

be deemed an affiliate of a company for purposes of this part if:

(1) That company is regulated under Title V of the GLB Act by the Bureau of Consumer Financial Protection or by a Federal functional regulator other than the Commission; and

(2) Rules adopted by the Bureau of Consumer Financial Protection or another Federal functional regulator under Title V of the GLB Act treat the futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer as an affiliate of that company.

\* \* \* \* \*

(n)(1) \* \* \*

(i) Any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer that is registered with the Commission as such or is otherwise subject to the Commission's jurisdiction; and

(ii) \* \* \*

(2) \* \* \*.

(i) Any person or entity, other than a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer that, with respect to any financial activity, is subject to the jurisdiction of the Commission under the Act.

\* \* \* \* \*

(o)(1) \* \* \*.

(i) 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; and

\* \* \* \* \*

(s) *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.

\* \* \* \* \*

(x) *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.

(y) \* \* \*

(4) Any commodity pool operator;

(5) Any introducing broker;

(6) Any major swap participant; and

(7) Any swap dealer subject to the jurisdiction of the Commission.

\* \* \* \* \*

5. Amend § 160.15 by revising paragraph (a)(4) to read as follows:

**§ 160.15 Other exceptions to notice and opt out requirements.**

(a) \* \* \*

(4) To the extent specifically permitted or required under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.*, to law enforcement agencies (including a Federal functional regulator, the Secretary of the Treasury, with respect to 31 U.S.C. Chapter 53, Subchapter II (Records and Reports on Monetary Instruments and Transactions) and 12 U.S.C. Chapter 21 (Financial Recordkeeping), a State insurance authority, with respect to any person domiciled in that insurance authority's state that is engaged in providing insurance, and the Bureau of Consumer Financial Protection), self-regulatory organizations, or for an investigation on a matter related to public safety;

\* \* \* \* \*

6. Amend § 160.17 by revising paragraph (b) to read as follows:

**§ 160.17 Relation to state laws.**

\* \* \* \* \*

(b) *Greater protection under state law*. For purposes of this section, a state statute, regulation, order or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order or interpretation affords to any consumer is greater than the protection provided under this part. A determination regarding whether a state statute, regulation, order, or interpretation is inconsistent with the provisions of this part may be made by the Bureau of Consumer Financial Protection, after consultation with the Commission, on its own motion or in response to a nonfrivolous petition initiated by any interested person.

7. Revise § 160.30 to read as follows:

**§ 160.30 Procedures to safeguard customer records and information.**

Every futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, and swap dealer subject to the jurisdiction of the Commission must adopt policies and procedures that address administrative, technical and physical safeguards for the protection of customer records and information.

By the Commission.

Dated: October 19, 2010.

**David A. Stawick,**  
*Secretary.*

Statement of Chairman Gary Gensler  
Privacy of Consumer Financial  
Information; Conforming Amendments  
Under Dodd-Frank Act

October 19, 2010

I support today's Commission vote on the notice of public rulemaking, which expands the scope of the Commission's existing protections afforded to consumers' information to two new entities created by the Dodd-Frank Act. The proposed rulemaking expands the Commission's Part 160 rules to customers of swap dealers and major swap participants. Part 160 includes the Commission's existing privacy rules for consumers.

[FR Doc. 2010-26912 Filed 10-26-10; 8:45 am]

**BILLING CODE 6351-01-P**

**COMMODITY FUTURES TRADING  
COMMISSION**

**17 CFR Part 162**

**RIN Number 3038-AD12**

**Business Affiliate Marketing and  
Disposal of Consumer Information  
Rules**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission ("Commission" or "CFTC") is proposing regulations to implement new statutory provisions enacted by Title X of the "Dodd-Frank Wall Street Reform and Consumer Protection Act" ("Dodd-Frank Act"). These proposed regulations apply to futures commission merchants, retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, swap dealers and major swap participants (collectively, "CFTC registrants"). The Dodd-Frank Act provides the CFTC with authority to implement regulations under sections 624 and 628 of the Fair Credit Reporting Act ("FCRA"). The proposed regulations implementing section 624 of the FCRA require CFTC registrants to provide consumers with the opportunity to prohibit affiliates from using certain information to make marketing solicitations to consumers. The proposed regulations implementing section 628 of the FCRA require CFTC registrants that possess or maintain consumer report information in connection with their business activities

to develop and implement a written program for the proper disposal of such information.

