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NADA MANAGEMENT SERIES L51

A DEALER GUIDE TO THE FTC Affiliate Marketing Rule

NADA NATIONAL AUTOMOBILE DEALERS ASSOCIATION

The National Automobile Dealers Association (NADA) has prepared this management guide to assist its dealer members in being as efficient as possible in the operation of their dealerships. The presentation of this information is not intended to encourage concerted action among competitors or any other action on the part of dealers that would in any manner fix or stabilize the price or any element of the price of any good or service.

This guide explains a Federal Trade Commission (FTC) rule that governs certain marketing activities by entities using certain information obtained from other affiliated entities. This guide explains the Rule, its relationship to existing law, and provides in Appendices A through E several samples of the notices required under the Rule. This guide does not address other federal or state restrictions (such as telemarketing restrictions) that may apply to the information-sharing and marketing practices described, or to the hypothetical scenarios discussed herein.

Nothing in this guide (including the appendices) is intended as legal advice. In addition, this guide only discusses the federal Affiliate Marketing Rule and the related information-sharing requirements under the Fair Credit Reporting Act (FCRA). It does not address state or local law that may impose additional requirements, or other federal laws that may apply to this topic.

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Scope and Application

The corporate structure of the modern dealership ranges from the single-point sole proprietorship to the publicly-traded, multiple-entity corporation. Related dealership entities often wish to use information about their customers and potential customers for marketing purposes. However, a new federal rule places restrictions on the ability of your affiliates to market their products and services to your customers. As discussed below, this means that dealers whose marketing programs rely on certain consumer information sent to or received by an affiliate will have to comply with this new rule.

The new Affiliate Marketing Rule (the "Rule") was published on Oct. 23, 2007 by the Federal Trade Commission (FTC).[1] The Rule provides that, subject to some important exceptions, a company may not use "eligibility information" received from an "affiliate" to "make" a "solicitation" to a consumer unless the consumer has received notice of such use and a "reasonable" period to opt out of such use, and has not opted out. The Rule took effect on Jan. 1, 2008, and the mandatory compliance date is **Oct. 1, 2008**. This guide will explain how the new Rule works, as well as the Rule's relationship with existing laws governing the sharing of information between affiliates.

Significantly, the Rule does not impose a blanket obligation on all dealers, all marketing activities, or all information used by a dealer. Instead, subject to several important exceptions discussed below, the Rule only applies to a dealer or other business if (1) it is an "affiliate"; (2) the information used by the affiliate is "eligibility information"; and (3) the information is used to make a "solicitation."

However, if these three conditions are present, the Rule requires the dealer to provide its consumers with clear and conspicuous disclosure of the affiliate's use of the eligibility information, and a reasonable opportunity and simple method for those consumers to opt out of that marketing. If the consumer does opt out—that is, states his or her desire not to receive marketing from the affiliate—the affiliate must honor that opt-out request for at least five years or longer (including permanently). The Rule also contains several important exceptions that, if applicable, would not require a dealer to provide notice and an opportunity to opt out.

The affiliate marketing provisions do not apply to information that a company receives prior to Oct. 1, 2008. Therefore, eligibility information that a company received from its affiliate prior to Oct. 1, 2008 may be used for marketing solicitations without regard to the affiliate marketing rules. (However, other restrictions, including the need to abide by the language in the dealer's privacy notice, still apply.)

Application to Commercial Truck Dealers

The Affiliate Marketing Rule only restricts marketing to consumers. Medium- and heavy-duty truck dealers whose marketing efforts are limited to businesses (and not consumers) should fall outside the scope of this Rule.

Example

Throughout this guide we will refer to a hypothetical dealer ("Dealer X") to illustrate some practical applications of the Rule. In the example, Dealer X owns a majority of the voting shares of two different, separately incorporated dealerships, Dealership A and Dealership B. The two dealerships carry different brands and are located in separate buildings across town. Keep this example in mind as you review this guide.

Key Definitions

As discussed above, the Affiliate Marketing Rule prohibits businesses from using "eligibility information" received from an "affiliate" to "make" a "solicitation" to a consumer unless the consumer has received notice of such use and a "reasonable" period to exercise an opportunity to opt out, and has not opted out.

