

nonpublic personal information. You may use this clause if you disclose nonpublic personal information other than as permitted by the exceptions in §§160.13, 160.14 and 160.15, as well as when permitted by the exceptions in §§160.14 and 160.15.

*Sample Clause A-4*

We may disclose nonpublic personal information about you to the following types of third parties:

- Financial service providers, such as [provide illustrative examples, such as “mortgage bankers”];
- Non-financial companies, such as [provide illustrative examples, such as “retailers, direct marketers, airlines and publishers”]; and
- Others, such as [provide illustrative examples, such as “non-profit organizations”].

We may also disclose nonpublic personal information about you to nonaffiliated third parties as permitted by law.

**A-5—SERVICE PROVIDER/JOINT MARKETING EXCEPTION**

You may use one of these clauses, as applicable, to meet the requirements of §160.6(a)(5) related to the exception for service providers and joint marketers in §160.13. If you disclose nonpublic personal information under this exception, you must describe the categories of nonpublic personal information you disclose and the categories of third parties with whom you have contracted.

*Sample Clause A-5, Alternative 1*

We may disclose the following information to companies that perform marketing services on our behalf or to other financial institutions with which we have joint marketing agreements:

- Information we receive from you on applications or other forms, such as [provide illustrative examples, such as “your name, address, Social Security number, assets and income”];
- Information about your transactions with us, our affiliates, or others, such as [provide illustrative examples, such as “your account balance, payment history, parties to transactions and credit card usage”]; and
- Information we receive from a consumer reporting agency, such as [provide illustrative examples, such as “your creditworthiness and credit history”].

*Sample Clause A-5, Alternative 2*

We may disclose all of the information we collect, as described [describe location in the notice, such as “above” or “below”] to companies that perform marketing services on our behalf or to other financial institutions with which we have joint marketing agreements.

**A-6—EXPLANATION OF OPT OUT RIGHT (INSTITUTIONS THAT DISCLOSE OUTSIDE OF THE EXCEPTIONS)**

You may use this clause, as applicable, to meet the requirement of §160.6(a)(6) to provide an explanation of the consumer’s right to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, including the method(s) by which the consumer may exercise that right. You may use this clause if you disclose nonpublic personal information other than as permitted by the exceptions in §§160.13, 160.14 and 160.15.

*Sample Clause A-6*

If you prefer that we not disclose nonpublic personal information about you to nonaffiliated third parties you may opt out of those disclosures; that is, you may direct us not to make those disclosures (other than disclosures permitted or required by law). If you wish to opt out of disclosures to nonaffiliated third parties, you may [describe a reasonable means of opting out, such as “call the following toll-free number: (insert number)”].

**A-7—CONFIDENTIALITY AND SECURITY (ALL INSTITUTIONS)**

You may use this clause, as applicable, to meet the requirement of §160.6(a)(8) to describe your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information.

*Sample Clause A-7*

We restrict access to nonpublic personal information about you to [provide an appropriate description, such as “those employees who need to know that information to provide products or services to you”]. We maintain physical, electronic and procedural safeguards that comply with federal standards to safeguard your nonpublic personal information.

[66 FR 21252, Apr. 27, 2001, as amended at 74 FR 62984, Dec. 1, 2009]

**PART 162—PROTECTION OF CONSUMER INFORMATION UNDER THE FAIR CREDIT REPORTING ACT**

Sec.

162.1 Purpose and scope.

162.2 Definitions.

**Subpart A—Business Affiliate Marketing Rules**

162.3 Affiliate marketing opt out and exceptions.

162.4 Scope and duration of opt out.

## Commodity Futures Trading Comm.

## § 162.2

- 162.5 Contents of opt-out notice; consolidated and equivalent notices.
- 162.6 Reasonable opportunity to opt out.
- 162.7 Reasonable and simple methods of opting out.
- 162.8 Acceptable delivery of opt-out notices
- 162.9 Renewal of opt out.
- 162.10–162.20 [Reserved]

### Subpart B—Disposal Rules

- 162.21 Proper disposal of consumer information.

### Subpart C—Identity Theft Red Flags

- 162.30 Duties regarding the detection, prevention, and mitigation of identity theft.
- 162.31 [Reserved]
- 162.32 Duties of card issuers regarding changes of address.

APPENDIX A TO PART 162—SAMPLE CLAUSES  
APPENDIX B TO PART 162—INTERAGENCY  
GUIDELINES ON IDENTITY THEFT DETECTION,  
PREVENTION, AND MITIGATION

AUTHORITY: Sec. 1088, Pub. L. 111–203; 124 Stat. 1376 (2010).

SOURCE: 76 FR 43884, July 22, 2011, unless otherwise noted.

#### § 162.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to implement various provisions in the Fair Credit Reporting Act, 15 U.S.C. 1681, *et seq.* (“FCRA”), which provide certain protections to consumer information.

(b) *Scope.* This part applies to certain consumer information held by the entities listed below. This part shall apply to futures commission merchants, retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, major swap participants and swap dealers, regardless of whether they are required to register with the Commission. This part does not apply to foreign futures commission merchants, foreign retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, major swap participants and swap dealers unless such entity registers with the Commission. Nothing in this part modifies limits or supersedes the requirements set forth in part 160 of this title.

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

part. Examples in a section illustrate only the issue described in the section and do not illustrate any other issue that may arise in this part.

#### § 162.2 Definitions.

(a) *Affiliate.* The term “affiliate” for the purposes of this part means any person that is related by common ownership or common corporate control with a covered affiliate.

(b) *Clear and conspicuous.* The term “clear and conspicuous” means reasonably understandable and designed to call attention to the nature and significance of the information presented in the notice.