**DATES:** Comments must be received on or before December 27, 2010.

**ADDRESSES:** You may submit comments, identified by RIN number 3038-AD12, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Regular Mail:* David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

- *E-mail:* [amr@cftc.gov](mailto:amr@cftc.gov).

- *Hand Delivery/Courier:* Same as mail above.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received at <http://www.cftc.gov>. You should submit information only that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established rules in CFTC Regulation 145.9.<sup>1</sup>

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and other applicable laws, and may be accessible under the Freedom of Information Act, 5 U.S.C. 552.

**FOR FURTHER INFORMATION CONTACT:** Carl E. Kennedy, Counsel, (202) 418-6625, Commodity Futures Trading Commission, Office of the General Counsel, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, facsimile number (202) 418-5524, e-mail: [c\\_kennedy@cftc.gov](mailto:c_kennedy@cftc.gov).

#### SUPPLEMENTARY INFORMATION:

#### I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").<sup>2</sup> Title VII of the

Dodd-Frank Act<sup>3</sup> amended the Commodity Exchange Act ("CEA")<sup>4</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commodity Futures Trading Commission's ("Commission" or "CFTC") rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

In addition, Title X of the Dodd-Frank Act—which is entitled the Consumer Financial Protection Act of 2010 ("CFP Act")—established a Bureau of Consumer Financial Protection within the Federal Reserve System and provided this new Federal agency with rulemaking, enforcement, and supervisory powers over many consumer financial products and services and the entities that sell them. In addition, the CFP Act amends a number of other Federal consumer protection laws enacted prior to the Dodd-Frank Act, including the Fair Credit Reporting Act ("FCRA"),<sup>5</sup> the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act")<sup>6</sup> and Title V of the Gramm-Leach-Bliley Act<sup>7</sup> ("GLB Act").

Section 1088 of the CFP Act sets out two amendments to the FCRA and the FACT Act directing the Commission to

Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

<sup>3</sup> Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

<sup>4</sup> 7 U.S.C. 1 *et seq.*

<sup>5</sup> See 15 U.S.C. 1681-1681x. The FCRA, enacted in 1970, sets standards for the collection, communication, and use of information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is collected and communicated by consumer reporting agencies. 15 U.S.C. 1681-1681x.

<sup>6</sup> See Public Law 108-159, Section 214, 117 Stat. 1952, 1980 (2003). The FACT Act was signed into law on December 4, 2003. The FACT Act amended the FCRA to enhance the ability of consumers to combat identity theft, to increase the accuracy of consumer reports, to allow consumers to exercise greater control regarding the type and amount of solicitations they receive, and to restrict the use and disclosure of sensitive medical information. A portion of section 214 of the FACT Act amended the FCRA to add section 624 to the FCRA.

<sup>7</sup> See Public Law 106-102, 113 Stat. 1338 (1999).

promulgate regulations that are intended to provide privacy protections to certain consumer information held by any person that is subject to the enforcement jurisdiction of the Commission. One provision of section 1088 amends section 214(b) of the FACT Act—which added section 624 to the FCRA in 2003—and directs the Commission to implement the provisions of section 624 of the FCRA with respect to persons that are subject to the CFTC's enforcement jurisdiction. Section 624 of the FCRA gives consumers the right to prohibit a CFTC registrant<sup>8</sup> from using certain information obtained from an affiliate to make solicitations to that consumer (hereinafter referred to as the "affiliate marketing rules"). The other provision in the CFP Act amends section 628 of the FCRA and mandates that the Commission implement regulations requiring persons subject to the CFTC's jurisdiction who possess or maintain consumer report information in connection with their business activities to properly dispose of that information (hereinafter referred to as the "disposal rules").

Both sections 624 and 628 of the FCRA required various Federal agencies charged with regulating financial institutions in possession of consumer information to issue regulations in final form in consultation and coordination with each other. In particular, these sections required the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Board"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), the National Credit Union Administration ("NCUA") (collectively, the "Banking Agencies"), the Securities and Exchange Commission ("SEC") and the Federal Trade Commission ("FTC") (the SEC, FTC and the Banking Agencies, are collectively, the "Agencies") in consultation and coordination with one another, to issue rules implementing these sections of the FCRA. The Agencies already have adopted final affiliate marketing rules and disposal rules.<sup>9</sup> Accordingly, the

<sup>8</sup> "CFTC registrant" includes a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer or major swap participant.