For ease of reference in describing a situation where information is shared between affiliates, we will sometimes generically refer to a **"Sending Affiliate"** as the entity that shares information with its affiliate, and a **"Receiving Affiliate"** as the entity that receives the information and wants to use it for marketing.

In order to determine whether the Rule applies to your dealership's operations, you must first understand these key terms:

Affiliate

The Rule only applies to information that is shared between separate legal entities that have some common connection. These related entities are called *"affiliates."* Specifically, a business is an "affiliate" if it is "related by common ownership or common corporate control with another company."[2]

The Rule defines "common ownership or common corporate control" as (a) ownership, control, or the power to vote 25 percent or more of the outstanding shares of any class of voting security; (b) control over the election of a majority of the directors or similar individuals; or (c) the power to exercise a controlling influence over the management or policies of a company.

In addition, "common ownership or common corporate control" exists where any "person" (which includes individuals, corporations, associations, trusts, etc.) has one or more of these relationships with both companies.[3] In our example, because Dealer X owns at least 25 percent of the outstanding shares of voting stock of Dealership A and separately incorporated Dealership B, those entities are all affiliates. Another example would be where one corporation controls several dealerships, each organized as a separate LLC. There are many possibilities, but what matters is the legal relationship. One corporate entity may run multiple stores in multiple locations and not be affected by the Rule. On the other hand, two separate legal entities could be located in the same building—indeed they may operate out of the same offices—but because they are separate legal entities, the Rule must be considered. Like all modern sophisticated businesses, dealerships can have complex corporate structures. Dealers should ensure that responsible dealership employees are aware of the corporate structure of the dealership so that they can identify whether their particular marketing practices are implicated by this Rule.

Eligibility Information

The Rule does not impose a general opt-out requirement on all marketing by companies using information obtained from affiliates. Rather, it only imposes a notice and opt-out requirement for *"eligibility information."* "Eligibility information" is defined as "any information, the communication of which would be a consumer report" under the existing affiliate information-sharing provision in the Fair Credit Reporting Act.[4] That provision is discussed in more detail below, but for purposes of the Affiliate Marketing Rule, what this means is that both of the following are "eligibility information" provided that either type of information is used for purposes of credit, insurance, or employment. (Note

this last category if you use credit information in any way in your hiring decisions.):

- **"consumer report"** information
- **"transaction or experience"** information

The Rule does not define "transaction or experience information," but it may include information related to an existing account. "Consumer report" information includes any other credit information that is not "transaction or experience" information, but which would otherwise be considered a consumer report under FCRA—such as information contained in a consumer's credit application or credit report (credit score, payment history, credit worthiness, etc.). More specifically, it includes any information that meets one of seven criteria for a "consumer report"—"credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." In the dealer context, this generally includes information found in a credit application or consumer credit report such as payment history, credit score, etc.

Making a "Solicitation for Marketing Purposes"

In General

A Receiving Affiliate *"makes"* a solicitation when:

- The Receiving Affiliate receives "eligibility information" from a Sending Affiliate; and
- The Receiving Affiliate uses that information to either:
  - o Identify the consumer or type of consumer who will receive an offering;
  - o Establish criteria to select a type of consumer to receive an offering; or,
  - o Decide which products or services to market; and
- The consumer receives a solicitation.

A "*solicitation*" under the Rule is the marketing of a product or service, initiated by a business to a particular consumer, where the marketing is based on eligibility information obtained from an affiliate, and intended to encourage a consumer to purchase or obtain a product or service.[5]

Note that **marketing communications to the general public are not considered solicitations.** Therefore, television or print advertisements are not "solicitations" under the Rule.

Common Databases

Direct communication between affiliates is not required for affiliates to be subject to the Rule. Where eligibility information is placed in a common database, all affiliates with access to that database are deemed to have received that information. **NOTE** *that use of a common database to store customer data raises a number of important privacy and other issues under federal (and possibly state) law that are outside the scope of this guide.* Assuming a multiple-affiliate business using a common database has considered and accounted properly for those issues, it must also be aware that use of that common database may implicate the Rule.

Use of Your Own Eligibility Information is not a "Solicitation"

The Rule also clarifies, however, that an affiliate will *not* be deemed to have made a solicitation for marketing purposes when it uses its own eligibility information to market another affiliate's products and services.