(c) *Common ownership or common corporate control.* The term “common ownership or common corporate control” for the purposes of this part means the power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of any company is presumed to control the company. Any person who does not own more than 25 percent of the voting securities of a company will be presumed not to control the company.

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

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

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

(f) *Consumer.* Except as otherwise provided, the term “consumer” means an individual person. The term consumer does not include market makers, floor brokers, locals, or individual persons whose information is not collected to determine eligibility for personal, family, or household purposes.

(g) *Consumer information.* The term “consumer information” means any record about an individual, whether in paper, electronic, or other form, that is

a consumer report or is derived from a consumer report (as defined in section 603(d)(2) of the FCRA). Consumer information also means a compilation of such records. Consumer information does not include information that does not identify individuals, such as aggregate information or blind data.

(h) *Covered affiliate*. The term “covered affiliate” means a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant or swap dealer, which is subject to the jurisdiction of the Commission.

(i) *Dispose or Disposal*—(1) *In general*. The terms “dispose” or “disposal” means:

(i) The discarding or abandonment of consumer information; or

(ii) The sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored.

(2) *Sale, donation, or transfer of consumer information*. The sale, donation, or transfer of consumer information is not considered disposal for the purposes of subpart B.

(j) *Dodd-Frank Act*. The term “Dodd-Frank Act” means the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)).

(k) *Eligibility information*. The term “eligibility information” means any information that 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. Examples of the type of information that would fall within the definition of eligibility information include an affiliate’s own transaction or experience information, such as information about a consumer’s account history with that affiliate, and other information, such as information from credit bureau reports or applications. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(l) *FCRA*. The term “FCRA” means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(m) *Financial product or service*. The term “financial product or service”

means any product or service that a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant or swap dealer could offer that is subject to the Commission’s jurisdiction.

(n) *GLB Act*. The term “GLB Act” means the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338 (1999)).

(o) *Major swap participant*. The term “major swap participant” has the same meaning as in section 1a(33) of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, as may be further defined by this title, and includes any person registered as such thereunder.

(p) *Person*. The term “person” means any individual, partnership, corporation, trust, estate, cooperative, association, or other entity.

(q) *Pre-existing business relationship*. The term “pre-existing business relationship” means a relationship between a person, or a person’s licensed agent, 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 by this part;

(2) The purchase, rental, or lease by the consumer of a persons’ services or a financial transaction (including holding an active account or policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this part; or

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

(r) *Solicitation*—(1) *In general*. The term “solicitation” means the marketing of a financial product or service initiated by an affiliate to a particular consumer that is—

(i) Based on eligibility information communicated to that covered affiliate by an affiliate that has or previously

had the pre-existing business relationship with a consumer as described in this part; and

(ii) Intended to encourage the consumer to purchase or obtain such financial product or service. A solicitation does not include marketing communications that are directed at the general public.

(2) *Examples.* Examples of what communications constitute solicitations include communications such as a tele-marketing solicitation, direct mail, or e-mail, when those communications are directed to a specific consumer based on eligibility information. A solicitation does not 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 financial products and services from the affiliate initiating the communications.

(s) *Swap dealer.* The term “swap dealer” has the same meaning as in section 1a(49) of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, as may be further defined by this title, and includes any person registered as such thereunder.

### Subpart A—Business Affiliate Marketing Rules

#### § 162.3 Affiliate marketing opt out and exceptions.

(a) *Initial notice and opt out.* A covered affiliate may not use eligibility information about a consumer that the covered affiliate receives from an affiliate with the consumer to make a solicitation for marketing purposes to such consumer unless—

(1) It is clearly and conspicuously disclosed to the consumer in writing or if the consumer agrees, electronically, in a concise notice that the person may use shared eligibility information about that consumer received from an affiliate to make solicitations for marketing purposes to such consumer;

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

(3) The consumer has not opted out.

(b) *Persons responsible for satisfying the notice requirement.* The notice required by this section must be provided:

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

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

(c) *Exceptions.* These proposed regulations would not apply to the following covered affiliate:

(1) A covered affiliate that has a pre-existing business relationship with a consumer;

(2) Communications between an employer and employee-consumer (or his or her beneficiary) in connection with an employee benefit plan;

(3) A covered affiliate that is currently providing services to the consumer;

(4) If the consumer initiated the communication with the covered affiliate by oral, electronic, or written means;

(5) If the consumer authorized or requested the covered affiliate’s solicitation; or

(6) If compliance by a person with these regulations would prevent that person’s compliance with state insurance laws pertaining to unfair discrimination.

(d) *Making solicitations—*(1) *When a solicitation occurs.* A covered affiliate makes a solicitation for marketing purposes if the person—

(i) Receives eligibility information from an affiliate;

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

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

(B) Establish criteria used to select the consumer to receive a solicitation about the covered affiliate’s financial products or services; or

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

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

(2) *Receipt of eligibility information.* A covered affiliate may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that the covered affiliate may access.

(3) *Service providers.* Except as provided in paragraph (d)(5) of this section, a covered affiliate receives or uses an affiliate's eligibility information if a service provider acting on the covered affiliate's behalf (regardless of whether such service provider is a third party or an affiliate of the covered affiliate) receives or uses that information in the manner described in paragraph (d)(1)(i) or (d)(1)(ii) of this section. All relevant facts and circumstances will determine whether a service provider is acting on behalf of a covered affiliate when it receives or uses an affiliate's eligibility information in connection with marketing the covered affiliate's financial products or services.

