act or other required disclosures.

It may not be feasible to incorporate all of the methods described above all the time. For example, a company may have to use legal terminology, rather than everyday words, in certain circumstances to provide a precise explanation. Companies are encouraged, but not required, to consider the practices described above in designing their notices or disclosures, as well as using readability testing to devise notices that are understandable to consumers.

Consumer

Proposed paragraph (e) defines the term ''consumer'' to mean an individual, which follows the statutory definition in section 603(c) of the FCRA. For purposes of this definition, an individual acting through a legal representative qualifies as a consumer.

Eligibility Information

Under proposed paragraph (g), the term ''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 may include a person's own transaction or experience information, such as information about a consumer's account history with that person, and other information, such as information from credit bureau reports or applications.

Person

Proposed paragraph (h) defines the term ''person'' to mean any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity. A person may act through an agent, such as a licensed agent (in the case of an insurance company), a trustee (in the case of a trust), or any other agent. For purposes of this part, actions taken by an agent on behalf of a person that are within the scope of the agency relationship will be treated as actions of that person.

Pre-Existing Business Relationship

Proposed paragraph (i) defines this term to mean a relationship between a person and a consumer based on the following: (1) A financial contract between the person and the consumer that is in force; (2) the purchase, rental, or lease by the consumer of that 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 that person, during the 18-month period immediately preceding the date on which a solicitation covered by 16 CFR 680 is made or sent to the consumer; or (3) an inquiry or application by the consumer regarding a product or service offered by that person during the 3-month period immediately preceding the date on which a covered solicitation is made or sent to the consumer. The proposed definition generally tracks the statutory definition contained in section 624 of the Act, with certain revisions for clarity.

In regard to sales and leases of goods or services, and consumer inquiries about such transactions, the definition is substantially similar to the definition of ''established business relationship'' under the amended Telemarketing Sales Rule (TSR) (16 CFR 310.2(n)). That definition was informed by Congress's intent that the ''established business relationship'' exemption to the ''do not call'' provisions of the Telephone Consumer Protection Act (47 U.S.C. 227 *et seq.*) should be grounded on the reasonable expectations of the consumer.[6] Congress's incorporation of similar language in the definition of ''pre-existing business relationship'' [7] suggests that it would be appropriate to

[5] In this rule, ''affiliate'' refers to any entity over which the Commission has FCRA enforcement authority under section 621(a)(1), which is universal except where ''specifically committed to some other government agency under subsection (b) hereof.'' Section 621(b) assigns federal bank and other agencies to enforce the statute as to certain banks, savings associations, credit unions, transportation and agricultural entities to other agencies. Because the Commission has enforcement authority over FCRA provisions as to all entities not assigned to other agencies, it is quite possible that in some corporate families one affiliate (*e.g.*, a mortgage lender) may be subject to the jurisdiction of the Commission while another (*e.g.*, a bank) would be subject to the jurisdiction of a different federal regulator.

[6] H.R. Rep. No. 102–317, at 14–15 (1991). 68 FR 4580, 4591–94 (Jan. 29, 2003).

[7] 149 Cong. Rec. S13,980 (daily ed. Nov. 5, 2003) (statement of Senator Feinstein).

consider the reasonable expectations of the consumer in determining the scope of this exception. Thus, for purposes of this regulation, an inquiry includes any affirmative request by a consumer for information, such that the consumer would reasonably expect to receive information from the affiliate about its products or services.[8] A consumer would not reasonably expect to receive information from the affiliate if the consumer does not request information or does not provide contact information to the affiliate.

The Commission has the statutory authority to define in the regulations other circumstances that qualify as a pre-existing business relationship. The Commission has not proposed to exercise this authority to expand the definition of ''pre-existing business relationship'' beyond the circumstances set forth in the statute. Comment is solicited, however, on whether there are other circumstances that the Commission should include within the definition of ''pre-existing business relationship.''

Solicitation

Proposed paragraph (j) defines this term to mean marketing initiated by a person to a particular consumer that is based on eligibility information communicated to that person by its affiliate and is intended to encourage the consumer to purchase a product or service. A communication, such as a telemarketing solicitation, direct mail, or e-mail, is a solicitation if it is directed to a specific consumer based on eligibility information. The proposed definition of solicitation does not, however, include communications that are directed at the general public without regard to eligibility information, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications. The proposed definition tracks the statutory definition contained in section 624 of the Act, with certain revisions for clarity.

The Commission has the statutory authority to determine by regulation that other communications do not constitute a solicitation. The Commission has not proposed to exercise this authority to specify other communications that would not be deemed ''solicitations'' beyond the circumstances set forth in the statute.

Comment is solicited, however, on whether there are other communications that the Commission should determine do not meet the definition of ''solicitation.'' Comment is also requested on whether, and to what extent, various tools used in Internet marketing, such as pop-up ads, may constitute solicitations as opposed to communications directed at the general public, and whether further guidance is needed to address Internet marketing.

Section 680.20—Use of Eligibility Information by Affiliates for Marketing

Proposed § 680.20 establishes the basic rules governing the requirement to provide the consumer with notice and a reasonable opportunity to opt out of a person's use of eligibility information that it obtains from an affiliate for the purpose of making or sending solicitations to the consumer. The statute is ambiguous because it does not specify which affiliate must provide the opt-out notice to the consumer. The proposed regulation would resolve this ambiguity by imposing certain duties on the person that communicates the eligibility information and certain duties on the affiliate that receives the information with the intent to use that information to make or send solicitations to consumers. These bifurcated duties are set forth in paragraphs (a) and (b).

Paragraph (a) sets forth the duty of a person that communicates eligibility information to an affiliate. Under the proposal, before an affiliate may use eligibility information to make or send solicitations to the consumer, the person that communicates eligibility information about a consumer to an affiliate must provide a notice to the consumer stating that such information may be communicated to and used by the affiliate to make or send solicitations to the consumer regarding the affiliate's products and services, and must give the consumer a reasonable opportunity and a simple method to opt out.

Some organizations may choose to share eligibility information among affiliates but not allow the affiliates that receive that information to use it to make or send marketing solicitations. In that case, proposed paragraph (a) would not apply and an opt-out notice would not be required if none of the affiliates that receive eligibility information use it to make or send solicitations to consumers.

Under the proposal, paragraph (a) would not apply if, for example, a finance company asks its affiliated retailer to include finance company marketing material in periodic statements sent to consumers by the retailer without regard to eligibility information. The Commission invites comment on whether, given the policy objectives of section 214 of the FACT Act, proposed paragraph (a) 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.

Proposed paragraph (a) also contains two rules of construction. The first rule of construction provides that the notice may be provided either in the name of a person with which the consumer currently does or previously has done business or in one or more common corporate names shared by members of an affiliate group of companies that includes the common corporate name used by that person. The rule of construction also provides alternatives regarding the manner in which the notice is given. A person that communicates eligibility information to an affiliate may provide the notice directly to the consumer, or may use an agent to provide the notice on the person's behalf. If the agent is the person's affiliate, the agent may not include any solicitations other than those of the person on or with the notice, unless one of the exceptions in paragraph (c) applies. Additionally, the agent must provide the opt-out notice in the name of the person or a common corporate name.[9] If an agent is used, the person remains responsible for any failure of the agent to fulfill its notice obligations. Alternatively, a person may provide a joint notice with one or more of its affiliates as provided in § 680.24(c) and discussed more fully below.

This rule of construction strikes a balance between giving companies flexibility to allow different entities within the affiliated group to provide the notice while ensuring that the notice

[8] *See* 68 FR at 4594.

[9] If the principal is a financial institution, and the agent sending the notice is not an affiliate, the agent would only be permitted to use the information for limited purposes under the GLB Act privacy regulations. 16 CFR 313.11(a)(1).

provided to the consumer is meaningful and designed to be effective. Thus, an opt-out notice provided to the consumer solely in the name of an affiliate that receives eligibility information but that is not known or recognizable to the consumer as an entity with which the consumer does or has done business is not likely to be an effective notice. For example, if the consumer has a relationship with the ABC affiliate, but the opt-out notice is provided solely in the name of the XYZ affiliate—which does not share a common name with the ABC affiliate—the notice is not likely to be effective. Indeed, many consumers may disregard a notice from the XYZ affiliate on the assumption that the notice is unsolicited junk mail. If, however, the consumer has a relationship with the ABC affiliate, and the opt-out notice is provided jointly in the name of all affiliated companies that share the ABC name and the XYZ name, the notice is likely to be effective.

The second rule of construction makes clear that it is not necessary for each affiliate that communicates the same eligibility information to provide an opt-out notice to the consumer, so long as the notice provided by the affiliate that initially communicated the information is broad enough to cover use of that information by each affiliate that receives and uses it to make solicitations. For example, if affiliate A communicates eligibility information to affiliate B, and affiliate B communicates that same information to affiliate C, affiliate B does not have to provide the consumer with an opt-out notice, so long as affiliate A's notice is broad enough to cover both B's and C's use of that information to make solicitations to the consumer. Examples are provided to illustrate how the rules of construction work.

Paragraph (a) contemplates that the opt-out notice will be provided to the consumer in writing or, if the consumer agrees, electronically. The Commission notes that the methods discussed above for complying with the statutory ''clear and conspicuous'' provision do not apply to oral notices, and seeks comment on whether (1) there are circumstances in which it is necessary and appropriate to allow an oral notice, and (2) there exists any practical method for meeting the ''clear and conspicuous'' standard in oral notices.