<sup>9</sup> For the disposal rules adopted by the various Federal agencies, see 69 FR 68690 (Nov. 24, 2004) (FTC); 69 FR 77610 (Dec. 28, 2004) (Banking Agencies); 73 FR 13692 (Mar. 13, 2008) (SEC). For the affiliate marketing rules adopted by the various Federal agencies, see 72 FR 61424 (Oct. 31, 2007) (FTC); 72 FR 62910 (Nov. 7, 2007) (Banking Agencies); 74 FR 58204 (Sept. 10, 2009) (SEC).

<sup>1</sup> 17 CFR 145.9.

<sup>2</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124

Commission is now proposing to adopt similar rules to the final rules adopted by the Agencies, to the extent possible, to ensure consistency and comparability.

The Commission requests comment on all aspects of the proposed regulations—both the affiliate marketing rules and the disposal rules—that are highlighted in the discussion in Section II below.

## II. Explanation of the Proposed Regulations

### A. Affiliate Marketing Rules

Section 624 of the FCRA and the Commission's proposed regulations generally provide that consumers can block a CFTC registrant from soliciting the consumer based on "eligibility information" (*i.e.*, certain financial information, such as information regarding the consumer's transactions or experiences with the person) that such registrant received from an affiliate that has or previously had pre-existing business relationship. Under the proposed regulations, these registrants can make solicitations to a consumer based on that consumer's eligibility information if:

- (1) The consumer is given clear, conspicuous and concise notice;
- (2) The consumer is given a reasonable opportunity to opt out of such use of the information; and
- (3) The consumer does not opt out.

Section 624 governs the use of information by an affiliate, not the sharing of information with or among affiliates.<sup>10</sup> While some of the entities that fall under the Commission's jurisdiction may comply already with the regulations promulgated by other Federal agencies implementing the provisions of section 624 of the FCRA, the Commission seeks comment on its proposed regulations implementing section 624 of the FCRA.

#### Responsibility for Providing Notice and an Opportunity to Opt Out

Section 624 does not specify which affiliate must give the consumer notice and an opportunity to opt out of the use of the information by an affiliate for marketing purposes. The Commission has reviewed the proposed and final regulations issued by the Agencies implementing section 624 and has determined to take a consistent approach with respect to which affiliate may provide the initial opt-out notice. As such, the Commission's proposed

regulations provide that the initial opt-out notice must be provided either by an affiliate that has or previously had a "pre-existing business relationship" with the consumer, or as part of a joint notice from two or more members of an affiliated group, provided that at least one of the affiliates on the joint notice has or previously had a pre-existing business relationship with the consumer. The Commission agrees with the Agencies that this approach provides a measure of flexibility and ensures that the notice is provided by an entity that is known to the consumer. The Commission invites comment on whether this approach continues to be a reasonable one.

#### Scope of Coverage

Section 624 of the FCRA specifies under which circumstances the provisions under this section and the proposed regulation do not apply. Specifically, section 624(a)(4) provides that the requirements and prohibitions of that section do not apply, in part, when: (1) The covered affiliate receiving the information has a pre-existing business relationship with the consumer; (2) the information is used to perform services for another affiliate that does not have such a relationship with the consumer (subject to certain conditions described below); (3) the information is used in response to a communication initiated by the consumer; or (4) the information is used to make a solicitation that has been authorized or requested by the consumer. The Commission has incorporated each of these statutory exceptions into the proposed rule.

In addition, the Commission has set out the persons to whom the proposed rule will apply, as well as the type of consumer information that is the subject of such rule. The Commission solicits comments on whether there should be other circumstances to which the proposed regulations do not apply.

#### Duration of Opt Out

Section 624(a)(3) of the FCRA provides that a consumer's affiliate marketing opt-out election shall be effective for at least five years. Accordingly, the proposed regulations provide that a consumer's opt-out election would be valid for a period of at least five years (the "opt-out period"), beginning as soon as reasonably practicable after the consumer's opt-out election is received, unless the consumer revokes the election before the opt-out period has expired. When a consumer opts out, unless a statutory exception applies, a receiving affiliate would be unable to make or send

marketing solicitations to that consumer based on his or her eligibility information during the opt-out period.