(4) *Use by an affiliate of its own eligibility information.* Unless a covered affiliate uses eligibility information that the covered affiliate receives from an affiliate in the manner described in paragraph (d)(2) of this section, the covered affiliate does not make a solicitation subject to this subpart:

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

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

(5) *Use of eligibility information by a service provider—(i) In general.* A covered affiliate does not make a solicitation subject to this subpart if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that the covered affiliate may access)

receives eligibility information from an affiliate that has or previously had a pre-existing business relationship with the consumer and uses that eligibility information to market the covered affiliate's financial products or services to the consumer, so long as—

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

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

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

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

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

(ii) *Writing requirements.* (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between the affiliate that has or previously had a pre-existing business relationship with the consumer and the service provider; and

(B) The specific terms and conditions established by the affiliate as provided

in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(e) *Relation to affiliate-sharing notice and opt out.* Nothing in this rulemaking will limit the responsibility of a covered affiliate to comply with the notice and opt-out provisions under other privacy rules under the FCRA, the GLB Act or the CEA.

#### § 162.4 Scope and duration of opt out.

(a) *Scope of opt-out election*—(1) *In general.* The consumer's election to opt out prohibits any covered affiliate subject to the scope of the opt-out notice from using eligibility information received from another affiliate to make solicitations to the consumer.

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

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

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

(ii) *Examples of a continuing relationship.* A consumer has a continuing relationship with a covered affiliate or its affiliate if:

(A) The covered affiliate is a futures commission merchant through whom a consumer has opened an account, or that carries the consumer's account on a fully-disclosed basis, or that effects or engages in commodity interest transactions with or for a consumer, even if the covered affiliate does not hold any assets of the consumer;

(B) The covered affiliate is an introducing broker that solicits or accepts specific orders for trades;

(C) The covered affiliate is a commodity trading advisor with whom a consumer has a contract or subscription, either written or oral, regardless of whether the advice is standardized, or is based on, or tailored to, the com-

modity interest or cash market positions or other circumstances or characteristics of the particular consumer;

(D) The covered affiliate is a commodity pool operator, and accepts or receives from the consumer, funds, securities, or property for the purpose of purchasing an interest in a commodity pool;

(E) The covered affiliate is a major swap participant that holds securities or other assets as collateral for a loan made to the consumer, even if the covered affiliate did not make the loan or do not affect any transactions on behalf of the consumer; or

(F) The covered affiliate is a swap dealer that regularly effects or engages in swap transactions with or for a consumer even if the covered affiliate does not hold any assets of the consumer.

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

(ii) *Examples of no continuing relationship.* A consumer does not have a continuing relationship with a covered affiliate or its affiliate if:

(A) The covered affiliate has acted solely as a “finder” for a futures commission merchant, and the covered affiliate does not solicit or accept specific orders for trades; or

(B) The covered affiliate has solicited the consumer to participate in a pool or to direct his or her account and he or she has not provided the covered affiliate with funds to participate in a pool or entered into any agreement with the covered affiliate to direct his or her account.

(4) *Menu of alternatives.* A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the

notice, electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all solicitations from all of the affiliates that are covered by the notice.

(5) *Special rule for a notice following termination of all continuing relationships.* A consumer must be given a new opt-out notice if, after all continuing relationships with the covered affiliate or its affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with the covered affiliate or its affiliate(s) and the consumer's eligibility information is to be used to make a solicitation. The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent with paragraph b of this section, the consumer's decision not to opt out after receiving the new opt-out notice would not override a prior opt-out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship.

(b) *Duration of opt-out election.* An opt-out election must be effective for a period of at least five years beginning when the consumer's opt-out election is received and implemented, unless the consumer subsequently revokes the opt-out election in writing or, if the consumer agrees, electronically. An opt-out election may be established for a period of more than five years or for an indefinite period unless revoked.

(c) *Time period in which a consumer can opt out.* A consumer may opt out at any time.

(d) *No effect on opt-out period.* An opt-out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt-out period, even if the consumer does not renew the opt out.

**§ 162.5 Contents of opt-out notice; consolidated and equivalent notices.**

(a) *Contents of the opt-out notice—(1) In general.* An opt-out notice must be in writing, be clear and conspicuous, as well as concise, and must accurately disclose the following:

(i) (A) The name of the affiliate that has or previously had a pre-existing business relationship with a consumer, which is providing the notice; or

(B) If jointly provided jointly by multiple affiliates and each affiliate shares a common name, then the notice may indicate that it is being provided by multiple companies with the same name or multiple companies in the same group or family of companies. If the affiliates providing the notice do not share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates;

(ii) The list of affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer;

(iii) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(iv) A statement that the consumer may elect to limit the use of eligibility information to make solicitations to the consumer;

(v) A statement that the consumer's election will apply for the specified period of time and, if applicable, that the consumer will be allowed to renew the election once that period expires;

(vi) If the notice is provided to consumers who have previously elected to opt out, that such consumer does not need to act again until the consumer receives a renewal notice; and

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

(2) *Specifying length of time period.* If consumer is granted an opt-out period longer than a five-year duration, the opt-out notice must specify the length of the opt-out period.

(3) *No revised notice for extension of opt-out period.* The duration of an opt-out period may be increased for a period longer than the period specified in

the opt-out notice without having to provide a revised notice of the increase to the consumer.

(b) *Joint relationships.* (1) If two or more consumers jointly obtain a financial product or service, a single opt-out notice may be provided to joint consumers.

(2) Any of the joint consumers may exercise the right to opt out on behalf of each joint consumer.

(3) The opt-out election notice must explain how an opt-out election by a joint consumer will be treated. That is, the notice should specify whether an opt-out election by a joint consumer will be treated as applying to all of the associated joint consumers, or as applying to each joint consumer separately.

(4) If the opt-out election notice provides that each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the joint consumers and the joint consumer must be permitted to exercise his or her separate rights to opt out in a single response.

(5) A covered affiliate cannot require all joint consumers to opt out before implementing any opt-out election.

(c) *Alternative contents.* If the consumer is afforded a broader right to opt out of receiving marketing than is required by this subpart, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights.