Paragraph (b) sets forth the general duties of an affiliate that receives eligibility information (''the receiving affiliate''). The receiving affiliate may not use eligibility information it receives from an affiliate to make solicitations to the consumer unless, prior to such use, the consumer has been provided an opt-out notice, as described in paragraph (a), that applies to that affiliate's use of eligibility information and a reasonable opportunity and simple method to opt out and the consumer did not opt out of that use.

Paragraphs (a) and (b) focus on whether the information communicated to affiliates meets the definition of ''eligibility information.'' Section 624(a)(1) of the Act concerns ''a communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A).'' The Commission has proposed to define ''eligibility information'' in a manner consistent with the statutory definition. The Commission recognizes, however, that there are other exceptions to the statutory definition of ''consumer report,'' such that it may be burdensome for companies to determine and track whether consumer report information is eligibility information (to which the marketing opt-out provisions of section 624 apply) or information that may be shared with affiliates under other exceptions in the FCRA (to which the marketing opt-out provisions of section 624 do not apply). To minimize this burden, the Commission believes that companies may satisfy the requirements of section 624 by voluntarily offering consumers the ability to opt out of marketing based on consumer report information that is shared under any of the exceptions in section 603(d)(2) of the FCRA, not just those in section 603(d)(2)(A), as required by section 624.

Paragraph (c) contains exceptions to the requirements of this regulation. It incorporates each of the following statutory exceptions to the affiliate marketing notice and opt-out requirements set forth in section 624(a)(4) of the FCRA: (1) Using the information to make a solicitation to a consumer with whom the affiliate has a pre-existing business relationship; (2) using the information to facilitate communications to an individual for whose benefit the affiliate provides employee benefit or other services under a contract with an employer related to and arising out of a current employment relationship or an individual's status as a participant or beneficiary of an employee benefit plan; (3) using the information to perform services for another affiliate, unless the services involve sending solicitations on behalf of the other affiliate and such affiliate is not permitted to send such solicitations itself as a result of the consumer's decision to opt out; (4) using the information to make solicitations in response to a communication initiated by the consumer; (5) using the information to make solicitations in response to a consumer's request or authorization for a solicitation; or (6) if compliance with the requirements of section 624 by the affiliate would prevent that affiliate from complying with any provision of state insurance laws pertaining to unfair discrimination in a state where the affiliate is lawfully doing business. Several of these exceptions are discussed below.

Proposed paragraph (c)(1) clarifies that the provisions of this subpart do not apply where the affiliate using the information to make a solicitation to a consumer has a ''pre-existing business relationship'' with that consumer, a key term discussed in detail above. Proposed paragraph (d)(1) provides examples of the pre-existing business relationship exception.

Proposed paragraph (c)(3) clarifies that the provisions of this part do not apply where the information is used to perform services for another affiliate, except that the exception does not permit the service provider to make or send solicitations on behalf of itself or an affiliate if the service provider or the affiliate, as applicable, would not be permitted to make or send such solicitations as a result of the consumer's election to opt out. Thus, when the notice has been provided to a consumer and the consumer has opted-out, an affiliate subject to the consumer's opt-out election that has received eligibility information from a person that has a relationship with the consumer may not circumvent the opt-out by instructing the person with the consumer relationship or another affiliate to make or send solicitations to the consumer on its behalf. The Commission requests comment on whether there are other means of circumvention that the final rule should also address.

Proposed paragraph (c)(4) incorporates the statutory exception for information used in response to a communication initiated by the consumer. The proposed rule clarifies that this exception may be triggered by an oral, electronic, or written communication initiated by the consumer. To be covered by the proposed exception, use of eligibility information must be responsive to the communication initiated by the consumer. For example, if a consumer calls an affiliate to ask about retail locations and hours, the affiliate may not then use eligibility information to make solicitations to the consumer about specific products because those solicitations would not be responsive to the consumer's communication.

Conversely, if the consumer calls an affiliate to ask about its products or services, then solicitations related to those products or services would be responsive to the communication and thus permitted under the exception. The time period during which solicitations remain responsive to the consumer's communication will depend on the facts and circumstances. The proposal also contemplates that a consumer has not initiated a communication if an affiliate makes the initial call and leaves a message for the consumer to call back, and the consumer responds. Proposed paragraph (d)(2) provides examples of the consumer-initiated communications exception.

Proposed paragraph (c)(5) provides that the provisions of this subpart do not apply where the information is used to make solicitations affirmatively authorized or requested by the consumer. This provision may be triggered by an oral, electronic, or written authorization or request by the consumer. Under the proposal, a pre-selected check box or boilerplate language in a disclosure or contract would not constitute an affirmative authorization or request.

The exception in paragraph (c)(5) could be triggered, for example, if a consumer obtains a mortgage from a mortgage lender and authorizes or requests to receive solicitations about homeowner's insurance from an insurance affiliate of the mortgage lender. Under this exception, the consumer may provide the authorization or make the request either through the person with whom the consumer has a business relationship or directly to the affiliate that will make the solicitation. In addition, the duration of the authorization or request will depend on the facts and circumstances. Finally, nothing in this exception supercedes the restrictions contained in the Telemarketing Sales Rule, including the ''Do-Not-Call List'' established by the FTC and the Federal Communications Commission. Proposed paragraph (d)(3) provides an example of the affirmative authorization or request exception.

The exceptions in proposed paragraphs (c)(1), (4), and (5) described above overlap in certain situations. For example, if a lender's customer makes a telephone call to the lender's insurance affiliate and requests information about homeowner or auto policies, the insurance affiliate may use information about the consumer it obtains from the lender to make or send solicitations in response to the telephone call initiated by the consumer under the exception in paragraph (c)(4) for responding to a communication initiated by the consumer. In addition, the consumer's request for information from the insurance affiliate triggers the exceptions in paragraph (c)(1) for inquiries by the consumer regarding a product or service offered by the insurance affiliate under the statutory definition of a ''pre-existing business relationship'' as well as the exception in paragraph (c)(5) for a use in response to a solicitation requested by the consumer.

Proposed paragraph (e) provides that the provisions of this part do not apply to eligibility information that was received by an affiliate prior to the date on which compliance with these regulations is required. This incorporates a limitation contained in the statute. The mandatory compliance date will be included in the final rule. Comment is requested on what the mandatory compliance date should be and whether it should be different from the effective date of the final regulations.

Finally, proposed paragraph (f) clarifies the relationship between the affiliate sharing notice and opt-out under section 603(d)(2)(A)(iii) of the FCRA and the affiliate marketing notice and opt-out in new section 624 of the Act. Specifically, it provides that nothing in 16 CFR Part 680 (these affiliate marketing regulations) limits the responsibility of a company to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the Act before it shares information other than transaction or experience information with an affiliate, in order to avoid becoming a consumer reporting agency.

Section 680.21—Contents of Opt-Out Notice

Proposed § 680.21 addresses the contents of the opt-out notice. Proposed paragraph (a) requires that the opt-out notice be clear, conspicuous, and concise, and accurately disclose: (1) That the consumer may elect to limit a person's affiliate from using eligibility information about the consumer that it obtains from that person to make or send solicitations to the consumer; (2) if applicable, that the consumer's election will apply for a specified period of time and that the consumer will be allowed to extend the election once that period expires; and (3) a reasonable and simple method for the consumer to opt out. (The notice will specify the actual length of time the consumer's election will apply.) Use of the model form in Appendix A, in appropriate circumstances, would comply with paragraph (a), but is not required. Paragraph (a) reflects the intent of Congress, as expressed in section 624(a)(2)(B) of the FCRA, that the notice required by this part must be ''clear, conspicuous, and concise,'' and that the method for opting-out must be ''simple.''

Proposed paragraph (b) defines the term ''concise'' to mean a reasonably brief expression or statement. Paragraph (b) also provides that a notice required by this part may be concise even if it is combined with other disclosures required or authorized by federal or state law. Such disclosures include, but are not limited to, a notice under the GLB Act, a notice under section 603(d)(2)(A)(iii) of the FCRA, and other similar consumer disclosures. Finally, paragraph (b) clarifies that the requirement for a concise notice would be satisfied by the appropriate use of one of the model forms contained in Appendix A to this part, although use of the model forms is not required.

Proposed paragraph (c) provides that the notice may allow a consumer to choose from a menu of alternatives when opting out, such as by selecting certain types of affiliates, certain types of information, or certain modes of delivery from which to opt out, so long as one of the alternatives gives the consumer the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivering solicitations.

Proposed paragraph (d) provides that, where a company elects to give consumers a broader right to opt out of marketing than is required by law, the company may modify the contents of the opt-out notice to reflect accurately the scope of the opt-out right it provides to consumers. Appendix A provides Model Form A–3 that may be helpful for companies that wish to allow consumers to prevent all marketing from the company and its affiliates, but use of the model form is not required.