As described in the section-by-section analysis below, an extension notice would be provided to the consumer at the end of the opt-out period if the receiving affiliate wishes to make marketing solicitations. Affiliated persons may wish to avoid the cost and burden of tracking five-year consumer opt-out periods with varying start and end dates, and delivering extension notices to each consumer at the appropriate time, by choosing to treat a consumer's opt-out election as effective for a period longer than five years, including indefinitely. An affiliate without a pre-existing business relationship that chooses to honor a consumer's opt-out election for more than five years would not violate the proposed rules.

In the discussion that follows, the Commission solicits comment on specific aspects of the proposed regulations on a section-by-section basis.

#### Section 162.1—Purpose, Scope and Examples

Proposed section 162.1 sets forth the purpose and scope of the proposed regulations. This section also provides that examples in this part are not exclusive; compliance with an example, to the extent applicable, constitutes compliance with this subpart.

#### Section 162.2—Definitions

Proposed section 162.2 contains definitions for, *inter alia*, the following terms: "affiliate"; "clear and conspicuous"; "common ownership or common corporate control"; "communication"; "company"; "consumer"; "covered affiliate"; "eligibility information"; "financial product or service"; "major swap participant"; "person"; "pre-existing business relationship"; "solicitation"; and "swap dealer".

#### Affiliate

Section 2 of the FACT Act (which, as noted above, added section 624 to the FCRA) defines the term "affiliate" to mean "persons that are related by common ownership or affiliated by corporate control."

The FACT Act and the GLB Act contain a variety of approaches to define the term "affiliate." Proposed paragraph (a) employs the same formulation used by the Commission in defining "affiliate" under part 160 of the

<sup>10</sup> The opt-out right contained in section 624 of the FCRA is distinct from the affiliate sharing provisions under section 603(d)(2)(A)(iii) of the FCRA.

Commission's Regulations.<sup>11</sup> Under the proposed regulation, the definition of "affiliate" will mean any company that is under common ownership or common corporate control with a covered affiliate.<sup>12</sup> The Commission believes it is important to harmonize the treatment of "affiliate" across its Regulations as much as possible and to construe them to have the same meaning. The Commission solicits comments on whether there should be any meaningful difference between the Commission's proposed definitions and the FACT Act and the GLB Act definitions.

#### Clear and Conspicuous

Proposed paragraph (b) defines the term "clear and conspicuous" to mean reasonably understandable and designed to call attention to the nature and significance of the information presented in the notice. Companies retain flexibility in determining how best to meet the clear and conspicuous standard. Again, the Commission has decided to harmonize the definition of this term across its Regulations. In addition, the Commission believes that the FCRA directs the Commission to provide specific guidance regarding how to comply with the clear and conspicuous standard. *See* 15 U.S.C. 1682s-3(a)(2)(B).

Companies may wish to consider a number of methods to make their notices clear and conspicuous. A notice or disclosure may be made reasonably understandable through methods that include, but are not limited to: Using clear and concise sentences, paragraphs,

and sections; using short explanatory sentences; using bullet lists; using definite, concrete, everyday words; using active voice; avoiding multiple negatives; avoiding legal and highly technical business terminology; and avoiding explanations that are imprecise and are readily subject to different interpretations. Various methods may also be used to design a notice or disclosure to call attention to the nature and significance of the information in it, including, but not limited to, using: A plain-language heading; a typeface and type size that are easy to read; wide margins and ample line spacing; or boldface or italics for key words. Companies that provide the notice on an Internet web page may use text or visual cues to encourage scrolling down the page if necessary to view the entire notice, and take steps to ensure that other elements on the Web site (such as pop-up ads, text, graphics, hyperlinks, or sound) do not distract attention from the notice.