(d) *Coordinated and consolidated consumer notices.* 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 by the covered affiliate providing the notice, including but not limited to notices in the FCRA or the GLB Act privacy notices.

(e) *Equivalent notices.* A notice or disclosure that is equivalent to the notice required by this part in terms of content, and that is provided to a consumer together with a notice required by any other provision of law, satisfies the requirements of this section.

(f) *Model notices.* Model notices are provided in appendix A of this part.

These notices were meant to facilitate compliance with this subpart; provided, however, that nothing herein shall be interpreted to require persons subject to this part to use the model notices.

#### **§ 162.6 Reasonable opportunity to opt out.**

(a) *In general.* A covered affiliate must not use eligibility information about a consumer that the covered affiliate receives from an affiliate to make a solicitation to such consumer about the covered affiliate's financial products or services, unless the consumer is provided a reasonable opportunity to opt out, as required by this subpart.

(b) *Examples.* A reasonable opportunity to opt out under this subpart is:

(1) If the opt-out notice is mailed to the consumer, the consumer has 30 days from the date the notice is mailed to opt out.

(2) If the opt-out notice is sent *via* electronic means to the consumer, the consumer has 30 days from the date the consumer acknowledges receipt to elect to opt out by any reasonable method.

(3) If the opt-out notice is sent *via* e-mail (where the consumer has agreed to receive disclosures by e-mail), the consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable method.

(4) If the opt-out notice provided to the consumer at the time of an electronic transaction, the consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction.

(5) If the opt-out notice is provided during an in-person transaction, the consumer is required to decide, as a necessary part of completing the transaction, whether to opt out through a simple process.

(6) If the opt-out notice is provided in conjunction with other privacy notices required by law, the consumer is allowed to exercise the opt-out election within a reasonable period of time and in the same manner as the opt out under that privacy notice.

## § 162.7

## 17 CFR Ch. I (4–1–23 Edition)

### § 162.7 Reasonable and simple methods of opting out.

(a) *In general.* A covered affiliate shall be prohibited from using eligibility information about a consumer received from an affiliate to make a solicitation to the consumer about the covered affiliate's financial products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by this subpart.

(b) *Examples.* Reasonable and simple methods of opting out include:

(1) Designating a check-off box in a prominent position on an opt-out election form;

(2) Including a reply form and a self-addressed envelope (in a mailing);

(3) Providing an electronic means, if the consumer agrees, that can be electronically mailed or processed through an Internet Web site;

(4) Providing a toll-free telephone number; or

(5) Exercising an opt-out election through whatever means are acceptable under a consolidated privacy notice required under other laws.

(c) *Specific opt-out method.* Each consumer may be required to opt out through a specific method, as long as that method is acceptable under this subpart.

### § 162.8 Acceptable delivery methods of opt-out notices.

(a) *In general.* The opt-out notice must be provided so that each consumer can reasonably be expected to receive actual notice.

(b) *Electronic notices.* For opt-out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in § 1.4 of this title or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.*

### § 162.9 Renewal of opt out.

(a) *Renewal notice and opt-out requirement—*(1) *In general.* Since the FCRA provides that opt-out elections can expire in a period of no less than five years, an affiliate that has or previously had a pre-existing business relationship with a consumer must provide a renewal notice to the consumer

after such time in order to allow its affiliates to make solicitations. After the opt-out election period expires, its affiliates may make solicitations unless:

(i) The consumer has been given a renewal notice that complies with the requirements of this section and §§ 162.6 through 162.8 of this subpart, and a reasonable opportunity and a reasonable and simple method to renew the opt-out election, and the consumer does not renew the opt out; or

(ii) An exception in Sec. 162.3(c) of this subpart applies.

(2) *Renewal period.* Each opt-out renewal must be effective for a period of at least five years as provided in § 162.4(b) of this subpart.

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

(i) By the affiliate that provided the previous opt-out notice, or its successor; or

(ii) As part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt-out notice.

(b) *Contents of renewal or extension notice.* The contents of the renewal notice must include all of the same contents of the initial notices, but also must include:

(1) A statement that the consumer previously elected to limit the use of certain information to make solicitations to the consumer;

(2) A statement that the consumer may elect to renew the consumer's previous election; and

(3) If applicable, a statement that the consumer's election to renew will apply for a specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires.

(c) *Timing of renewal notice.* Renewal notices must be provided in a reasonable period of time before the expiration of the opt-out election 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 election are made to the consumer.

(d) *No effect on opt-out period.* An opt-out period may not be shortened by

## Commodity Futures Trading Comm.

## § 162.30

sending a renewal notice to the consumer before the expiration of the opt-out period, even if the consumer does not renew the opt-out election.

### §§ 162.10–162.20 [Reserved]

## Subpart B—Disposal Rules

### § 162.21 Proper disposal of consumer information.

(a) *In general.* Any covered affiliate must adopt must adopt reasonable, written policies and procedures that address administrative, technical, and physical safeguards for the protection of consumer information. These written policies and procedures must be reasonably designed to:

(1) Insure the security and confidentiality of consumer information;

(2) Protect against any anticipated threats or hazards to the security or integrity of consumer information; and

(3) Protect against unauthorized access to or use of consumer information that could result in substantial harm or inconvenience to any consumer.

(b) *Standard.* Any covered affiliate under this part who maintains or otherwise possesses consumer information for a business purpose must properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.

(c) *Examples.* The following examples are “reasonable” disposal measures for the purposes of this subpart—

(1) Implementing and monitoring compliance with policies and procedures that require the burning, pulverizing, or shredding of papers containing consumer information so that the information cannot practicably be read or reconstructed;

(2) Implementing and monitoring compliance with policies and procedures that require the destruction or erasure of electronic media containing consumer information so that the information cannot practicably be read or reconstructed; and

(3) After due diligence, entering into and monitoring compliance with a written contract with another party engaged in the business of record destruction to dispose of consumer infor-

mation in a manner that is consistent with this rule.