To illustrate this, let's look at Dealership A and its affiliated Dealership B. The separately incorporated Dealership B, hoping to market to Dealership A's customers, provides marketing materials and certain criteria to Dealership A, which has a pre-existing business relationship with the consumers. For example, Dealership B requests that Dealership A send Dealership B's marketing materials to all of Dealership A's customers with a credit score under a certain number, or to all of Dealership A's customers who failed to qualify for financing. Importantly, Dealership B has not used Dealership A's eligibility information to (i) identify the customer or type of customer; (ii) establish the criteria; or, (iii) decide

which of its products or services to market, or tailor its marketing based on that eligibility information. Dealership A then applies those criteria to the eligibility information it has for its consumers and sends the selected consumers Dealership B's marketing material.

Under the Rule, Dealership B would not be considered to have made a solicitation for marketing purposes because it did not use Dealership A's eligibility information in any way. Instead, it simply gave criteria to Dealership A, which then evaluated the eligibility information of its own consumers against the criteria.

Service Providers

A similar result occurs where Dealership A's service provider, at the direction of Dealership A, compares Dealership B's criteria against the eligibility information of Dealership A's consumers. The Rule provides that there is no solicitation for marketing purposes by Dealership B where Dealership A's service provider receives eligibility information from Dealership A and uses that information to market Dealership B's products or services to Dealership A's customers. The rule requires Dealership A to maintain strict controls over the process, however, including:

(a) Dealership A must control access to and use of its eligibility information by the service provider under the terms of a written agreement with the service provider;

(b) Dealership A must establish specific terms and conditions under which the service provider can access and use Dealership A's eligibility information to market Dealership B's products and services, and must periodically audit the service provider's compliance with those terms and conditions;

(c) Dealership A must require the service provider to implement reasonable policies and procedures to ensure that the service provider uses Dealership A's eligibility information in accordance with Dealership A's terms and conditions;

(d) Dealership A must be identified in Dealership B's marketing materials that are provided to Dealership A's customers; and

(e) Just as above, Dealership B may not have used Dealership A's eligibility information to identify the customers to be solicited, establish the criteria used to select the consumers, or decide which products or services to offer (i.e., any such activity may be done only by Dealership A or its service provider).

The Rule's Relationship to Affiliate Information-Sharing Rules

With some of the basic definitions in mind, let's look at how the new Rule works in the context of existing law. It is important to understand that this Rule imposes new restrictions on an affiliate's *use* of information for marketing purposes, and does not alter the existing FCRA provision that imposes restrictions on the initial *sharing* of the information among affiliates.[6] The two requirements are separate, but because they both need to be considered by affiliated entities that market to each others' customers, we should review the existing law.

Existing FCRA Information-Sharing Restrictions

Subject to certain exceptions, under the Fair Credit Reporting Act (FCRA), communication of credit report or credit application information is considered a "consumer report,"[7] and the entity that communicates that information is considered a "consumer reporting agency," and is thereby subject to a variety of additional requirements under FCRA. To avoid having to comply with these additional duties, a Sending Affiliate must have authority to share information with a Receiving Affiliate before the Receiving Affiliate can even consider using that information for marketing purposes.

Under existing law, information about an entity's transactions or experiences with a consumer is not considered a "consumer report."[8] Therefore, to the extent it exists, this kind of "experience" information can be freely *shared* under the FCRA with both affiliates

and nonaffiliated companies, but is still subject to the restrictions contained in the FTC's Privacy Rule.[9]

However, any "other" credit-related information (i.e., credit-related information that is *not* related to a business's prior transactions or experience with its consumers) may only be shared with affiliated entities (and not be deemed a "consumer report") if the consumer is given notice (required to be included in the dealership's GLB Privacy Notice) that the sharing may occur and given an opportunity (before the sharing occurs) to opt out of allowing the information to be shared, and has not opted out. This notice and opt-out requirement is *separate* and *in addition* to the notice and opt-out requirement under the Affiliate Marketing Rule.