When a notice or disclosure is combined with other information, methods for designing the notice or disclosure to call attention to the nature and significance of the information in it may include using distinctive type sizes, styles, fonts, paragraphs, headings, graphic devices, and groupings or other devices. It is unnecessary, however, to use distinctive features, such as distinctive type sizes, styles, or fonts, to differentiate an affiliate marketing opt-out notice from other components of a required disclosure (e.g., where a privacy notice under the GLB Act includes several opt-out disclosures in a single notice). Nothing in the clear and conspicuous standard requires the segregation of an affiliate marketing opt-out notice when it is combined with a privacy notice under the GLB Act or other provisions of law.

It may not be feasible to incorporate all of the methods described above all of the time. For example, a company may have to use legal terminology, rather than everyday words, in certain circumstances to provide a precise explanation. Companies are encouraged, but not required, to consider the practices described above in designing their notices or disclosures, as well as using readability testing to devise notices that are understandable to consumers.

The Commission has proposed model forms in Appendix A that may, but are not required to, be used to facilitate compliance with the affiliate marketing notice requirements. The requirement for clear and conspicuous notices would

be satisfied by the appropriate use of one of the model forms.

#### Common Ownership or Common Corporate Control

Proposed paragraph (f) defines the term "common ownership or common corporate control" for purposes of Part 162 to mirror the definition of "control" under Part 160. Under the proposal, "common ownership or common corporate control" 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.

#### Company

Proposed paragraph (g) defines the term "company" to mean any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization. This definition is consistent with the definition of company in Part 160 of the Commission's Regulations.

#### Concise

Proposed paragraph (h) defines the term "concise" to mean a reasonably brief expression or statement. The proposal also provides that a notice required by this subpart may be concise even if it is combined with other disclosures required or authorized by Federal or state law. Such disclosures may include, but are not limited to, a GLB Act privacy notice or other consumer disclosures required under the FCRA or any other provision of law.

As noted above, the Commission has proposed model forms in Appendix A that may, but are not required to, be used to facilitate compliance with the affiliate marketing notice requirements in this subpart. The requirement for concise notices would be satisfied by the appropriate use of one of the model forms.

#### Consumer

Proposed paragraph (i) defines the term "consumer" to mean an individual person, which follows the statutory definition in section 603(c) of the FCRA. For purposes of this definition, an individual acting through a legal representative qualifies as a consumer. The Commission notes that the

<sup>11</sup> Part 160 of the Commission's Regulations implement the provisions of Title V of the GLB Act. Under Title V of the GLB Act, "financial institutions" (which include futures commission merchants, retail foreign exchange dealers, commodity trading advisors and other CFTC registrants) are required to provide initial and annual privacy notices to their customers. These requirements apply only to customers that are individuals who obtain financial products or services that are primarily used for personal, family, or household purposes. Part 160 also requires financial institutions that share nonpublic, personal information about a customer with non-affiliates to provide the customer with a reasonable opportunity to opt out of the sharing of such information. *See* section 160.7 of the Commission's Regulations.

<sup>12</sup> The terms "swap dealer" and "major swap participant" as used in this proposed regulation refer to the statutory definitions of such terms as defined in Title VII of the Dodd-Frank Act, and as may be further defined by the Commission in a future rulemaking. *See* section 721(b) of the Dodd-Frank Act, which provides that the Commission has the authority to adopt rules further defining any term included in the Dodd-Frank Act, which amends the CEA. *See* also section 721(c) which provides that the Commission is required to adopt a rule to further define, *inter alia*, the terms "swap dealer" and "major swap participant" to include transactions and entities that have been structured to evade provisions in the Dodd-Frank Act.

definition of “consumer” is broader than the definition of that term in the GLB Act and is consistent with the definitions used by the Agencies in their rulemakings promulgated under section 624 of the FCRA. The Commission believes that the use of distinct definitions of “consumer” in the two statutes reflects differences in the scope and objectives of each statute.

#### Covered Affiliate

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

#### Eligibility information

Under proposed paragraph (j), 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.<sup>13</sup> Examples of the type of information that would fall within the definition of “eligibility information” includes an affiliate’s own transaction or experience information, such as information about a consumer’s account history with that person, and other information, such as information from credit bureau reports or applications. The Commission’s proposal defines the term “eligibility information” consistently with the definitions in the Agencies’ regulations promulgated pursuant to section 624 of the FCRA.

The term “eligibility information” does not include aggregate or blind data that does not contain personal identifiers. Examples of personal identifiers include account numbers, names, or addresses, as well as Social Security numbers, driver’s license numbers, telephone numbers, or other

types of information that, depending on the circumstances or when used in combination, could identify the consumer.