(d) *Relation to other laws.* Nothing in this section shall be construed:

(1) To require a person to maintain or destroy any record pertaining to a consumer that is imposed under Sec. 1.31 or any other provision of law; or

(2) To alter or affect any requirement imposed under any other provision of law to maintain or destroy such a record.

## Subpart C—Identity Theft Red Flags

SOURCE: 78 FR 23661, Apr. 19, 2013, unless otherwise noted.

### § 162.30 Duties regarding the detection, prevention, and mitigation of identity theft.

(a) *Scope of this subpart.* This section applies to financial institutions or creditors that are subject to administrative enforcement of the FCRA by the Commission pursuant to Sec. 621(b)(1) of the FCRA, 15 U.S.C. 1681s(b)(1).

(b) *Special definitions for this subpart.* For purposes of this section, and appendix B to this part, the following definitions apply:

(1) Account means a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes. Account includes an extension of credit, such as the purchase of property or services involving a deferred payment.

(2) The term *board of directors* includes:

(i) In the case of a branch or agency of a foreign bank, the managing official in charge of the branch or agency; and

(ii) In the case of any other creditor that does not have a board of directors, a designated senior management employee.

(3) *Covered account* means:

(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a margin account; and

(ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.

(4) *Credit* has the same meaning in Sec. 603(r)(5) of the FCRA, 15 U.S.C. 1681a(r)(5).

(5) *Creditor* has the same meaning as in 15 U.S.C. 1681m(e)(4), and includes any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer, or major swap participant that regularly extends, renews, or continues credit; regularly arranges for the extension, renewal, or continuation of credit; or in acting as an assignee of an original creditor, participates in the decision to extend, renew, or continue credit.

(6) *Customer* means a person that has a covered account with a financial institution or creditor.

(7) *Financial institution* has the same meaning as in 15 U.S.C. 1681a(t) and includes any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer, or major swap participant that directly or indirectly holds a transaction account belonging to a consumer.

(8) *Identifying information* means any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any—

(i) Name, Social Security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(ii) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(iii) Unique electronic identification number, address, or routing code; or

(iv) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

(9) *Identity theft* means a fraud committed or attempted using the identifying information of another person without authority.

(10) *Red Flag* means a pattern, practice, or specific activity that indicates the possible existence of identity theft.

(11) *Service provider* means a person that provides a service directly to the financial institution or creditor.

(c) *Periodic identification of covered accounts.* Each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As a part of this determination, a financial institution or creditor shall conduct a risk assessment to determine whether it offers or maintains covered accounts described in paragraph (b)(3)(ii) of this section, taking into consideration:

(1) The methods it provides to open its accounts;

(2) The methods it provides to access its accounts; and

(3) Its previous experiences with identity theft.

(d) *Establishment of an Identity Theft Prevention Program—(1) Program requirement.* Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Identity Theft Prevention Program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

(2) *Elements of the Identity Theft Prevention Program.* The Identity Theft Prevention Program must include reasonable policies and procedures to:

(i) Identify relevant Red Flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those Red Flags into its Identity Theft Prevention Program;

(ii) Detect Red Flags that have been incorporated into the Identity Theft

## Commodity Futures Trading Comm.

## § 162.32

Prevention Program of the financial institution or creditor;

(iii) Respond appropriately to any Red Flags that are detected pursuant to paragraph (d)(2)(ii) of this section to prevent and mitigate identity theft; and

(iv) Ensure the Identity Theft Prevention Program (including the Red Flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.

(e) *Administration of the Identity Theft Prevention Program.* Each financial institution or creditor that is required to implement an Identity Theft Prevention Program must provide for the continued administration of the Identity Theft Prevention Program and must:

(1) Obtain approval of the initial written Identity Theft Prevention Program from either its board of directors or an appropriate committee of the board of directors;

(2) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the Identity Theft Prevention Program;

(3) Train staff, as necessary, to effectively implement the Identity Theft Prevention Program; and

(4) Exercise appropriate and effective oversight of service provider arrangements.

(f) *Guidelines.* Each financial institution or creditor that is required to implement an Identity Theft Prevention Program must consider the guidelines in appendix B of this part and include in its Identity Theft Prevention Program those guidelines that are appropriate.

### § 162.31 [Reserved]

### § 162.32 Duties of card issuers regarding changes of address.

(a) *Scope.* This section applies to a person described in § 162.30(a) that issues a debit or credit card (card issuer).

(b) *Definition of cardholder.* For purposes of this section, a cardholder

means a consumer who has been issued a credit or debit card.

(c) *Address validation requirements.* A card issuer must establish and implement reasonable policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a consumer's debit or credit card account and, within a short period of time afterwards (during at least the first 30 days after it receives such notification), the card issuer receives a request for an additional or replacement card for the same account. Under these circumstances, the card issuer may not issue an additional or replacement card, until, in accordance with its reasonable policies and procedures and for the purpose of assessing the validity of the change of address, the card issuer:

(1)(i) Notifies the cardholder of the request:

(A) At the cardholder's former address; or

(B) By any other means of communication that the card issuer and the cardholder have previously agreed to use; and

(ii) Provides to the cardholder a reasonable means of promptly reporting incorrect address changes; or

(2) Otherwise assesses the validity of the change of address in accordance with the policies and procedures the card issuer has established pursuant to § 162.30.

(d) *Alternative timing of address validation.* A card issuer may satisfy the requirements of paragraph (c) of this section if it validates an address pursuant to the methods in paragraph (c)(1) or (c)(2) of this section when it receives an address change notification, before it receives a request for an additional or replacement card.