New Restrictions on the USE of Shared Information for Marketing

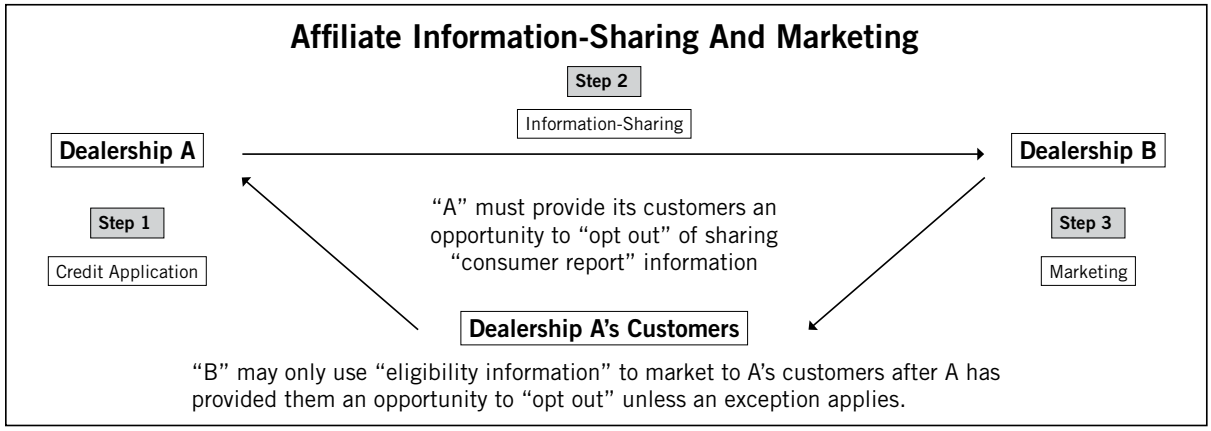
The Affiliate Marketing Rule addresses the next step in the process: when the Receiving Affiliate wants to use information sent by a Sending Affiliate to market to the Receiving Affiliate's customers.

As discussed above, the Rule restricts the use of "eligibility information," which includes *both* "consumer report" information and "transaction and experience information." As a result, while transaction or experience information may be *shared* with affiliates under FCRA, that same information may not be *used* for marketing by that affiliate without complying with the Rule. In short, it is important to keep in mind the distinction between the sharing of information among affiliates (which is governed by existing law) and the use of properly shared information by an affiliate for marketing purposes (which is governed by the Affiliate Marketing Rule).

> ***Eligibility Information*** **= "Consumer Report" Information + "Transaction" Information + "Experience" Information**

The diagram below shows the relationship between the two rules:

- In Step 1, the customer provides a credit application to Dealership A.
- In Step 2, Dealership A wishes to share that information and/or information it obtains from a credit report with Dealership B. Under the existing FCRA provision, Dealership A cannot share that information until it has provided its customers with notice and an opportunity to opt out (in the GLB privacy notice) of that sharing.
- In Step 3, Dealership B wishes to use that information or other information Dealership A may have shared with Dealership B involving Dealership A's past transactions or experiences with the customer ("eligibility information") to market to Dealership A's customers. Under the new Affiliate Marketing Rule, Dealership B cannot do so until Dealership A has given its customers *another* notice and *another* opportunity to opt out of the marketing from Dealership B. As discussed below, these two notices can be combined, but are not required to be combined.



What Does this Mean for Me?

Now that you are familiar with some of the key terms and concepts, let's look at some practical applications of the Rule. Consider the following scenarios at our example dealership, "Dealer X":

Scenario 1: A customer ("Customer") walks into Dealership A seeking to purchase a specific vehicle. Customer gives the salesperson his name and phone number, but before Customer completes a credit application or provides any credit information, the salesperson realizes that Dealership A does not have the specific vehicle that Customer is looking for in inventory. Dealership A's sales manager knows that Dealership B does have the vehicle in inventory.

(a) May the sales manager give his colleague at Dealership B Customer's contact information?

(b) May Dealership B use that information to contact Customer?

Answer: Here, Dealership A may *share* Customer's contact information with Dealership B under the information-sharing provision without notice and opportunity to opt out. It does not bear on Customer's credit worthiness, credit standing, etc. Therefore the information is not "consumer report" information and thus is not subject to the notice and opt-out restrictions of the existing FCRA information-sharing provision.

