

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 telemarketing 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) re-

ceives 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

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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