Section 680.22—Reasonable Opportunity To Opt Out

Proposed paragraph (a) provides that before the affiliate uses the eligibility information to make or send solicitations to the consumer, the person that communicates such eligibility information to the affiliate must provide the consumer with a reasonable opportunity to opt out following delivery of the opt-out notice. Given the variety of circumstances in which companies must provide a reasonable opportunity to opt out, the Commission believes that a reasonable opportunity to opt out should be construed as a general test that avoids setting a mandatory waiting period in all cases. A general

standard would provide flexibility to allow affiliates to use eligibility information received from another affiliate to make or send solicitations at an appropriate point in time which may vary depending upon the circumstances, while assuring that the consumer is given a realistic opportunity to prevent such use of this information. The Commission also believes that providing examples for what constitutes a reasonable opportunity to opt out may be useful by illustrating how the opt-out might work in different situations and by providing a safe harbor for opt-out periods of 30 days in certain situations. Although 30 days is a safe harbor, a person subject to this requirement may decide, at its option, to give consumers more than 30 days in which to decide whether or not to opt-out. Whether a shorter waiting period would be adequate in certain situations depends on the circumstances.

Proposed paragraphs (b)(1) and (2) contain examples of reasonable opportunities to opt out by mail or by electronic means that parallel examples used in the GLB Act privacy rules. The example of a reasonable opportunity to opt out for notices given by electronic means in paragraph (b)(2) is triggered by the consumer's acknowledgment of receipt of the electronic notice, consistent with an example in the GLB Act privacy regulations. 16 CFR 313.10(a)(3)(iii). Of course, these examples assume the consumer has agreed to electronic delivery under proposed § 680.23(a)(3).

Proposed paragraph (b)(3) would provide an example of a reasonable opportunity to opt out where, in a transaction that is conducted electronically, the consumer is required to decide, as a necessary part of proceeding with the transaction, whether or not to opt out before completing the transaction, so long as the company provides a simple process right at the Internet Web site that the consumer may use at that time to opt out. In this example, the opt-out notice would automatically be provided to the consumer, such as through a non-bypassable link to an intermediate webpage, or ''speedbump.'' The consumer would be given a choice of either opting-out or not opting-out at that time through a simple process conducted at the web site. For example, the consumer could be required to check a box right at the Internet web site in order to opt out or decline to opt out before continuing with the transaction. However, this example would not cover a situation where the consumer is required to send a separate e-mail or visit a different Internet Web site in order to opt out. The Commission seeks comment on whether this is a good example of a reasonable opportunity to opt out, and whether additional protections or clarifications are needed. Proposed paragraph (b)(4) illustrates that including the affiliate marketing opt-out notice in a notice under the GLB Act will satisfy the reasonable opportunity standard. In such cases, the consumer should be allowed to exercise the opt-out in the same manner and be given the same amount of time to exercise the opt-out as is provided for any other opt-out provided in the GLB Act privacy notice. This example is consistent with the statutory requirement that the Commission consider methods for coordinating and combining notices.

Proposed paragraph (b)(5) illustrates how an ''opt-in'' can meet the requirement to provide a reasonable opportunity to opt out. Specifically, if a company has a policy of not allowing its affiliates to use eligibility information to market to consumers without the consumer's affirmative consent, providing the consumer with an opportunity to ''opt in'' or affirmatively consent to such use constitutes a reasonable opportunity to opt out. The Commission views the term ''affirmative'' to mean a knowing action by the consumer to receive marketing solicitations. The requirement that the company must ''document'' the consumer's consent is not satisfied by a paragraph in a lengthy form provided to the consumer, but rather requires evidence that the opt-in was a conscious choice by the consumer. The paragraph specifies one example of an ostensible opt-in that would not be evidence of the consumer's affirmative consent—a pre-selected check box.

The proposed regulations do not require companies subject to this rule to disclose in their opt-out notices how long a consumer has to respond to the opt-out notice before eligibility information communicated to other affiliates will be used to make or send solicitations to the consumer. Companies, however, have the flexibility to include such disclosures in their notices. In this respect, the proposed regulations are consistent with the GLB Act privacy regulations. The Commission solicits comment on whether companies subject to the proposed rule should be required to disclose in their opt-out notices how long a consumer has to respond to the opt-out notice. If so, why? If not, why not?

Section 680.23—Reasonable and Simple Methods of Opting Out

Proposed paragraph (a) sets forth reasonable and simple methods of opting out. These examples generally track the examples of reasonable opt-out means from the GLB Act privacy regulations with certain revisions to give effect to Congress's mandate that methods of opting-out be simple. See 16 CFR 313.7(a)(2)(ii). For simplicity, the example in paragraph (a)(2) contemplates including a self-addressed envelope with the reply form and opt-out notice. In regard to the example in paragraph (a)(4) of a toll-free telephone number that consumers can call to opt out, the Commission contemplates that it would be adequately designed and staffed, as necessary, to enable consumers to opt out in a single phone call.

Proposed paragraph (b) sets forth methods of opting-out that are not reasonable and simple. Such methods include requiring the consumer to write a letter to the company or to call or write to obtain an opt-out form rather than including it with the notice. In addition, a consumer who agrees to receive the opt-out notice in electronic form only, such as by electronic mail or a process at a web site, should be allowed to opt out by the same or a substantially similar electronic form and should not be required to opt out solely by telephone or paper mail.

Section 680.24—Delivery of Opt-Out Notices

Proposed paragraph (a) provides that a company must deliver an opt-out notice so that each consumer can reasonably be expected to receive actual notice. For opt-out notices delivered electronically, the notices may be delivered either in accordance with the electronic disclosure provisions in this subpart or in accordance with the Electronic Signatures in Global and National Commerce Act.[10] Under the example in proposed paragraph (b)(1)(iii), the company may e-mail its notice to a consumer who has agreed to the electronic delivery of information or provide the notice on its Internet web site for the consumer who obtains a product or service electronically from that web site. That example is virtually identical to an example in the GLB Act Privacy Rule. 16 CFR 313.9(b)(1)(iii).

As indicated by the examples provided in proposed paragraph (b), the

[10] Pub. L. No. 106–229, 114 Stat. 464 (2000). Because nothing in Section 624 of the Act requires that the notice be provided in writing, the ESIGN Act's provisions requiring consumer consent to electronic delivery of the FCRA opt-out notices would not apply.

standard described in paragraph (a) is a lesser standard than actual notice. For instance, if a person subject to the rule mails a printed copy of its notice to the last known mailing address of a consumer, the person has met its obligation even if the consumer has changed addresses and never receives the notice.

Proposed paragraph (c) permits a person subject to this rule to provide a joint opt-out notice with one or more of its affiliates that are identified in the notice, so long as the notice is accurate with respect to each affiliate jointly issuing the notice. A joint notice does not have to list each affiliate participating in the joint notice by its name. If each affiliate shares a common name, such as ''ABC,'' then the joint notice may state that it applies to ''all companies with the ABC name'' or ''all affiliates in the ABC family of companies.'' If, however, an affiliate does not have ABC in its name, then the joint notice must separately identify that company or family of companies with a common name.

Proposed paragraph (d)(1) sets out rules that apply when two or more consumers jointly obtain a product or service from a person subject to this rule (referred to in the proposed regulation as joint consumers), such as a loan to two consumers (joint debtors). For example, a lender subject to this rule may provide a single opt-out notice to two joint debtors. The notice must indicate whether the person will consider an opt-out by one joint debtor as an opt-out by both, or whether each consumer may opt out separately. The person may not require both consumers to opt out before honoring an opt-out direction by one of them. Paragraph (d)(2) gives examples of these rules.

Proposed paragraph (d)(1)(vii) and the example in paragraph (d)(2)(iii) address the situation where only one of two joint consumers has opted out. Those paragraphs are derived from similar provisions in the GLB Act privacy regulations. Because section 624 of the FCRA deals with the use of information for marketing by affiliates, rather than the sharing of information among affiliates, comment is requested on whether information about a joint account should be allowed to be used for making solicitations to a joint consumer who has not opted out.

Section 680.25—Duration and Effect of Opt-Out

Proposed § 680.25 addresses the duration and effect of the consumer's opt-out election. Proposed paragraph (a) provides that the consumer's election to opt out shall be effective for the opt-out period, which is a period of at least 5 years, beginning as soon as reasonably practicable after the consumer's opt-out election is received. Nothing in this paragraph limits the ability of affiliated persons to set an opt-out period longer than 5 years, including an opt-out period that does not expire unless revoked by the consumer. No opt-out period, however, may be less than 5 years. In addition, if a consumer elects to opt out every year, a new opt-out period of at least 5 years begins upon receipt of each successive opt-out election.

Proposed paragraph (b) provides that a receiving affiliate may not make or send solicitations to a consumer during the opt-out period based on eligibility information it receives from an affiliate, except as provided in the exceptions in § 680.20(c) or if the opt-out is revoked by the consumer. Under this paragraph, the opt-out is tied to the consumer, not to the information. Thus, if a consumer initially elects to opt out, but does not extend the opt-out upon expiration of the opt-out period, a receiving affiliate may use all eligibility information it has received about the consumer from its affiliate, including eligibility information that it received during the opt-out period. However, if the consumer subsequently opts out again some time after the initial opt-out period has lapsed, a receiving affiliate may not use any eligibility information about the consumer it has received from an affiliate on or after the mandatory compliance date for the regulations under this part, including information it received during the period in which no opt-out election was in effect.[11]

Proposed paragraph (c) clarifies that a consumer may opt out at any time. Thus, even if the consumer did not opt out in response to the initial opt-out notice or if the consumer's election to opt out is not prompted by an opt-out notice, a consumer may still opt out. Regardless of when the consumer opts out, the opt-out must be effective for a period of at least 5 years.

