



August 16, 2004

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex Q)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FACT Act Affiliate Marketing Rule, Matter No. R411006

To Whom It May Concern:

The American Financial Services Association appreciates this opportunity to comment on the Proposed Rule regarding the affiliate marketing provisions included in Section 214(a) of the FACT Act. AFSA is the national trade association for consumer credit providers. The credit products offered by AFSA's members include personal loans, first and second mortgage loans, home equity lines of credit, credit card accounts, retail sales financing and credit insurance.

The Fair and Accurate Transactions Act of 2003 modified the Fair Credit Reporting Act by creating a new section 624 that addresses the use of certain shared consumer information between affiliates for marketing purposes. Specifically, section 624 provides that information that otherwise would not be a consumer credit report under section 603(d) of FCRA cannot be used by an affiliate to make a solicitation for marketing purposes unless the consumer is first given notice of the use for solicitation purposes and an opportunity to opt out of such solicitations by such person.

AFSA is a member of the Coalition to Implement the FACT Act. As a member of the Coalition, we fully align ourselves with their submitted comments. AFSA offers these additional comments.

I. The Term "Pre-Existing Business Relationship" Should be Amended to Extend to a Limited Set of Affiliate Relationships.

Many AFSA members offer similar products to consumers through multiple corporations. In many instances, the formation and operation of multiple corporations are required to meet regulatory restrictions inherent in the financial services business. For example, in some states a lender will choose, or will be required for regulatory reasons, to operate its personal loan operations through a different corporation (or other business entity) than its

mortgage operations. However, both lenders share a common trade name; share common employees; operate out of the same physical location; and offer similar products.

In this and similar cases, consumer expectations would be met by allowing this limited set of affiliates to use eligibility information for solicitation purposes, regardless of whether a consumer has elected to “opt out.”

Consumers would anticipate that a company offering a full range of related products or services under a common name, with shared employees out of a single location, would be able to discuss that full range of products or services with their customers. An opt out requirement in this particular scenario would be a triumph of form over substance.

The Proposed Rule would prevent consumers from learning about potentially beneficial options available to them regarding products or services of a type in which the consumer has already shown an interest. For example, in the lending context, a consumer might have a mortgage loan with a lender whose affiliate offers small loans out of the same location utilizing the same employees. If the consumer, who has opted out under the Proposed Rule, has need for additional funds and contacts the lender to refinance his or her mortgage loan, the lender would be prohibited from using eligibility information to suggest to the consumer that a small side loan might be a less costly alternative to refinancing the mortgage loan.

As another example, a lender who is aware that its personal loan customer has a large amount of high rate debt would be unable to discuss with that customer the option of consolidating that debt into a lower rate mortgage loan.

AFSA suggests that this limited exception be incorporated into the definition of “pre-existing business relationship,” as follows:

(i) Pre-existing business relationship:

(1) A pre-existing business relationship means a relationship between a person and a consumer, based on—

(a) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by this part;

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

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

(2) If a pre-existing relationship exists with a person as a result of sections (1)(a) – (1)(c), above, it also exists with that person’s affiliates so long as –

(a) The affiliates share a common trade name;

- (b) The affiliates share the same employees or representatives;
- (c) The affiliates operate out of the same physical location or locations; and
- (d) The affiliates offer similar products.

II. Dealer Financing

We believe it is critical for the Commission to adopt rules addressing the application of the "pre-existing business relationship" exception in connection with the sale and financing of new automobiles¹ and recognizing the relationship among product manufacturers, their affiliated finance companies and the retailers who sell the products to the public and perform services for the manufacturer and the finance company.

In most states, an automobile manufacturer is prohibited by law from selling motor vehicles (cars and trucks) directly to consumers. This has led to the development of a well established and accepted network of manufacturer authorized or "franchised" dealers who, pursuant to agreements with manufacturers, sell motor vehicles to the general public and provide warranty and other servicing of the vehicles sold. Often, the manufacturer's affiliated or "captive" finance company acquires the financing for the vehicles from the originating dealerships by purchasing from the dealers the installment contracts between the dealers and the customers. The manufacturer, while not a direct seller of its product to the consumer, nevertheless has an ongoing relationship with the consumer well after the vehicle is first obtained from the franchised dealer. This relationship includes warranty obligations, recalls and other communications relevant to the safety and use of the vehicle whether carried out directly or through its franchised dealer. It should be noted that with regard to certain foreign automobile manufacturers, the vehicles are shipped to the United States and then distributed through U.S. based distributors. In those instances, the distributor would play the same role as the domestic manufacturer for purposes of this discussion.