The Commission invites comment on whether the term “eligibility information”, as defined, appropriately reflects the scope of what information should be covered by this proposed regulation.

#### Financial Product or Service

Proposed paragraph (l) defines the term “financial product or service” to mean 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. This definition is consistent with the definition of financial product or service in Part 160 of the Commission’s Regulations, with certain revisions made to fit within the scope of the proposed regulations. The Commission invites comment on whether the term “financial product or service”, as defined, appropriately captures the types of products or services that should be covered by this regulation.

#### Major Swap Participant

Proposed paragraph (n) defines the term “major swap participant” to have the same meaning as in section 1a(33) of the Commodity Exchange Act, as may be further defined by the Commission’s Regulations, and includes any person registered as such thereunder.

#### Person

Proposed paragraph (o) defines the term “person” to mean any individual, partnership, corporation, trust, association, or other entity. For purposes of this part, actions taken by an agent on behalf of a person that are within the scope of the agency relationship will be treated as actions of that person. The definition of person in the proposed regulation is consistent with the definition of person in CFTC Regulation 1.3(u).

#### Pre-Existing Business Relationship

Proposed paragraph (p) defines this term to mean a relationship between a person (or a person’s licensed agent) and a consumer based on the following: (1) A financial contract between the person and the consumer that is in force on the date on which the consumer is sent a solicitation by this subpart; (2) the purchase, rental, or lease by the consumer of a person’s financial products 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 subpart is sent to the consumer; 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 subpart. The proposed definition generally tracks the statutory definition contained in section 624 of the FCRA, with certain revisions for clarity.

The Commission believes that, for purposes of this proposed regulation, an inquiry should include any affirmative request by a consumer for information, such that the consumer would reasonably expect to receive information from the affiliate about its financial products or services. In addition, the Commission believes that a consumer would not reasonably expect to receive information from the affiliate if the consumer does not request information or does not provide contact information to the affiliate.

The Commission has the statutory authority to define in the regulations other circumstances that qualify as a pre-existing business relationship. The Commission has not proposed to exercise this authority at this time to expand the definition of “pre-existing business relationship” beyond the circumstances set forth in the statute. The Commission solicits comments, however, on whether there are other circumstances that the Commission should include within the definition of “pre-existing business relationship”.

#### Solicitation

Proposed paragraph (q) defines the term “solicitation” to mean the marketing of a financial product or service initiated by a covered affiliate to a particular consumer that is based on eligibility information communicated to the covered affiliate by its affiliate and is intended to encourage the consumer to purchase the covered affiliate’s financial product or service. A communication, such as a telemarketing solicitation, direct mail, or e-mail, is a solicitation if it is directed to a specific consumer based on eligibility information. The proposed definition of solicitation does not, however, 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

<sup>13</sup> Section 603(d)(2)(A) of the FCRA provides that the term “consumer report” does not include “(i) [any] report containing information solely as to transactions or experiences between the consumer and the person making the report; (ii) communication of that information among persons related by common ownership or affiliated by corporate control; or (iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons \* \* \*.” Thus, the scope of what falls within the definition of “eligibility information” is broader than, and includes, information that would fall within the definition of “consumer report”.

financial products and services from the person initiating the communications. The proposed definition tracks the statutory definition contained in section 624 of the FCRA, with certain revisions for clarity.

The proposed definition of “solicitation” does not distinguish between different mediums of communication. A determination of whether a marketing communication constitutes a solicitation will depend upon the facts and circumstances. The Commission has decided not to make those determinations in this rulemaking.

The Commission has the statutory authority to determine by regulation that other communications do not constitute a solicitation. The Commission has decided to use the same definition of “solicitation” adopted by the Agencies, and as a result, has not proposed to exercise its authority under section 624 at this time to specify other communications that would not be deemed “solicitations” beyond the circumstances set forth in the statute.

The Commission solicits comment, however, on whether there are other communications that the Commission should determine do not meet the definition of “solicitation.” The Commission also solicits comment on whether, and to what extent, various tools used in Internet marketing, such as popup ads, may constitute solicitations as opposed to communications directed at the general public, and whether further guidance is needed to address Internet marketing.