Proposed paragraph (d) describes how the termination of a consumer relationship affects the consumer's opt-out. Specifically, if a consumer's relationship with a company terminates for any reason when a consumer's opt-out election is in force, the opt-out will continue to apply indefinitely, unless revoked by the consumer.

[11] Section 624(a)(5) of the FCRA is a non-retroactivity provision, which states that nothing shall prohibit the use of information to send a solicitation to a consumer if such information was received prior to the date on which persons are required to comply with the regulations implementing section 624.

Section 680.26—Extension of Opt-Out

Proposed § 680.26 describes the procedures for extension of an opt-out. Proposed paragraph (a) provides that a receiving affiliate may not make or send solicitations to the consumer after the expiration of the opt-out period based on eligibility information it receives or has received from an affiliate, unless the person responsible for providing the initial opt-out notice, or its successor, has given the consumer an extension notice and a reasonable opportunity to extend the opt-out, and the consumer does not extend the opt-out. If an extension notice is not provided to the consumer, the opt-out period continues indefinitely. The requirement to provide an extension notice also applies when a consumer fails to opt out initially, but at a subsequent point in time informs the company of his or her decision to opt out, which would be effective for a period of at least 5 years. The consumer may extend the opt-out at the expiration of each successive opt-out period. Paragraph (b) also provides that each opt-out extension must comply with § 680.25(a), which means that it must be effective for a period of at least 5 years.

Proposed paragraph (c) addresses the contents of an extension notice. A notice under paragraph (c) must be clear and conspicuous, and concise. Paragraph (c) provides some flexibility in the design and contents of the notice. Under one approach, the notice must accurately disclose the same items required to be disclosed in the initial opt-out notice under § 680.21(a), along with a statement explaining that the consumer's prior opt-out has expired or is about to expire, as applicable, and that if the consumer wishes to keep the consumer's opt-out election in force, the consumer must opt out again. Under another approach, the extension notice would provide that: (1) The consumer previously elected to limit an affiliate from using eligibility information about the consumer that it obtains from the communicating affiliate to make or send solicitations to the consumer; (2) the consumer's election has expired or is about to expire, as applicable; (3) the consumer may elect to extend the consumer's previous election; and (4) a reasonable and simple method for the consumer to opt out. The Agencies propose to give companies the flexibility to decide which of these notices best meets their needs.

Companies do not need to provide extension notices if they treat the consumer's opt-out election as valid in perpetuity, unless revoked by the consumer. Comment is requested on whether companies plan to limit the

duration of the opt-out or not, and on the relative burdens and benefits of the two approaches.

Proposed paragraph (d) addresses the timing of the extension notice and provides that an extension notice can be given to the consumer either a reasonable period of time before the expiration of the opt-out period, or any time after the expiration of the opt-out period but before solicitations that would have been prohibited by the expired opt-out are made to the consumer. Providing the extension notice a reasonable period of time before the expiration of the opt-out period is appropriate to facilitate the smooth transition of consumers that choose to change their election.

An extension notice given too far in advance of the expiration of the opt-out period, however, may be confusing to consumers. The Commission does not propose to set a fixed time for what would constitute a reasonable period of time before the expiration of the opt-out period to send an extension notice, because a reasonable period of time may depend upon the amount of time afforded to the consumer for a reasonable opportunity to opt out, the amount of time necessary to process opt-outs, and other factors. Nevertheless, providing an extension notice on or with the last annual privacy notice required by the GLB Act privacy provisions sent to the consumer before the expiration of the opt-out period shall be deemed reasonable in all cases. Proposed paragraph (e) makes clear that sending an extension notice to the consumer before the expiration of the opt-out period does not shorten the 5-year opt-out period.

Including an affiliate marketing opt-out notice or an extension notice on an initial or annual notice under the GLB Act raises special issues, because GLB Act notices typically state that the consumer does not need to opt out again if the consumer previously opted-out. This statement would be accurate if the company and its affiliates choose to make the affiliate marketing opt-out effective in perpetuity. However, if the opt-out period is limited to a defined period of 5 years or more, such a statement would not be accurate with respect to the extension notice, and the notice would have to make clear to the consumer the necessity of opting-out again in order to extend the opt-out.

Section 680.27—Consolidated and Equivalent Notices

Proposed § 680.27 implements section 624(b) of the Act, and provides that a notice required by this subpart may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the Act and the notice required by title V of the GLB Act. A notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of this subpart.

Comment is solicited on whether the affiliate marketing notice will be consolidated with the GLB Act privacy notice or the affiliate sharing opt-out notice under section 603(d)(2)(A)(iii) of the FCRA, whether the Agencies have provided sufficient guidance on consolidated notices, and whether consolidation would be helpful to consumers.

Effective Date

Consistent with the requirements of section 624 of the FACT Act, the proposed regulations will become effective 6 months after the date on which they are issued in final form. The Commission requests comment on whether there is any need to delay the compliance date beyond the effective date, to permit financial institutions to incorporate the affiliate marketing notice into their next annual GLB Act notice.

Appendix A

The Commission is proposing model forms to illustrate by way of example how companies may comply with the notice and opt-out requirements of section 624 and the proposed regulations. Ideally, the Commission would test the proposed model forms both alone and in conjunction with other opt-out notices under the FCRA and GLB Act. Because consumer testing is unlikely to be undertaken and completed before this rule is issued in final form, we solicit comment on these proposals at this time.

Appendix A includes three proposed model forms. Model Form A–1 is a proposed form of an initial opt-out notice. Model Form A–2 is a proposed form of an extension notice. Model Form A–3 is a proposed form that companies may use if they offer consumers a broader right to opt out of marketing than is required by law.

Use of the model forms is not mandatory. Companies have the flexibility to use or not use the model forms, or to modify the forms, so long as the requirements of the regulation are met. For example, although Model Forms A–1 and A–2 use 5 years as the duration of the opt-out period, companies are free to choose an opt-out period of longer than 5 years and substitute the longer time period in the opt-out notices. Alternatively, companies may choose to treat the consumer's opt-out as effective in perpetuity and thereby omit any reference to the limited duration of the opt-out period or the right to extend the opt-out in the initial opt-out notice.

Each of the proposed model forms is designed as a stand-alone form. The Commission anticipates that some companies that are financial institutions subject to the GLB Act may want to combine the opt-out form with the privacy notice required by that law. If so combined, the Commission expects that companies would integrate the affiliate marketing opt-out notice with other required disclosures and avoid repetition of certain information, such as the methods for opting-out. Developing a model form that combines various opt-out notices, however, is beyond the scope of this rulemaking.

The proposed model forms have been designed to convey the necessary information to consumers as simply as possible. The Commission and other Agencies have tested the proposed model forms using two widely available readability tests, the Flesch reading ease test and the Flesch-Kincaid grade level test, each of which generates a score.[12] Proposed Model Form A–1 has a Flesch reading ease score of 53.7 and a Flesch-Kincaid grade level score of 9.9. Proposed Model Form A–2 has a Flesch reading ease score of 57.5 and a Flesch-Kincaid grade level score of 9.6. Proposed Model Form A–3 has a Flesch reading ease score of 69.9 and a Flesch-Kincaid grade level score of 6.7.

The Commission recognizes the benefits of working with communications experts and conducting consumer testing to achieve better and more readable consumer opt-out notices. Comment is solicited on the form and content of the proposed model forms based on commenters' work with communications experts and experience with consumer testing. Comment is also requested on whether companies would combine the affiliate marketing notice with other opt-out notices or issue a separate affiliate marketing opt-out notice, and how those two approaches may affect consumer comprehension of the notices and their rights. In developing a final rule, the Commission will carefully consider any consumer

[12] The Flesch reading ease test generates a score between zero and 100, where the higher score correlates with improved readability. The Flesch-Kincaid grade level test generates a numerical assessment of the grade-level at which the text is written.

testing that may suggest ways to improve the proposed model forms, including efforts by consumer groups and industry, as well as the Commission's own initiative to consider alternative forms of privacy notices under the GLB Act. *See* 68 FR 75164 (Dec. 30, 2003).

IV. Communications by Outside Parties to Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. *See* 16 CFR. 1.26(b)(5).

V. Paperwork Reduction Act

The Commission has submitted this proposed rule and a Supporting Statement to the Office of Management and Budget for review under the Paperwork Reduction Act (''PRA'') (44 U.S.C. 3501–3517). As required by the FACT Act, the proposed rule specifies disclosure requirements for certain affiliated companies subject to the Commission's jurisdiction. These requirements may constitute ''collections of information'' for purposes of the PRA. *See* 5 CFR 1320.3(c). The FACT Act and the proposed rule require covered entities to provide consumers with notice and an opportunity to opt out of the use of certain information for sending marketing solicitations. The proposed rule generally provides that, if a company communicates certain information about a consumer (''eligibility information'') to an affiliate, the affiliate may not use that information to make or send solicitations to the consumer 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. Where the company has chosen to set a limited time period for the opt-out (no less than 5 years), the company must provide prior to the expiration of the opt-out, a notice that the consumer has a right to extend the opt-out for an additional period of time of at least 5 years (''extension notice''). There are a number of exceptions to these requirements. Moreover, although its disclosure requirements are expressly required by the FACT Act, the Commission's proposed rule provides flexibility in implementing these requirements.