In addition, during the consumer's possession of the vehicle, the manufacturer often sends the consumer marketing materials about its products and services, as well as information relating to product use and safety such as recalls and other information. To provide information that is meaningful and relevant to the consumer, often those marketing plans are supplemented by information obtained from the manufacturer's captive finance company. This information may include experience or transactional information such as the amount of the customer's monthly payment and present status of the consumer's finance contract, allowing the manufacturer to tailor marketing offers that best meet the consumer's needs, including special plans or incentives through the captive finance company available to existing customers of the manufacturer. Because the consumer sought out the manufacturer's products, the consumer often welcomes the subsequent marketing campaigns that allow her to trade into a higher line vehicle or a newer model,

¹ While this section consistently refers to the sale of automobiles through dealers, our discussion and recommendation would apply equally to dealer financing of such items as lawn tractors, motorcycles, ATVs and other motorized items which are typically sold through dealerships.

all with discrete financial benefits for the consumer. In the case of a lease, the consumer must return the vehicle and seek a replacement at lease end. Receiving marketing solicitations from the vehicle's manufacturer near lease-end is well within the consumer's expectations.

The requirements of the proposed rule would considerably complicate the ability of manufacturers to provide such advantageous marketing offers to consumers with whom it has an ongoing business relationship. We wish to clarify that the relationship between the manufacturer and the consumer as described herein meets the definition of "existing business relationship" or alternatively that the relationship be recognized as an "existing business relationship" pursuant to authority granted in 624 (d)(1)(D).

The Commission's discussion in the Supplementary Information of proposed Section 680.3(i) recognizes that the "reasonable expectations of the consumer" should be taken into account in determining the scope of the "pre-existing business relationship". We believe that a consumer who acquires a new automobile from a franchised dealer and who finances that acquisition from the captive finance company fully expects, and in fact welcomes, information from that manufacturer about new products and financing arrangements to acquire new products, even if the consumer does not request information from or provide contact information to the captive's affiliated manufacturer.

We believe that proposed 16 C.F.R. Section 680.3(i) should include *the purchase, rental or lease of a manufacturer's goods through the franchised dealer method of selling those goods to consumers*, which is similar in concept to obtaining services from the "person's licensed agent" as stated in the statute.

The purchase, rental or lease of a manufacturer's goods from a franchised dealer creates a business relationship between the consumer and the dealer, as well as, a relationship between the consumer and the manufacturer. The relationship with the consumer continues throughout the term during which the manufacturer has obligations to the consumer (such as warranty obligations). In both cases the consumer fully expects to be dealing directly with the manufacturer of the goods after the retail transaction, such as is the case with a manufacturer. If the Commission believes that the "purchase, rental or lease" exception is not applicable in this context, we respectfully ask that the Commission create a new exception for sales and financing pursuant to section 624(d)(1)(D) for the reasons we have provided.

III. The Definition of a "Consumer" Should Be Narrowed

The Commission's Proposed Rule defines a consumer as "an individual." While this definition aligns itself with the Fair Credit Reporting Act, AFSA believes this definition is too broad because it does not take account of other FCRA sections that shape the definition of consumer. Rather, a definition of consumer drawn from the Gramm-Leach-Bliley Act would be more appropriate. The GLBA defines a consumer as "an individual who obtains, from a financial institution, financial products or services which are to be

used primarily for personal, family, or household purposes, and also means the legal representative of such an individual”².

Our particular concern here is that a broad definition could cause information not otherwise subject to the FCRA to be subject to this rule. The scope of the Fair Credit Reporting Act and its implementing regulations should be limited to consumer credit, consumer insurance and employment. It should not extend to commercial credit.

The FCRA defines a consumer report as:

"The term "consumer report" means any 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 —

(A) credit or insurance to be used **primarily for personal, family, or household purposes**;

(B) employment purposes; or

(C) other purposes authorized under section 604. (emphasis added)

Therefore the use of information that does not fall within that definition, like a Dunn & Bradstreet report obtained to evaluate a sole proprietor's application for business credit, would not be subject to the FCRA and should also not be subject to FCRA regulations.

In its Commentary on the FCRA, the Commission stated: **.62 Comment 604(3)(E) —2. Commercial Transactions.** The term "business transaction" in this section means a business transaction with a consumer primarily for personal, family, or household purposes. Business transactions that involve purely commercial purposes are not covered by the FCRA.

To eliminate possible ambiguity, we propose the following definition of "consumer": Consumer means an individual who has engaged in transactions with a person relating to credit or insurance used or to be used primarily for personal, family, or household purposes or employment.

IV. The Final Rule Should Not Address “Constructive Sharing”

² Public Law 106-102 Section 509(9)