#### Swap Dealer

Proposed paragraph (r) defines the term “swap dealer” to have the same meaning as in section 1a(49) of the Commodity Exchange Act, as may be further defined by the Commission’s Regulations, and includes any person registered as such thereunder.

#### Section 162.3—Affiliate Marketing Opt Out and Exceptions

Proposed section 162.3 establishes the basic rules governing the requirement to provide the consumer with notice, a reasonable opportunity and a simple method to opt out of a company’s use of eligibility information that it obtains from an affiliate for the purpose of making solicitations to the consumer.

#### General Notice Requirement

Proposed paragraph (a) contains three conditions that must be met before a covered affiliate that does not have a pre-existing business relationship with a consumer may use eligibility information about the consumer that it receives from an affiliate that does have

such a relationship to make a solicitation for marketing purposes to that consumer. First, the proposal provides that it must be clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that the covered affiliate that does not have a pre-existing business relationship may use shared eligibility information to make solicitations to the consumer. Second, the consumer must be provided a reasonable opportunity and a reasonable and simple method to opt out of the use of that eligibility information to make solicitations to the consumer. Third, the consumer must not have opted out.

The Commission believes that an opt-out notice may not be provided orally. Indeed, the Commission is concerned that with oral notice, it may be impossible to ensure that a consumer receives the appropriate notice or information on the right to opt out. In addition, the Commission is concerned that oral notice may create enforcement barriers for the Commission.

#### Persons Responsible for Satisfying the Notice Requirement

Section 624 does not specify explicitly which affiliate must provide the opt-out notice to the consumer. Proposed paragraph (b) sets forth the duty of the persons responsible for satisfying the notice requirement under section 624. This proposal is consistent with the approach taken by the Agencies in their respective rulemakings pursuant to section 624. The proposed regulation strives to provide flexibility by allowing either: (1) The affiliate with a pre-existing business relationship to report the initial opt-out notice directly to the consumer; or (2) one or more of affiliates to provide a joint notice to the consumer, provided that at least one of the affiliates has or previously had the pre-existing business relationship with the consumer. The Commission solicits comments on whether this approach will provide meaningful or effective notice and will not lead to consumer confusion as to whether the opt-out notice is itself a solicitation.

#### Exceptions to the General Rule

Paragraph (c) contains exceptions to the requirements of this subpart. It incorporates each of the following statutory exceptions to the affiliate marketing notice and opt-out requirements set forth in section 624(a)(4) of the FCRA: (1) Using the information to make a solicitation to a consumer with whom the affiliate has a pre-existing business relationship; (2)

using the information to facilitate communications to an individual for whose benefit the affiliate provides employee benefit or other services under a contract with an employer related to, and arising out of, a current employment relationship or an individual’s status as a participant or beneficiary of an employee benefit plan; (3) using the information to perform services for another affiliate, unless the services involve sending solicitations on behalf of the other affiliate and such affiliate is not permitted to send such solicitations itself as a result of the consumer’s decision to opt out; (4) using the information to make solicitations in response to a communication initiated by the consumer; (5) using the information to make solicitations in response to a consumer’s request or authorization for a solicitation; or (6) if compliance with the requirements of section 624 by the affiliate would prevent that affiliate from complying with any provision of state insurance laws pertaining to unfair discrimination in a state where the affiliate is lawfully doing business. Several of these exceptions are discussed immediately below.

Proposed paragraph (c)(1) clarifies that the provisions of this subpart do not apply where the covered affiliate using the information to make a solicitation to a consumer has a “pre-existing business relationship” with that consumer, a key term that is discussed in detail above.

Proposed paragraph (c)(3) clarifies that the provisions of this subpart do not apply where the information is used to perform services for another affiliate, except that the exception does not permit the service provider to make solicitations on behalf of itself or an affiliate if the service provider or the affiliate, as applicable, would not be permitted to make such solicitations as a result of the consumer’s election to opt out. Thus, when the notice has been provided to a consumer and the consumer has opted-out, a covered affiliate subject to the consumer’s opt-out election that has received eligibility information from its affiliate may not circumvent the opt-out notice requirement by instructing its affiliate or another affiliate to make solicitations to the consumer on its behalf. The Commission requests comment on whether there are other means of circumvention that the final rule should also address.