The Commission's staff does not know how many companies subject to the FTC's jurisdiction under the proposed rule actually share eligibility information among affiliates and use such information to make marketing solicitations to consumers. The estimates provided in this paperwork burden analysis, therefore, may well overstate the actual burden. The entities covered by the proposed rule include firms from a wide variety of industries engaged in business with consumers, including non-bank lenders, insurers, retailers, landlords, mortgage brokers, automobile dealers, telecommunication firms, and any other businesses that may communicate what the proposed rule defines as ''eligibility information'' to their affiliates.

The Commission's staff estimates that there are 7.7 million businesses that are subject to the FTC's jurisdiction, because they are not subject to the jurisdiction of one of the other Agencies responsible for enforcing the FACT Act.[13] The staff estimates that some 7.6 million of these are non-GLBA entities[14] and subject to the FTC's jurisdiction. Because the proposed rule addresses the practices only of affiliated companies, the staff estimates that 16.75 percent, or 1.2 million non-GLBA companies, are in affiliated relationships and thus potentially subject to the proposed rule.[15] The staff further estimates that there are an average of 5 businesses per family or affiliated relationship, and that affiliated entities will choose to send a joint notice as permitted by the proposed rule. Thus, an estimated 238,000 non-GLBA entities may send the new affiliate marketing notice.

Non-GLBA companies that will need to send a notice, however, should not incur significant start-up burdens and attendant costs, because the proposed rule provides a model disclosure, which should reduce costs significantly. Therefore, the staff estimates the hour burden for non-GLBA companies to be 3,335,000 hours and the cost burden to be $81,072,000 for the first year of the clearance period, which includes the start-up burden and attendant costs, such as determining compliance obligations.[16] The staff estimates that the paperwork burden in subsequent years will be significantly lower because creating the notice is generally a one-time cost that will have already been incurred.[17] Thus, staff estimates the annual burden for the non-GLBA entities, averaged over the three year clearance period, to be 2,699,000 hours and $62,656,000. Moreover, this estimate is likely to overstate the actual burden because a number of non-GLBA companies provide notices and opt-out choices voluntarily as a service to their customers, and many businesses may not even share eligibility information to market to consumers. The number of such companies, however, is not known at this time.

Staff estimates that about 100,000 entities are subject to the Commission's GLBA privacy notice regulation and, therefore, already provide privacy notices to their customers. Because the proposed rule addresses the practices only of affiliated companies, the staff estimates that 16.75 percent of the GLBA companies, or 16,750 companies, are affiliated entities subject to the new notice requirement.[18] As noted above, the staff is estimating that there are an average of 5 businesses per family or affiliated relationship, and that affiliated entities will choose to send a joint notice as permitted by the proposed rule. Thus, an estimated 3,350 GLBA companies may send the new affiliate marketing notice.

Because the FACT Act and proposed rule contemplate that the new affiliate marketing notice can be included in the GLBA notices, the burden on GLBA-regulated entities is greatly reduced. Costs are also reduced because the proposed rule provides model notices. Therefore, the staff estimates that incorporating the new disclosure into the GLBA notice will take approximately 5 hours of managerial time to understand the compliance obligations and only an hour to execute the notice, given that the proposed rule provides a model. No additional clerical costs should be incurred, if the new disclosure is combined with the GLBA notices. So, for the approximately 3,350 affiliated GLBA entities under the FTC's jurisdiction, the total burden hours for

[13] This estimate is derived from an analysis of a database of U.S. businesses based on SIC codes for businesses that market goods or services to consumers, which included the following industries: transportation services; communication; electric, gas, and sanitary services; retail trade; finance, insurance, and real estate; and services (excluding business services and engineering, management services).

[14] Staff estimates that about 100,000 entities are subject to the Commission's GLBA privacy notice regulation. The paperwork burden for GLBA entities has been analyzed separately.

[15] *See*, note 13.

[16] The estimate of hours is based upon 7 hours of managerial skills at $31.55 per hour, 2 hours of technical skills at $26.44 per hour, and 5 hours of clerical skills at $13.33 per hour, which totals 14 hours per affiliated family of companies. (Bureau of Labor Statistics, Table 1, July 2002; *http://www.bls.gov/ncs/ocs/sp/ncbl0539.pdf*).

[17] Staff estimates that in subsequent years, non-GLBA companies will spend 4 hours of managerial time, 1 hour of technical time, and 5 hours of clerical time per affiliated family of companies. Thus the annual burden for the remaining two years of the clearance will be 2,382,000 hours and $53,448,000.

[18] *See*, note 13.

the first year of the clearance period are estimated to be 20,000 hours and the total costs $617,000.[19] The staff has estimated that the paperwork burden in subsequent years will be lower because creating the notice is generally a one-time cost that will have already been incurred.[20] Thus, the staff estimates the annual burden for the GLBA entities, averaged over the three year clearance period, to be 15,600 hours and $487,500.

In sum, the staff has estimated that the average annual burden over the first three years for both GLBA and non-GLBA companies to be 2,715,000 in burden hours and $63,144,000 in labor costs.

The Commission invites comment that will enable it to: (1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collections of information on those who must comply, including through the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information technology.

VI. Invitation To Comment

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments addressing the issues raised by this Notice. Comments must be received on or before July 20, 2004. Comments should refer to ''FACT Act Affiliate Marketing Rule, Matter No. R411006'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/ Office of the Secretary, Room H–159 (Annex Q), 600 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled ''Confidential.'' [21] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

An electronic comment can be filed by (1) Clicking on *http://www.regulations.gov*; (2) selecting ''Federal Trade Commission'' at ''Search for Open Regulations;'' (3) locating the summary of this Notice; (4) clicking on ''Submit a Comment on this Regulation;'' and (5) completing the form. For a given electronic comment, any information placed in the following fields—''Title,'' ''First Name,'' ''Last Name,'' ''Organization Name,'' ''State,'' ''Comment,'' and ''Attachment''—will be publicly available on the FTC Web site. The fields marked with an asterisk on the form are required in order for the FTC to fully consider a particular comment. Commenters may choose not to fill in one or more of those fields, but if they do so, their comments may not be considered.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission. Comments should be submitted via facsimile to (202) 395–6974 because U.S. postal mail at the Office of Management and Budget is subject to lengthy delays due to heightened security precautions. Such comments should also be sent to the following address: Federal Trade Commission/Office of the Secretary, Room H–159 (Annex Q), 600 Pennsylvania Avenue, NW., Washington, DC 20580.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule and a Final Regulatory Flexibility Analysis (''FRFA'') with the final rule, if any, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603–605. The Commission has determined that it is appropriate to publish an IRFA in order to inquire into the impact of the proposed rule on small entities. Therefore, the Commission has prepared the following analysis and requests public comment in the following areas.

A. Reasons for the Proposed Rule

Section 214 of the FACT Act (which adds a new section 624 to the FCRA) generally prohibits a person from using certain information received from an affiliate to make a solicitation for marketing purposes to a consumer, unless the consumer is given notice and an opportunity and simple method to opt out of the making of such solicitations. Section 214 also requires the Agencies, including the Commission, in consultation and coordination with each other, to issue regulations implementing the section that are as consistent and comparable as possible. The FTC is publishing its proposed rule separately from the other Agencies, but it is comparable in all substantive respects to the proposed rule published by the other Agencies.

B. Statement of Objectives and Legal Basis

The objectives of the proposed Rule are discussed in the **SUPPLEMENTARY INFORMATION** section above. The legal basis for the proposed rule is section 214 of the FACT Act.

[19] These estimates are based on 5 hours of managerial time at $31.55 per hour ($157.75) and one hour of technical time at $26.44 per hour. (Bureau of Labor Statistics, Table 1, July 2002; *http://www.bls.gov/ncs/ocs/sp/ncbl0539.pdf*)

[20] Staff estimates that in subsequent years, GLBA companies will spend 3 hours of managerial time, 1 hour of technical time. No clerical time is estimated as the notice will likely be combined with existing GLBA notices. Thus the annual burden for the remaining two years of clearance will be 13,400 hours and $422,800.

[21] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

C. Description of Small Entities to Which the Proposed Rule Will Apply

The FTC's proposed affiliate marketing rule, which closely tracks the language of section 214 of the FACT Act, would apply to ''[a]ny 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).'' In short, section 214 applies to any entity that (1) is under the FTC's jurisdiction pursuant to the FCRA and (2) receives consumer report information from an affiliate and uses that information to make a marketing solicitation to the consumer.

As discussed above, the entities covered by the proposed rule would include non-bank lenders, insurers, retailers, landlords, mortgage brokers, automobile dealers, telecommunication firms, and any other business that shares eligibility information with its affiliates. It is not readily feasible to determine a precise number of small entities that will be subject to the proposed rule, but it is not likely that many of the entities covered by this new rule are small as defined by the Small Business Administration since most of the entities with affiliates are likely to be above the $6 M level. *See http://www.sba.gov/size/indextableofsize.html*. The Commission invites comment and information on the number and type of small entities affected by the proposed rule.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The proposed rule requires entities subject to section 624 of the FCRA to provide consumers notice and an opportunity to opt out of affiliates' use of the shared information for marketing solicitations. For those entities that provide the section 624 notice consolidated with the GLBA notices or other federally-mandated disclosures, the proposed rule imposes very limited additional reporting or recordkeeping requirements within the meaning of the PRA, as discussed above. However, for those entities that choose to send the notices separately, or that are not subject to the GLB Act, the reporting and recordkeeping requirements here may be substantial. The Commission, however, does not have a practicable or reliable basis for quantifying the costs of the proposed rule.