Dealership B may also *use* that information to market to Customer (assuming Dealership B abides by applicable telemarketing restrictions). The name and phone number, with nothing more, is not "eligibility information," and therefore is not subject to the Affiliate Marketing Rule.

Scenario 2: Dealership B would like to send marketing materials to some of Dealership A's customers related to an ongoing special finance rate promotion by its manufacturer.

a) May Dealership B obtain a list of:

   i) All of Dealership A's service customers from the last six months?
   ii) All of Dealership A's new- or used-vehicle customers who purchased between two and five years ago?
   iii) All of Dealership A's new- or used-vehicle customers with credit scores between 600 and 750?

b) May Dealership B send marketing materials about the special finance rate to the individuals on those lists?

c) May Dealership A send marketing materials about the special finance rate on Dealership B's behalf to those individuals?

Answer:

Under the Existing Affiliate Information-Sharing Provision

Dealership A may share a list of its service customers (as in the first point under "a" above) with Dealership B, assuming that information is not based on, or selected in any way based on, credit information. In other words, a general list of all service customers during a certain time period does not implicate the affiliate information-sharing restriction, but a list of all service customers who were extended credit would likely trigger the notice and opt-out requirement under the existing FCRA provision, because it may include "consumer report" information.

The situation becomes somewhat less clear when dealing with new- and used-vehicle customers (the next two points under "a" above) because of the possibility that consumer report information may be implicated. However, in the example above, if Dealership A, as in the second point under "a" above," sends a list of *all* new- and used-vehicle customers who purchased between two and five years ago (with no identification of, or distinction between, credit or cash customers), no notice or opportunity to opt out should be required under the existing FCRA information-sharing provision because that information is not a consumer report.

Dealership A cannot, however, share a list of all of its new- or used-vehicle customers with credit scores between 600 and 750 (the third point under "a" above) without providing the information-sharing notice to those customers, and the opportunity to opt out. Credit score information is clearly a "consumer report" which triggers the notice requirements of the existing FCRA provision.

Under the Affiliate Marketing Rule

Dealership B may send marketing materials about a special finance rate to the service customers because this would not be eligibility information. Again, this would be true as long as that list contained *all* service customers, with no distinction or selection based on payment history or credit status. (Notice and an opportunity to opt out must be provided if Dealership B seeks to market only to Dealership A's customers who were extended credit.)

Similarly, because a list of *all* new- and used-vehicle customers who purchased between two and five years ago (with no identification of, or distinction between, credit or cash customers) is not eligibility information, Dealership B could also send marketing materials to such customers without a notice and opportunity to opt out under the Affiliate Marketing Rule.

As above, Dealership B may not send marketing materials to the customers of Dealership A with credit scores in a certain range unless Dealership A sent *another* notice and opt-out opportunity pursuant to the Affiliate Marketing Rule, as this is clearly "eligibility information."

Note that Dealership B could provide marketing materials according to all the criteria described in "a" above to Dealership A, and Dealership A could send marketing materials about the special finance rate on Dealership B's behalf to its customers, because under the Rule, as long as Dealership B does not receive eligibility information from Dealership A (or use it in any of the ways described under "Use of Your Own Eligibility Information is Not a Solicitation" above) a notice and opt-out requirement under the Affiliate Marketing Rule is *not triggered* because Dealership B has not received and used eligibility information from Dealership A, and thus has not "made a solicitation" under the Rule.

Exceptions

The Rule includes several important exceptions to the affiliate marketing requirements. If an exception is available, an affiliate marketing notice and opt-out opportunity is not required, even if a dealer "makes a solicitation for marketing purposes." Discussed below are four of the more significant exceptions that may apply to dealers.[10] The Rule provides a number of helpful examples for each exception; please consult those examples for further guidance.

Pre-existing Business Relationship

The affiliate marketing notice and opt-out requirement do not apply where the affiliate has a pre-existing business relationship with the consumer. This means that if an affiliate has a pre-existing business relationship as defined below, it can use eligibility information it receives from the sending affiliate to market its products and services to that customer.