(e) *Form of notice.* Any written or electronic notice that the card issuer provides under this paragraph must be clear and conspicuous and provided separately from its regular correspondence with the cardholder.

APPENDIX A TO PART 162—SAMPLE  
CLAUSES

A. Although use of the model forms is not required, use of the model forms in this appendix (as applicable) complies with the requirement in section 624 of the FCRA for clear, conspicuous, and concise notices.

B. Certain changes may be made to the language or format of the model forms without losing the protection from liability afforded by use of the model forms. These changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Persons making such extensive revisions will lose the safe harbor that this appendix provides. Acceptable changes include, for example:

1. Rearranging the order of the references to “your income”, “your account history”, and “your credit score”.

2. Substituting other types of information for “income”, “account history”, or “credit score” for accuracy, such as “payment history”, “credit history”, or “claims history”.

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as “the [ABC] group of companies,” including without limitation a statement that the entity providing the notice recently purchased the consumer’s account.

4. Substituting other types of affiliates covered by the notice for “commodity advisor”, “futures clearing merchant”, or “swap dealer” affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt-out period, the notice may omit information about the renewal notice.

6. Adding a statement informing consumers how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: “If you previously opted out, you do not need to do so again.”

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address.

• A-1 Model Form for Initial Opt-out notice (Single-Affiliate Notice)

• A-2 Model Form for Initial Opt-out notice (Joint Notice)

• A-3 Model Form for Renewal Notice (Single-Affiliate Notice)

• A-4 Model Form for Renewal Notice (Joint Notice)

• A-5 Model Form for Voluntary “No Marketing” Notice

A-1 MODEL FORM FOR INITIAL OPT-OUT  
NOTICE (SINGLE-AFFILIATE NOTICE)

[YOUR CHOICE TO LIMIT MARKETING]/  
[MARKETING OPT OUT]

—[Name of Affiliate] is providing this notice.

—[Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

—You may limit our affiliates in the [ABC] group of companies, such as our [commodity advisor, futures clearing merchant, and swap dealer] affiliates, from marketing their financial products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].

—Your choice to limit marketing offers from our affiliates will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years]/[at least another 5 years].

—[Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

—By telephone: 1-877-###-####

—On the Web: [www.—.com](#)

—By mail: check the box and complete the form below, and send the form to:

—[Company name]

—[Company address]

—Do not allow your affiliates to use my personal information to market to me.

A-2 MODEL FORM FOR INITIAL OPT-OUT  
NOTICE (JOINT NOTICE)

[YOUR CHOICE TO LIMIT MARKETING]/  
[MARKETING OPT OUT]

—The [ABC group of companies] is providing this notice.

—[Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

—You may limit the [ABC companies], such as the [ABC commodity advisor, futures

clearing merchant, and swap dealer] affiliates, from marketing their financial products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].

- Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years]/[at least another 5 years].
- [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from the [ABC] companies, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

By telephone: 1-877-###-####

On the Web: [www.—.com](http://www.—.com)

By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

- Do not allow any company [in the ABC group of companies] to use my personal information to market to me.

#### A-3 MODEL FORM FOR RENEWAL NOTICE (SINGLE-AFFILIATE NOTICE)

[RENEWING YOUR CHOICE TO LIMIT MARKETING]/[RENEWING YOUR MARKETING OPT OUT]

- [Name of Affiliate] is providing this notice.
- [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]
- You previously chose to limit our affiliates in the [ABC] group of companies, such as our [commodity advisor, futures clearing merchant, and swap dealer] affiliates, from marketing their financial products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].
- Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

By telephone: 1-877-###-####

On the Web: [www.—.com](http://www.—.com)

By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

- Renew my choice to limit marketing for [x] more years.

#### A-4 MODEL FORM FOR RENEWAL NOTICE (JOINT NOTICE)

[RENEWING YOUR CHOICE TO LIMIT MARKETING]/[RENEWING YOUR MARKETING OPT OUT]

- The [ABC group of companies] is providing this notice.
- [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]
- You previously chose to limit the [ABC companies], such as the [ABC commodity advisor, futures clearing merchant, and swap dealer] affiliates, from marketing their financial products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].
- Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

By telephone: 1-877-###-####

On the Web: [www.—.com](http://www.—.com)

By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

- Renew my choice to limit marketing for [x] more years.

#### A-5 MODEL FORM FOR VOLUNTARY “NO MARKETING” NOTICE

[YOUR CHOICE TO STOP MARKETING]

- [Name of Affiliate] is providing this notice. You may choose to stop all marketing from us and our affiliates.

To stop all marketing offers, contact us [include all that apply]:

By telephone: 1-877-###-####

On the Web: [www.—.com](http://www.—.com)

By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

- Do not market to me.

APPENDIX B TO PART 162—INTERAGENCY  
GUIDELINES ON IDENTITY THEFT DE-  
TECTION, PREVENTION, AND MITIGA-  
TION

Section 162.30 requires each financial institution or creditor that offers or maintains one or more covered accounts, as defined in §162.30(b)(3), to develop and provide for the continued administration of a written Identity Theft Prevention Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. These guidelines are intended to assist financial institutions and creditors in the formulation and maintenance of an Identity Theft Prevention Program that satisfies the requirements of §162.30.

I. THE IDENTITY THEFT PREVENTION PROGRAM

In designing its Identity Theft Prevention Program, a financial institution or creditor may incorporate, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

II. IDENTIFYING RELEVANT RED FLAGS

(a) *Risk factors.* A financial institution or creditor should consider the following factors in identifying relevant Red Flags for covered accounts, as appropriate:

- (1) The types of covered accounts it offers or maintains;
- (2) The methods it provides to open its covered accounts;
- (3) The methods it provides to access its covered accounts; and
- (4) Its previous experiences with identity theft.