Any analysis of the impact of this law and its implementing regulation must take into consideration that it is rather limited in its scope. First, the new law only applies to the use by affiliates of shared information for sending marketing solicitations. Thus, affiliates that do marketing based solely upon their own information are not affected by this law. Second, the new law provides for a number of exceptions, including permitting entities to market to consumers with whom they have a ''pre-existing business relationship'' or from whom they have received a specific request, orally, electronically, or in writing for information. And finally, the new law also permits entities to market to the general public without triggering the notice and opt-out obligations.

A number of alternatives exist, however, to reduce the costs presented by compliance with the proposed rule. First, significant cost savings may be obtained by consolidating these notices with the GLBA privacy notice. Consolidated notices may also be less confusing to consumers. In addition, the Agencies have included model forms for opt-out notices that the Agencies would deem to comply with the requirements of the proposed regulation and that entities could customize to suit their needs. Furthermore, the proposal would permit companies to offer consumers a permanent opt-out from the sharing of information for making or sending solicitations among affiliates, which would be consistent with the GLBA and FCRA opt-outs and would reduce recordkeeping requirements. Small entities, therefore, may wish to consider whether consolidation of their notices and opt-outs can reduce their compliance costs.

Affiliates that communicate or receive eligibility information will likely need the advice of legal counsel to ensure that they comply with the rule, and may also require computer programming changes and additional staff training. Tracking the notice and opt-outs to prevent violations of the rule may not be a significant burden on any entity using database software to maintain their customer information. Such software should enable an entity to easily tag the customer database information with the opt-out requirement. The use of technology to track the opt-outs may reduce the costs of implementation.

The Commission is concerned about the potential impact of the proposed rule on small entities, and invites comment on the costs of compliance for such parties. Please provide comment on any or all of the provisions in the proposed rule with regard to (a) the impact of the provision(s) (including any benefits and costs), if any, the Commission should consider, as well as the costs and benefits of those alternatives, paying specific attention to the effect of the rule on small entities in light of the above analysis. Costs to implement and comply with the rule include expenditures of time and money for any employee training, attorney, or other professional time and preparing and processing the notices.

E. Identification of Other Duplicative, Overlapping, or Conflicting Federal Rules

With the exception of the opt-out for information other than transaction or experience information in section 603(d)(2)(A)(iii), the Commission is unable to identify any federal statutes or regulations that would duplicate, overlap, or conflict with the proposed rule. The overlap of the proposed rule and section 603(d)(2)(A)(iii) is discussed in the **SUPPLEMENTARY INFORMATION** section. The Commission seeks comment regarding any other statutes or regulations, including state or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed rule.

F. Discussion of Significant Alternatives

The Commission has considered whether and how the obligations of section 624 can be modified to address the concerns of small entities. Section 214 of the FACT Act (which adds a new section 624 to 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 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. As discussed above in section D of this subpart, the law's limited scope (including the threshold requirement that it be an affiliated entity) reduces the burden on small entities, as do a number of implementation procedures provided for in the proposed rule.

The Commission welcomes comments on any significant alternatives, consistent with the mandate in section 214 to restrict the use of certain information for marketing solicitations, that would minimize the impact of the proposed rule on small entities.

List of Subjects in 16 CFR Part 680

Fair Credit Reporting Act, Consumer reports, Consumer reporting agencies, Credit, Trade practices.

Accordingly, for the reasons set forth in the preamble, the FTC proposes to add a new 16 CFR Part 680, to read as follows:

PART 680—AFFILIATE USE OF INFORMATION FOR MARKETING PURPOSES

Sec.
680.1 Purpose and scope
680.2 Examples
680.3 Definitions
680.4–680.19 [Reserved]
680.20 Affiliate use of eligibility information for marketing solicitations
680.21 Contents of opt-out notice
680.22 Reasonable opportunity to opt out
680.23 Reasonable and simple methods of opting out
680.24 Delivery of opt-out notices
680.25 Duration and effect of opt-out
680.26 Extension of opt-out
680.27 Consolidated and equivalent notices

Appendix A to Part 680

Authority: 15 U.S.C. 1681s; sec. 214, Pub. L. 108–159; 117 Stat. 1952.

§ 680.1 Purpose and scope.

(a) *Purpose.* This part implements section 214 of the Fair and Accurate Credit Transactions Act of 2003, which is designed to allow consumers to prohibit (''opt out'' of) the use of certain information about them to send marketing solicitations.

(b) *Scope.* This part applies to any person over which the Federal Trade Commission has jurisdiction that shares information with affiliated persons to make or send marketing solicitations.

§ 680.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part.

§ 680.3 Definitions.

As used in this part, unless the context requires otherwise:

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

(b) *Affiliate* means any person that is related by common ownership or common corporate control with another person.

(c) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

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

(e) *Consumer* means an individual.

(f) *Control* of a company means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company.

(g) *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 Act did not apply.

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

(i) *Pre-existing business relationship* means a relationship between a person and a consumer, based on—

(1) 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 part;

(2) 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 a solicitation covered by this part is made or sent to the consumer; or

(3) An inquiry or application by the consumer regarding a product or service offered by that person during the 3-month period immediately preceding the date on which a solicitation covered by this part is made or sent to the consumer.

(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.

(2) *Exclusion of marketing directed at the general public.* A solicitation does not include communications that are directed at the general public and distributed without the use of eligibility information communicated by an affiliate. For example, television, magazine, and billboard advertisements do not constitute solicitations, even if those communications are intended to encourage consumers to purchase products or services from the person initiating the communications.

(3) *Examples of solicitations.* A solicitation includes a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a specific consumer that is based on eligibility information communicated by an affiliate.

(k) *You* includes each person or company over which the Commission has enforcement jurisdiction pursuant to section 621(a)(1) of the Act.

§ 680.4–680.19 [Reserved]

§ 680.20 Affiliate use of eligibility information for marketing solicitations.

(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 to the consumer, unless prior to such use by the affiliate—

(i) You provide a clear and conspicuous notice to the consumer stating that the information may be communicated to and used by your affiliate to make or send solicitations to the consumer about its products and services;

(ii) You provide the consumer a reasonable opportunity and a simple method to ''opt out'' of such use of that information by your affiliate; and

(iii) The consumer has not chosen to opt out.

(2) *Rules of construction*—(i) *In general.* The notice required by this paragraph may be provided either in the name of a person with which the consumer currently does or previously has done business or in one or more common corporate names shared by members of an affiliated group of companies that includes the common corporate name used by that person, and may be provided in the following manner:

(A) You may provide the notice directly to the consumer;

(B) Your agent may provide the notice on your behalf, so long as—

(*1*) Your agent, if your affiliate, does not include any solicitation other than yours on or with the notice, unless it falls within one of the exceptions in paragraph (c) of this section; and

(*2*) Your agent gives the notice in your name or a common name or names used by the family of companies; or

(C) You may provide a joint notice with one or more of your affiliates or under a common corporate name or names used by the family of companies as provided in § 222.24(c).

(ii) *Avoiding duplicate notices.* If Affiliate A communicates eligibility

information about a consumer to Affiliate B, and Affiliate B communicates that same information to Affiliate C, Affiliate B does not have to give an opt-out notice to the consumer when it provides eligibility information to Affiliate C, so long as Affiliate A's notice is broad enough to cover Affiliate C's use of the eligibility information to make solicitations to the consumer.

(iii) *Examples of rules of construction.* A, B, and C are affiliates. The consumer currently has a business relationship with affiliate A, but has never done business with affiliates B or C. Affiliate A communicates eligibility information about the consumer to B for purposes of making solicitations. B communicates the information it received from A to C for purposes of making solicitations. In this circumstance, the rules of construction would—

(A) Permit B to use the information to make solicitations if:

(*1*) A has provided the opt-out notice directly to the consumer; or

(*2*) B or C has provided the opt-out notice on behalf of A.

(B) Permit B or C to use the information to make solicitations if:

(*1*) A's notice is broad enough to cover both B's and C's use of the eligibility information; or

(*2*) A, B, or C has provided a joint opt-out notice on behalf of the entire affiliated group of companies.

(C) Not permit B or C to use the information to make solicitations if B has provided the opt-out notice only in B's own name, because no notice would have been provided by or on behalf of A.

(b) *General duties of an affiliate receiving eligibility information.* If you receive eligibility information from an affiliate, you may not use the information to make or send solicitations to a consumer, unless the consumer has been provided an opt-out notice, as described in paragraph (a) of this section, that applies to your use of eligibility information and the consumer has not opted-out.