"Pre-existing business relationship" is defined as "a relationship between a person or person's agent, and a consumer based on":

(a) A financial contract between the person and the consumer which is in effect on the date the consumer is sent a solicitation;

(b) A purchase, rental, or lease by the consumer of the person's goods or services or a financial transaction during the 18-month period immediately preceding the date on which the consumer is sent a solicitation; or

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

NOTE: *The Rule contains a series of examples of what constitutes a pre-existing business relationship. Please consult these examples and contact counsel if you are unsure of the applicability of this exception.*

The pre-existing business relationship must be between the consumer and the company whose products or services are being marketed to the consumer. Therefore, using the example of Dealership A and Dealership B, the fact that Dealership A has a pre-existing business relationship with a consumer would *not* allow Dealership B to use eligibility information received from Dealership A to make a solicitation to the consumer—even if the solicitation was made by Dealership A on behalf of Dealership B (unless the notice and opt-out requirement were first fulfilled). Contrast this with the scenario described above where Dealership B gives Dealership A marketing materials to send to customers meeting certain criteria. That practice does not implicate the Rule because Dealership B *never receives eligibility information* from Dealership A.

Of course, the pre-existing business relationship exception would apply where Dealership B also has its own pre-existing business relationship with the consumer. For example, if Consumer financed a vehicle from Dealership A within the last 18 months, and was a service customer of Dealership B within the last 18 months, Dealership B can use credit information about Consumer obtained from Dealership A (pursuant to the FCRA information-sharing restrictions and the FTC Privacy Rule) to market a new manufacturer financing program to Consumer because both Dealership A and B have a pre-existing business relationship with Consumer.

Service Provider

The Rule also contains a service provider exception that allows a service provider to market on behalf of a Receiving Affiliate, as long as the Receiving Affiliate could have sent the materials itself.

This exception should be distinguished from the situation discussed above where Dealership A can use a service provider to review its own eligibility information, and then send Dealership B's marketing materials to its own customers, and not be deemed to have "made a solicitation," as long as several key controls are in place. (See discussion in "Service Providers" above).

Consumer-Initiated Communications

Under this exception, the notice and opt-out provisions do not apply where an affiliate's solicitation is in response to a communication that is initiated by the consumer, whether in writing, orally, electronically, or otherwise. This exception applies only to items that the consumer asks about. Although the Rule allows for oral authorizations or requests, it would be prudent for dealers to require written, specific authorization both to share information with an affiliate, and for the affiliate to make a solicitation.

Consumer Authorization or Request

The notice and opt-out requirements also do not apply where the consumer specifically authorizes or requests a solicitation. The customer can give the authorization to either the company with whom the consumer has a relationship or the affiliate from whom the consumer would like to receive a solicitation. As with the consumer-initiated communication exception, the request or authorization need not be in writing, but must still be a specific request or authorization. In addition, the solicitation must be responsive to the request (i.e., the consumer's authorization cannot be used to market products that are unrelated to the consumer's request). The Rule provides several examples of methods that can be used to gain the customer's authorization including calls or emails from a consumer, and a box for consumers to check on a written or online application. Note, however, that the Rule states that pre-filled boxes on an application or form that have to be "un-checked," or "preprinted boilerplate language" in the terms and conditions

of an agreement are not consumer authorizations or requests.

Although oral requests are allowed under the Rule, it would be prudent for dealers to ensure that all such authorizations are in writing. This minimizes the dealer's exposure if the consumer's authorization becomes an issue, and ensures that the consumer clearly understands the authorization or request.

Affiliate Marketing Notice and Opt-Out

If the Affiliate Marketing Rule applies to a dealer's marketing practices, and if none of the exceptions are available, the dealer must comply with certain notice and opt-out procedures before it can use eligibility information received from an affiliate for solicitation purposes. Specifically, the affiliate that sends the eligibility information must provide clear and conspicuous notice to the consumer, in writing or (if the consumer agrees) electronically, that such marketing activities may occur, and it must allow the consumer a reasonable opportunity to opt out and a simple means of doing so. NOTE that this notice and opt-out requirement is separate from the Affiliate Information-*Sharing* opt-out notice described above.[11] The notices generally may be combined (but see discussion below for certain exceptions).

The Rule provides examples of required content for the opt-out notices, as well as examples of what the FTC considers a reasonable opportunity to opt out, a reasonable method of opting out, and proper delivery methods of the required notice. These examples address opting out by mail, online posting, email, privacy notice, and at the time of transaction through mechanisms including a check-off box, postal and online reply forms, a toll-free telephone number, and consolidation with other notices. Finally, the Rule identifies additional requirements for renewal notices that are sent once the initial opt-out term expires.

