

(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)(i) 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 commodity 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 ob-

tain 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