(c) *Exceptions.* The provisions of this subpart do not apply if you use eligibility information you receive from an affiliate:

(1) To make or send a marketing solicitation to a consumer with whom you have a pre-existing business relationship as defined in § 680.3(i);

(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 subparagraph shall not be construed as permitting you to make or send solicitations on your behalf or on behalf of an affiliate if you or the affiliate, as applicable, would not be permitted to make or send the solicitation as a result of the election of the consumer to opt out under this part;

(4) In response to a communication initiated by the consumer orally, electronically, or in writing;

(5) In response to an affirmative authorization or request by the consumer orally, electronically, or in writing to receive a solicitation; 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) *Examples of pre-existing business relationships.*

(i) If a consumer has an insurance policy with your insurance affiliate that is currently in force, your insurance affiliate has a pre-existing business relationship with the consumer and can therefore use eligibility information it has received from you to make solicitations.

(ii) If a consumer has an insurance policy with your insurance affiliate that has lapsed, your insurance affiliate has a pre-existing business relationship with the consumer for 18 months after the date on which the policy ceases to be in force and can therefore use eligibility information it has received from you to make solicitations for 18 months after the date on which the policy ceases to be in force.

(iii) If a consumer applies to your affiliate for a product or service, or inquires about your affiliate's products or services and provides contact information to your affiliate for receipt of that information, your affiliate has a pre-existing business relationship with the consumer for 3 months after the date of the inquiry or application and can therefore use eligibility information it has received from you to make solicitations for 3 months after the date of the inquiry or application.

(iv) If a consumer makes a telephone call to a centralized call center for an affiliated group of companies to inquire about the consumer's account with a lender, the call does not constitute an inquiry with any affiliate other than that lender, and does not establish a pre-existing business relationship between the consumer and any affiliate of the lender.

(2) *Examples of consumer-initiated communications.* (i) If a consumer who has an account with you initiates a telephone call to your securities affiliate to request information about brokerage services or mutual funds and provides contact information for receiving that information, your securities affiliate may use eligibility information about the consumer it obtains from you to make solicitations in response to the consumer-initiated call.

(ii) If your affiliate makes the initial marketing call, leaves a message for the consumer to call back, and the consumer responds, the communication is not initiated by the consumer, but by your affiliate.

(iii) If the consumer calls your affiliate to ask about retail locations and hours, but does not request information about your affiliate's products or services, solicitations by your affiliate using eligibility information about the consumer it obtains from you would not be responsive to the consumer-initiated communication.

(3) *Example of consumer affirmative authorization or request.* If a consumer who obtains a mortgage from you requests or affirmatively authorizes information about homeowner's insurance from your insurance affiliate, such authorization or request, whether given to you or to your insurance affiliate, would permit your insurance affiliate to use eligibility information about the consumer it obtains from you to make solicitations about homeowner's insurance to the consumer. A pre-selected check box would not satisfy the requirement for an affirmative authorization or request.

(e) *Prospective application.* The provisions of this part shall not prohibit your affiliate from using eligibility information communicated by you to make or send solicitations to a consumer if such information was received by your affiliate prior to [MANDATORY COMPLIANCE DATE PURSUANT TO THE FINAL RULE].

(f) *Relation to affiliate-sharing notice and opt-out.* Nothing in this part limits the responsibility of a company to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the Act, before it shares information other than transaction or experience information among affiliates, in order to avoid becoming a consumer reporting agency.

§ 680.21 Contents of opt-out notice.

(a) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) That the consumer may elect to limit your affiliate from using eligibility information about the consumer that it obtains from you to make or send solicitations to the consumer;

(2) If applicable, that the consumer's election will apply for a specified period of time and that the consumer will be allowed to extend the election once that period expires; and

(3) A reasonable and simple method for the consumer to opt out.

(b) *Concise*—(1) *In general.* For purposes of this part, the term ''concise'' means reasonably brief.

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

(3) *Use of model form.* The requirement for a concise notice is satisfied by use of a model form contained in Appendix A of this part, although use of the model form is not required.

(c) *Providing a menu of opt-out choices.* With respect to the opt-out election, you may allow a consumer to choose from a menu of alternatives when opting out of affiliate use of eligibility information for marketing, such as by selecting certain types of affiliates, certain types of information, or certain methods of delivery from which to opt out, so long as you offer as one of the alternatives the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery.

(d) *Alternative contents.* If you provide the consumer with a broader right to opt out of marketing than is required by law, you satisfy the requirements of this section by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights. Proposed Model Notice A–3 provided in Appendix A provides guidance, although use of the model notice is not required.

§ 680.22 Reasonable opportunity to opt out.

(a) *In general.* Before your affiliate uses eligibility information communicated by you to make or send solicitations to a consumer, you must provide the consumer with a reasonable opportunity, following the delivery of the opt-out notice, to opt out of such use by your affiliates.

(b) *Examples of a reasonable opportunity to opt out.* You provide a consumer with a reasonable opportunity to opt out if:

(1) *By mail.* You mail the opt-out notice to a consumer and give the consumer 30 days from the date you mailed the notice to elect to opt out by any reasonable means.

(2) *By electronic means.* You notify the consumer electronically and give the consumer 30 days after the date that the consumer acknowledges receipt of the electronic notice to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* You provide the opt-out notice to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet web site, and request that the consumer decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, so long as you provide a simple process at the Internet web site that the consumer may use at that time to opt out.

(4) *By including in a privacy notice.* You include the opt-out notice in a Gramm-Leach-Bliley Act privacy notice and allow the consumer to exercise the opt-out within a reasonable period of time and in the same manner as the opt-out under the Gramm-Leach-Bliley Act.

(5) *By providing an ''opt-in''.* If you have a policy of not allowing an affiliate to use eligibility information to make or send solicitations to the consumer unless the consumer affirmatively consents, you give the consumer the opportunity to ''opt in'' by affirmative consent to such use by your affiliate. You must document the consumer's affirmative consent. A pre-selected check box does not constitute evidence of the consumer's affirmative consent.

§ 680.23 Reasonable and simple methods of opting out.

(a) *Reasonable and simple methods of opting-out.* You provide a reasonable and simple method for a consumer to exercise a right to opt out if you—

(1) Designate check-off boxes in a prominent position on the relevant forms included with the opt-out notice required by this part;

(2) Include a reply form and a self-addressed envelope together with the opt-out notice required by this part;

(3) Provide an electronic means to opt out, such as a form that can be electronically mailed or processed at your web site, if the consumer agrees to the electronic delivery of information; or

(4) Provide a toll-free telephone number that consumers may call to opt out.

(b) *Methods of opting-out that are not reasonable or simple.* You *do not* provide a reasonable and simple method for exercising an opt-out right if you—

(1) Require the consumer to write his or her own letter to you;

(2) Require the consumer to call or write to you to obtain a form for opting-out, rather than including the form with the notice; or

(3) Require the consumer who agrees to receive the opt-out notice in electronic form only, such as by electronic mail or at your web site, to opt out solely by telephone or by paper mail.

§ 680.24 Delivery of opt-out notices.

(a) *In general.* You must provide an opt-out notice so that each consumer can reasonably be expected to receive actual notice. For opt-out notices you provide electronically, you may either comply with the electronic disclosure provisions in this part or with the provisions in § 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.*

(b) *Examples of expectation of actual notice.* (1) You may reasonably expect that a consumer will receive actual notice if you:

(i) Hand-deliver a printed copy of the notice to the consumer;

(ii) Mail a printed copy of the notice to the last known mailing address of the consumer; or

(iii) For the consumer who obtains a product or service from you electronically, such as on an Internet web site, post the notice on your electronic site and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular product or service;

(2) You may *not* reasonably expect that a consumer will receive actual notice if you:

(i) Only post a sign in your branch or office or generally publish advertisements presenting your notice; or

(ii) Send the notice via electronic mail to a consumer who has not agreed to the electronic delivery of information.

(c) *Joint notice with affiliates*—(1) *In general.* You may provide a joint notice from you and one or more of your affiliates, as identified in the notice, so long as the notice is accurate with respect to you and each affiliate.

(2) *Identification of affiliates.* You do not have to list each affiliate providing the joint notice by its name. If each affiliate shares a common name, such as ''ABC,'' then the joint notice may state that it applies to ''all companies with the ABC name'' or ''all affiliates in the ABC family of companies.'' If, however, an affiliate does not have ABC in its name, then the joint notice must

separately identify each such affiliate or similarly-named family of companies.

(d) *Joint relationships*— (1) *In general.* If two or more consumers jointly obtain a product or service from you (joint consumers), the following rules apply:

(i) You may provide a single opt-out notice.

(ii) Any of the joint consumers may exercise the right to opt out.

(iii) You may either—

(A) Treat an opt-out direction by a joint consumer as applying to all of the associated joint consumers; or

(B) Permit each joint consumer to opt out separately.

(iv) If you permit each joint consumer to opt out separately, you must permit:

(A) One of the joint consumers to opt out on behalf of all of the joint consumers; and

(B) One or more joint consumers to notify you of their opt-out directions in a single response.

(v) You must explain in your opt-out notice which of the policies in paragraph (d)(1)(iii) you will follow, as well as the information required by paragraph (d)(1)(iv).

(vi) You may not require *all* joint consumers to opt out before you implement *any* opt-out direction.

(vii) If you receive an opt-out by a particular joint consumer that does not apply to the others, you may use eligibility information about the others as long as no eligibility information is used about the consumer who opted out.