To reiterate, the obligation to provide notice and an opportunity to opt out is only triggered when an affiliate that receives eligibility information wishes to send a solicitation to the Sending Affiliate's customers based on that eligibility information and an exception does not apply. Therefore, dealers will need to consider their particular information-sharing and marketing practices (both current and expected in the future) to determine whether and under what circumstances the notice and opt-out must be given.

Content of the Opt-Out Notice

The FTC provides a series of example opt-out notices that are attached hereto in Appendices A through E. Please consult these model notices when drafting your notice.

The Rule requires generally that the opt-out notice be clear, conspicuous, and concise. Specifically, it must identify the name of the affiliate providing the notice (or each of the affiliates if it is provided on behalf of multiple affiliates). If the notice is provided on behalf of affiliates identified by a common name, the notice need not identify the full name of each affiliate, but instead can state that it is provided by the multiple companies with the common name—e.g., "ABC auto group." (See Model Notice C-2 in Appendix B.) The notice must also identify the affiliates or types of affiliates whose use of eligibility information is covered by the notice.

In addition, the notice must: (1) describe the types of eligibility information that may be used to make solicitations; (2) explain that the consumer may elect to limit the use of eligibility information for solicitations; (3) explain that the consumer's election will apply for a specified period of time, and, if applicable, that the consumer will be able to renew the election once that period expires; (4) if the notice is provided to a consumer who may have previously opted out, explain that the consumer need not opt out again until he or she receives a renewal notice; and, finally, (5) the notice must provide a reasonable and simple method to opt out.

Who Must Provide the Notice?

The notice must be provided by an affiliate that has or had a pre-existing business relationship with the consumer, or as part of a joint notice from two or more affiliated companies, so long as at least one of the affiliates had or has a pre-existing business relationship with the consumer. What constitutes a "pre-existing business relationship" is discussed above.

Delivery of Opt-Out Notices

An opt-out notice must be delivered to a consumer so that the consumer can reasonably be expected to receive actual notice. Examples include hand-delivery, mail, email to a consumer who has agreed to receive electronic disclosures, or posting on a website where the consumer obtained a product or service (so long as the consumer acknowledges receipt of the notice from the website).

Opportunity to Opt Out

The consumer must be provided with both a reasonable opportunity to opt out and a simple means of doing so. While there is no mandatory waiting period once an opt-out notice is delivered to the consumer, the Rule provides a safe harbor if 30 days have passed with no opt-out election from the consumer—meaning that if you wait 30 days from the date the opt-out notice is mailed, emailed, or electronic receipt is acknowledged by the consumer, and have not received an opt-out from the consumer, you are deemed to have given the consumer a "reasonable opportunity," and therefore may permit your affiliate to market its products and services to the consumer. However, if the consumer opts out at any time after the 30 day period, you must honor that request.

Scope and Duration of an Opt-Out

The Rule provides for flexibility in determining what the opt-out covers. In particular, a consumer's opt-out can apply to a single continuing relationship, multiple continuing relationships, a relationship with just one affiliate, or a relationship with several affiliates. If a consumer elects to opt out (which the consumer may do at any time), the election must be honored for at least five years from the date the consumer's opt-out election is received and implemented, unless the consumer subsequently revokes the opt-out election in writing or electronically. Dealers also may choose to honor an opt-out permanently. The notice can allow the consumer to select from a menu of alternatives regarding which solicitations to prohibit. However, at least one of the options on that menu must allow the consumer to prohibit all solicitations from all affiliates covered by the notice.

Renewal Notices

For those companies that choose not to permanently honor an opt-out election, the Rule requires them to send a renewal notice to a consumer who has opted out before the expiration of the opt-out period (which must be at least five years) and to allow the consumer an opportunity to renew his or her opt-out election for at least another five years. The renewal notice must be sent only to consumers who have exercised their opt-out rights.

The renewal notice cannot simply be another copy of the initial notice provided to the consumer. Instead, the renewal notice must, among other things, specifically advise the consumer that his or her opt-out election has or is about to expire and that the consumer may elect to renew his or her previous opt-out election. (See Appendices C and D for several sample renewal notices.)