(b) *Sources of Red Flags.* Financial institutions and creditors should incorporate relevant Red Flags from sources such as:

- (1) Incidents of identity theft that the financial institution or creditor has experienced;
- (2) Methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and
- (3) Applicable supervisory guidance.

(c) *Categories of Red Flags.* The Identity Theft Prevention Program should include relevant Red Flags from the following categories, as appropriate. Examples of Red Flags from each of these categories are appended as Supplement A to this Appendix B.

- (1) Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;
- (2) The presentation of suspicious documents;

(3) The presentation of suspicious personal identifying information, such as a suspicious address change;

(4) The unusual use of, or other suspicious activity related to, a covered account; and

(5) Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

III. DETECTING RED FLAGS

The Identity Theft Prevention Program's policies and procedures should address the detection of Red Flags in connection with the opening of covered accounts and existing covered accounts, such as by:

- (a) Obtaining identifying information about, and verifying the identity of, a person opening a covered account; and
- (b) Authenticating customers, monitoring transactions, and verifying the validity of change of address requests, in the case of existing covered accounts.

IV. PREVENTING AND MITIGATING IDENTITY  
THEFT

The Identity Theft Prevention Program's policies and procedures should provide for appropriate responses to the Red Flags the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution or creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent Internet Web site. Appropriate responses may include the following:

- (a) Monitoring a covered account for evidence of identity theft;
- (b) Contacting the customer;
- (c) Changing any passwords, security codes, or other security devices that permit access to a covered account;
- (d) Reopening a covered account with a new account number;
- (e) Not opening a new covered account;
- (f) Closing an existing covered account;
- (g) Not attempting to collect on a covered account or not selling a covered account to a debt collector;
- (h) Notifying law enforcement; or
- (i) Determining that no response is warranted under the particular circumstances.

#### V. UPDATING THE IDENTITY THEFT PREVENTION PROGRAM

Financial institutions and creditors should update the Identity Theft Prevention Program (including the Red Flags determined to be relevant) periodically, to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft, based on factors such as:

- (a) The experiences of the financial institution or creditor with identity theft;
- (b) Changes in methods of identity theft;
- (c) Changes in methods to detect, prevent, and mitigate identity theft;
- (d) Changes in the types of accounts that the financial institution or creditor offers or maintains; and
- (e) Changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures, and service provider arrangements.

#### VI. METHODS FOR ADMINISTERING THE IDENTITY THEFT PREVENTION PROGRAM

(a) *Oversight of Identity Theft Prevention Program.* Oversight by the board of directors, an appropriate committee of the board, or a designated senior management employee should include:

- (1) Assigning specific responsibility for the Identity Theft Prevention Program's implementation;
- (2) Reviewing reports prepared by staff regarding compliance by the financial institution or creditor with §162.30; and
- (3) Approving material changes to the Identity Theft Prevention Program as necessary to address changing identity theft risks.

(b) *Reports.* (1) *In general.* Staff of the financial institution or creditor responsible for development, implementation, and administration of its Identity Theft Prevention Program should report to the board of directors, an appropriate committee of the board, or a designated senior management employee, at least annually, on compliance by the financial institution or creditor with §162.30.

(2) *Contents of report.* The report should address material matters related to the Identity Theft Prevention Program and evaluate issues such as: The effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; service provider arrangements; significant incidents involving identity theft and management's response; and recommendations for material changes to the Identity Theft Prevention Program.

(c) *Oversight of service provider arrangements.* Whenever a financial institution or

creditor engages a service provider to perform an activity in connection with one or more covered accounts the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. For example, a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant Red Flags that may arise in the performance of the service provider's activities, and either report the Red Flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft.

#### VII. OTHER APPLICABLE LEGAL REQUIREMENTS

Financial institutions and creditors should be mindful of other related legal requirements that may be applicable, such as:

- (a) For financial institutions and creditors that are subject to 31 U.S.C. 5318(g), filing a Suspicious Activity Report in accordance with applicable law and regulation;
- (b) Implementing any requirements under 15 U.S.C. 1681c-1(h) regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert;
- (c) Implementing any requirements for furnishers of information to consumer reporting agencies under 15 U.S.C. 1681s-2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and
- (d) Complying with the prohibitions in 15 U.S.C. 1681m on the sale, transfer, and placement for collection of certain debts resulting from identity theft.

#### *Supplement A to Appendix B*

In addition to incorporating Red Flags from the sources recommended in section II(b) of the Guidelines in Appendix B of this part, each financial institution or creditor may consider incorporating into its Identity Theft Prevention Program, whether singly or in combination, Red Flags from the following illustrative examples in connection with covered accounts:

#### Alerts, Notifications or Warnings From a Consumer Reporting Agency

- 1. A fraud or active duty alert is included with a consumer report.
- 2. A consumer reporting agency provides a notice of credit freeze in response to a request for a consumer report.
- 3. A consumer reporting agency provides a notice of address discrepancy, as defined in Sec. 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)).

4. A consumer report indicates a pattern of activity that is inconsistent with the history and usual pattern of activity of an applicant or customer, such as:

- a. A recent and significant increase in the volume of inquiries;
- b. An unusual number of recently established credit relationships;
- c. A material change in the use of credit, especially with respect to recently established credit relationships; or
- d. An account that was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

#### Suspicious Documents

5. Documents provided for identification appear to have been altered or forged.

6. The photograph or physical description on the identification is not consistent with the appearance of the applicant or customer presenting the identification.

7. Other information on the identification is not consistent with information provided by the person opening a new covered account or customer presenting the identification.

8. Other information on the identification is not consistent with readily accessible information that is on file with the financial institution or creditor, such as a signature card or a recent check.

9. An application appears to have been altered or forged, or gives the appearance of having been destroyed and reassembled.