(2) *Example.* If consumers A and B, who have different addresses, have a joint loan account with you and arrange for you to send statements to A's address, you may do any of the following, but you must explain in your opt-out notice which opt-out policy you will follow. You may send a single opt-out notice to A's address and:

(i) Treat an opt-out direction by A as applying to the entire account. If you do so and A opts out, you may not require B to opt out as well before implementing A's opt-out direction.

(ii) Treat A's opt-out direction as applying to A only. If you do so, you must also permit:

(A) A and B to opt out for each other; and

(B) A and B to notify you of their opt-out directions in a single response (such as on a single form) if they choose to give separate opt-out directions.

(iii) If A opts out only for A, and B does not opt out, your affiliate may use information only about B to send solicitations to B, but may not use information about A and B jointly to send solicitations to B.

§ 680.25 Duration and effect of opt-out.

(a) *Duration of opt-out.* The election of a consumer to opt out shall be effective for the opt-out period, which is a period of at least 5 years beginning as soon as reasonably practicable after the consumer's opt-out election is received. You may establish an opt-out period of more than 5 years, including an opt-out period that does not expire unless the consumer revokes it in writing, or if the consumer agrees, electronically.

(b) *Effect of opt-out.* A receiving affiliate may not make or send solicitations to a consumer during the opt-out period based on eligibility information it receives from an affiliate, except as provided in the exceptions in § 680.20(c) or if the opt-out is revoked by the consumer.

(c) *Time of opt-out.* A consumer may opt out at any time.

(d) *Termination of relationship.* If the consumer's relationship with you terminates when a consumer's opt-out election is in force, the opt-out will continue to apply indefinitely, unless revoked by the consumer.

§ 680.26 Extension of opt-out.

(a) *In general.* For a consumer who has opted out, a receiving affiliate may not make or send solicitations to the consumer after the expiration of the opt-out period based on eligibility information it receives or has received from an affiliate, unless the person responsible for providing the initial opt-out notice, or its successor, has given the consumer an extension notice and a reasonable opportunity to extend the opt-out, and the consumer does not extend the opt-out.

(b) *Duration of extension.* Each opt-out extension shall comply with § 680.25(a).

(c) *Contents of extension notice.* The notice provided at extension must be clear, conspicuous, and concise, and must accurately disclose either:

(1) The same contents specified in § 680.21(a) for the initial notice, along with a statement explaining that the consumer's previous opt-out has expired or is about to expire, as applicable, and that the consumer must opt out again if the consumer wishes to keep the opt-out election in force; or

(2) Each of the items listed below:

(i) That the consumer previously elected to limit your affiliate from using information about the consumer that it obtains from you to make or send solicitations to the consumer;

(ii) That the consumer's election has expired or is about to expire, as applicable;

(iii) That the consumer may elect to extend the consumer's previous election; and

(iv) A reasonable and simple method for the consumer to opt out.

(d) *Timing of the extension notice*— (1) *In general.* An extension notice may be provided to the consumer either—

(i) A reasonable period of time before the expiration of the opt-out period; or

(ii) Any time after the expiration of the opt-out period but before any affiliate makes or sends solicitations to the consumer that would have been prohibited by the expired opt-out.

(2) *Reasonable period of time before expiration.* Providing an extension notice on or with the last annual privacy notice required by the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, that is provided to the consumer before expiration of the opt-out period shall be deemed reasonable in all cases.

(e) *No effect on opt-out period.* The opt-out period may not be shortened to a period of less than 5 years by sending an extension notice to the consumer before expiration of the opt-out period.

§ 680.27 Consolidated and equivalent notices.

(a) *Coordinated and consolidated notices.* A notice required by this part may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the Act and the Gramm-Leach-Bliley Act privacy notice.

(b) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this part, and that you provide to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of this part.

APPENDIX A TO PART 680—MODEL FORMS FOR OPT-OUT NOTICES

A–1—Model Form for Initial Opt-Out Notice

Your Choice To Limit Marketing

1. You may limit our affiliates from marketing their products or services to you based on information that we share with them, such as your income, your account history with us, and your credit score.

2. [Include if applicable.] Your decision to limit marketing offers from

our affiliates will apply for 5 years. Once that period expires, you will be allowed to extend your decision.

3. [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To limit marketing offers [include all that apply]:

• Call us toll-free at 877-###-####; or

• Visit our Web site at *http://www.websiteaddress.com;* or

• Check the box below and mail it to:

[Company name]

[Company address]

__I do not want your affiliates to market their products or services to me based on information that you share with them.

A–2—Model Form for Extension Notice

Extending Your Choice To Limit Marketing

1. You previously chose to limit our affiliates from marketing their products or services to you based on information that we share with them, such as your income, your account history with us, and your credit score.

2. Your choice has expired or is about to expire.

3. [Include if applicable.] This limitation does not apply in certain circumstances, such as if you currently do business with one of our affiliates or if you ask to receive information or offers from them.

To extend your choice for another 5 years [include all that apply]:

• Call us toll-free at 877-###-####; or

• Visit our Web site at *http://www.websiteaddress.com;* or

• Check the box below and mail it to:

[Company name]

[Company address]

__I want to extend my choice for another 5 years.

A–3—Model Form for Voluntary ''No Marketing'' Notice

Your Choice To Stop Marketing

You may choose to stop all marketing offers from us and our affiliates.

To stop all marketing offers [include all that apply]:

• Call us toll-free at 877-###-####; or

• Visit our Web site at *http://www.websiteaddress.com;* or

• Check the box on the form below and mail it to:

[Company name]

[Company address]

__I do not want you or your affiliates to send me marketing offers.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 04–13481 Filed 6–14–04; 8:45 am]

BILLING CODE 6750–01–P

POSTAL SERVICE

39 CFR Part 111

Eligibility Requirements for Certain Nonprofit Standard Mail Material

AGENCY: Postal Service.

ACTION: Proposed rule.

SUMMARY: The Postal Service proposes revisions to Domestic Mail Manual (DMM) E670.5.5, which sets forth guidelines for determining whether the coverage provided by an insurance policy offered by an authorized nonprofit organization to its members is not generally otherwise commercially available.

DATES: Submit comments on or before July 15, 2004.

ADDRESSES: Mail or deliver written comments to the Manager, Mailing Standards, U.S. Postal Service, 475 L'Enfant Plaza SW., Room 3436, Washington DC 20260–3436. Copies of all written comments will be available for inspection and photocopying at USPS Headquarters Library, 475 L'Enfant Plaza SW., 11th Floor N, Washington DC, between 9 a.m. and 4 p.m., Monday through Friday. Comments may not be submitted via fax or e-mail.

FOR FURTHER INFORMATION CONTACT: Jerry Lease, Mailing Standards, U.S. Postal Service, (202) 268–7264; or Garry A. Rodriguez, Mailing Standards, U.S. Postal Service, (202) 268–7281.

SUPPLEMENTARY INFORMATION:

Authorized organizations are entitled to mail their qualifying materials at the Nonprofit Standard Mail rates (''nonprofit rates''), which are significantly lower than the regular Standard Mail rates. However, the Postal Service Appropriations Act of 1991 limits the types of material that may be sent at the nonprofit rates (originally called the ''special bulk third-class rates''). Among the provisions is one restricting promotional materials for insurance from being mailed at the nonprofit rates unless, among other things, the coverage provided by the policy is ''not generally otherwise commercially available'' (39 U.S.C. 3626(j)(1)(B)).

On June 25, 1992 (57 FR 28464), the Postal Service adopted standards defining the phrase, ''not generally otherwise commercially available,'' for purposes of determining the eligibility of promotional insurance mailed at the nonprofit rates. Those standards, as currently stated in DMM E670.5.4 and 5.5, state that promotional materials pertaining to the coverage provided by insurance policies may not be mailed at the nonprofit rates, ''unless the organization promoting the purchase of such policy is authorized to mail at the Nonprofit Standard Mail rates at the entry post office; the policy is designed for and primarily promoted to the members, donors, supporters, or beneficiaries of that organization; and the coverage provided by the policy is not generally otherwise commercially available.''

DMM E670.5.5 explains, ''The term not generally otherwise commercially available applies to the actual coverage stated in an insurance policy, without regard to the amount of the premiums, the underwriting practices, and the financial condition of the insurer. When comparisons are made with other policies, consideration is given to policy coverage benefits, limitations, and exclusions, and to the availability of coverage to the targeted category of recipients. When insurance policy coverages are compared for determining whether coverage in a policy offered by an organization is not generally otherwise commercially available, the comparison is based on the specific characteristics of the recipients of the piece (*e.g.*, geographic location or demographic characteristics).''

The standard further explains that the types of insurance considered generally commercially available include, but are not limited to, homeowner's, property, casualty, marine, professional liability (including malpractice), travel, health, life, airplane, automobile, truck, motorhome, motorbike, motorcycle, boat, accidental death, accidental dismemberment, Medicare supplement (Medigap), catastrophic care, nursing home, and hospital indemnity insurance.

Several years after these standards were issued, the Postal Service was challenged in the United States District Court for the District of Columbia by two organizations authorized to mail qualifying matter at nonprofit rates. Each organization offered insurance to its respective members. In each case, the Postal Service had determined that the organization's mailings promoting insurance were not eligible for nonprofit rates. The organizations asked the District Court to reverse those decisions.

One of the nonprofit organizations was a fraternal benefit organization that offered life, medical, disability, and