Relationship to Affiliate Information Sharing and GLB Privacy Notices

The Rule permits (but does not require) the affiliate marketing notice to be combined with the affiliate information-sharing notice and the initial and annual GLB privacy notices.[12] While it may make sense to combine the affiliate marketing notice with the dealer's GLB privacy notice (which, as noted above, must contain the dealer's affiliate information-sharing notice if applicable), dealers

need to consider certain items. Unlike GLB, there is no requirement in the Affiliate Marketing Rule that the affiliate marketing notice and opt-out be given annually.[13] In addition, any effort to combine the affiliate marketing notice with the annual GLB privacy notice will likely require changes to the form of a company's existing privacy notice. In particular, privacy notices typically state that if a consumer has opted out, he need not do so again. If a dealer chooses to honor the affiliate marketing opt-out permanently, that may simplify compliance. However, if a dealer chooses to honor an affiliate marketing opt-out less than permanently (at least five years), the dealer must give the consumer the opportunity to renew the opt-out election, which could complicate compliance efforts.

Civil Liability and Preemption

The FTC is the agency responsible for enforcement of the Rule, and may initiate an investigation into a business's failure to comply with the Rule. If the FTC investigates and concludes that there is a rule violation, the business could be exposed to injunctive relief, damages (if there are any), and civil penalties up to $11,000 for each subsequent violation.

The FCRA allows for a private right of action for a violation of the affiliate marketing rules. That includes potential liability for a "willful" violation of FCRA, which can result in statutory damages of up to $1,000 per violation, as well as punitive damages and attorneys' fees. *Each solicitation* (letter, telephone call, email, etc.) that violates the Rule would likely be considered a separate violation with a separate penalty.

Appendices

Appendix A[14]

C-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 [credit card, insurance, and securities] affiliates, from marketing their 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.

Appendix B

C-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 credit card, insurance, and securities] affiliates, from marketing their 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
- **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.

Appendix C

C-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 [credit card, insurance, and securities] affiliates, from marketing their 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
- **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.

Appendix D

C-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 credit card, insurance, and securities] affiliates, from marketing their 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
- **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.

Appendix E

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

[Company name]

[Company address]

__ Do not market to me.

ENDNOTES

[1] 16 C.F.R. Part 680 and Appendix C to Part 698. Implementing the affiliate-marketing provisions of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) at 15 U.S.C. § 1681s-3. 72 Fed. Reg. 61,424 (Oct. 31, 2007); 72 Fed. Reg. 62,910 (Nov. 7, 2007).

[2] 16 C.F.R.§ 680.3(b).

[3] *See id.* at (d).

[4] *See id.* at (h).

[5] 16 C.F.R.§ 680.3(k).

[6] *See* 15 U.S.C. § 1681(d)(2)(A)(iii).

[7] "[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a 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 consumer credit or employment purposes." 15 U.S.C. § 1681(d)(1)

[8] *Id.* at § 1681 (d)(2)(A)(i).

[9] 15 U.S.C. § 6801 *et seq.*

[10] The other exceptions not covered in detail are:

(a) The use of eligibility information received from an affiliate "[t]o 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 employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan"; and

(b) "If your compliance with [the Rule] 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."

[11] 15 U.S.C. § 1681(e).

[12] Dealers may or may not be required to include an opt-out notice with the privacy notice, depending on whether the Dealer intends to disclose the customer's personal information with nonaffiliated third parties outside of certain delineated exceptions to the opt-out notice requirement. *See* Q&A 3 of 16, FTC'S PRIVACY RULE AND AUTO DEALERS: FREQUENTLY ASKED QUESTIONS, available at: http://www.ftc.gov/bcp/conline/pubs/buspubs/autoglb.pdf

[13] Dealers are only required to give an initial privacy notice, and not an annual privacy notice, unless they maintain continuing credit relationships with their customers. *See* Q&A 8 of 16, FTC'S PRIVACY RULE AND AUTO DEALERS: FREQUENTLY ASKED QUESTIONS, available at: http://www.ftc.gov/bcp/conline/pubs/buspubs/autoglb.pdf

[14] Appendices A-E can be found at 16 C.F.R. 698, Appx. C.

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