#### Suspicious Personal Identifying Information

10. Personal identifying information provided is inconsistent when compared against external information sources used by the financial institution or creditor. For example:

- a. The address does not match any address in the consumer report; or
- b. The Social Security Number (SSN) has not been issued, or is listed on the Social Security Administration's Death Master File.

11. Personal identifying information provided by the customer is not consistent with other personal identifying information provided by the customer. For example, there is a lack of correlation between the SSN range and date of birth.

12. Personal identifying information provided is associated with known fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

- a. The address on an application is the same as the address provided on a fraudulent application; or
- b. The phone number on an application is the same as the number provided on a fraudulent application.

13. Personal identifying information provided is of a type commonly associated with fraudulent activity as indicated by internal

or third-party sources used by the financial institution or creditor. For example:

- a. The address on an application is fictitious, a mail drop, or a prison; or
- b. The phone number is invalid, or is associated with a pager or answering service.

14. The SSN provided is the same as that submitted by other persons opening an account or other customers.

15. The address or telephone number provided is the same as or similar to the address or telephone number submitted by an unusually large number of other persons opening accounts or by other customers.

16. The person opening the covered account or the customer fails to provide all required personal identifying information on an application or in response to notification that the application is incomplete.

17. Personal identifying information provided is not consistent with personal identifying information that is on file with the financial institution or creditor.

18. For financial institutions or creditors that use challenge questions, the person opening the covered account or the customer cannot provide authenticating information beyond that which generally would be available from a wallet or consumer report.

#### Unusual Use of, or Suspicious Activity Related to, the Covered Account

19. Shortly following the notice of a change of address for a covered account, the institution or creditor receives a request for a new, additional, or replacement means of accessing the account or for the addition of an authorized user on the account.

20. A new revolving credit account is used in a manner commonly associated with known patterns of fraud. For example:

- a. The majority of available credit is used for cash advances or merchandise that is easily convertible to cash (*e.g.*, electronics equipment or jewelry); or
- b. The customer fails to make the first payment or makes an initial payment but no subsequent payments.

21. A covered account is used in a manner that is not consistent with established patterns of activity on the account. There is, for example:

- a. Nonpayment when there is no history of late or missed payments;
- b. A material increase in the use of available credit;
- c. A material change in purchasing or spending patterns;
- d. A material change in electronic fund transfer patterns in connection with a deposit account; or
- e. A material change in telephone call patterns in connection with a cellular phone account.

22. A covered account that has been inactive for a reasonably lengthy period of time is used (taking into consideration the type of

## Commodity Futures Trading Comm.

## § 165.2

account, the expected pattern of usage and other relevant factors).

23. Mail sent to the customer is returned repeatedly as undeliverable although transactions continue to be conducted in connection with the customer's covered account.

24. The financial institution or creditor is notified that the customer is not receiving paper account statements.

25. The financial institution or creditor is notified of unauthorized charges or transactions in connection with a customer's covered account.

Notice From Customers, Victims of Identity Theft, Law Enforcement Authorities, or Other Persons Regarding Possible Identity Theft in Connection With Covered Accounts Held by the Financial Institution or Creditor

26. The financial institution or creditor is notified by a customer, a victim of identity theft, a law enforcement authority, or any other person that it has opened a fraudulent account for a person engaged in identity theft.

[78 FR 23660, Apr. 19, 2013]

### PART 165—WHISTLEBLOWER RULES

Sec.

165.1 General.

165.2 Definitions.

165.3 Procedures for submitting original information.

165.4 Confidentiality.

165.5 Requirements for consideration of an award.

165.6 Whistleblowers ineligible for an award.

165.7 Procedures for award applications in Commission actions and related actions, and Commission award determinations.

165.8 Amount of award.

165.9 Criteria for determining amount of award.

165.10 Contents of record for award determination.

165.11 Awards based upon related actions.

165.12 Payment of awards from the Fund, financing of customer education initiatives, and deposits and credits to the Fund.

165.13 Appeals.

165.14 Procedures applicable to the payment of awards.

165.15 Administering the whistleblower program.

165.16 No immunity.

165.17 Awards to whistleblowers who engage in culpable conduct.

165.18 Staff communications with whistleblowers from represented entities.

165.19 Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.

165.20 Whistleblower anti-retaliation protections.

APPENDIX A TO PART 165—GUIDANCE WITH RESPECT TO THE PROTECTION OF WHISTLEBLOWERS AGAINST RETALIATION

APPENDIX B TO PART 165—FORM TCR AND FORM WP-APP

AUTHORITY: 7 U.S.C. 2, 5, 9, 12a(5), 13a, 13a-1, 13b, and 26.

SOURCE: 76 FR 53200, Aug. 25, 2011, unless otherwise noted.

### § 165.1 General.

Section 23 of the Commodity Exchange Act, entitled "Commodity Whistleblower Incentives and Protection," requires the Commission to pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about violations of the Commodity Exchange Act. This part 165 describes the whistleblower program that the Commission intends to establish to implement the provisions of Section 23, and explains the procedures the whistleblower will need to follow in order to be eligible for an award. Whistleblowers should read these procedures carefully, because the failure to take certain required steps within the time frames described in this part may result in disqualification from receiving an award. Unless expressly provided for in this part, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any award or the amount thereof.

### § 165.2 Definitions.

As used in this part:

(a) *Action*. The term "action" generally means a single captioned judicial or administrative proceeding. Notwithstanding the foregoing:

(1) For purposes of making an award under § 165.7, the Commission will treat as a Commission action two or more administrative or judicial proceedings brought by the Commission if these proceedings arise out of the same nucleus of operative facts; or

(2) For purposes of determining the payment on an award under § 165.14, the Commission will deem as part of the Commission action upon which the