Proposed paragraph (c)(4) incorporates the statutory exception for information used in response to a communication initiated by the consumer. The proposed rule clarifies

that this exception may be triggered by an oral, electronic, or written communication initiated by the consumer. To be covered by the proposed exception, use of eligibility information must be responsive to the communication initiated by the consumer. For example, if a consumer calls a covered affiliate to ask about business locations and hours, the covered affiliate may not then use eligibility information to make solicitations to the consumer about specific financial products or services because those solicitations would not be responsive to the consumer's communication. Conversely, if the consumer calls a covered affiliate to ask about its financial products or services, then solicitations related to those financial products or services would be responsive to the communication and thus be permitted under the exception. The time period during which solicitations remain responsive to the consumer's communication will depend on the facts and circumstances. The Commission does not intend for this exception to apply to a communication where a covered affiliate makes the initial call and leaves a message for the consumer to call back, and the consumer responds.

Proposed paragraph (c)(5) provides that the provisions of this subpart do not apply where the information is used to make solicitations affirmatively authorized or requested by the consumer. This provision may be triggered by an oral, electronic, or written authorization or request by the consumer. Under this exception, the consumer may provide the authorization or make the request either through the company with whom the consumer has a business relationship or directly to the covered affiliate that will make the solicitation. In addition, the duration of the authorization or request will depend on the facts and circumstances.

The exceptions in proposed paragraphs (c)(1), (4), and (5) described above may overlap in certain situations. For example, if a customer makes a telephone call to the commodity trading advisor's clearing broker affiliate and requests information about its services, the clearing broker affiliate may use information about the consumer it obtains from the commodity trading advisor to make solicitations in response to the telephone call initiated by the consumer under the exception in paragraph (c)(4) for responding to a communication initiated by the consumer. In addition, the consumer's request for information from the clearing broker affiliate triggers the

exceptions in paragraph (c)(1) for inquiries by the consumer regarding a financial product or service offered by the clearing broker affiliate under the statutory definition of a "pre-existing business relationship" as well as the exception in paragraph (c)(5) for a use in response to a solicitation requested by the consumer.

#### Making Solicitations

Proposed paragraph (d) sets forth when a covered affiliate makes a solicitation to a consumer. Section 624 does not describe what a covered affiliate must do in order to make a solicitation. Similarly the legislative history does not contain guidance as to the meaning of making a solicitation. For that reason, the Commission believes it important to provide clear guidance regarding what activities constitute making a solicitation. Proposed section 162.3(d)(1) provides that a covered affiliate makes a solicitation for marketing purposes to a consumer if: (i) The covered affiliate receives eligibility information from an affiliate; (ii) the covered affiliate uses that eligibility information to do one of the following—identify the consumer or type of consumer to receive a solicitation, establish the criteria used to select the consumer to receive a solicitation, or decide which of its financial products or services to market to the consumer or tailor its 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 about the covered affiliate's financial products or services.

The Commission recognizes that several common industry practices create issues in applying the provisions in proposed subparagraph (d)(1). First, affiliated companies often use a common database as the repository for eligibility information obtained by various affiliates, and information in that database may be accessible to multiple affiliates. Second, affiliated companies often use service providers to perform marketing activities, and some of those service providers may provide services for a number of different affiliates. Third, a covered affiliate may use its own eligibility information to market the financial products or services of another affiliate. Proposed sections 162.3(d)(2)–(5) seek to address these issues.

Proposed subparagraph (d)(2) provides that a covered affiliate may receive eligibility information from an affiliate in various ways, including when the covered affiliate places that information into a common database

that the covered affiliate may access. Thus, the use of a common database may satisfy the first element of the rule outlined in subparagraph (d)(1) (*i.e.*, through a common database, the covered affiliate receives eligibility information from an affiliate).

Proposed subparagraph (d)(3) provides that a covered affiliate receives or uses an affiliate's eligibility information if a service provider acting on behalf of the covered affiliate receives or uses that information in the manner described in subparagraphs (d)(1)(i) or (d)(1)(ii), except as provided in subparagraph (d)(5), which is discussed below. Proposed subparagraph (d)(3) also provides that all relevant facts and circumstances will determine whether a service provider is acting on behalf of a covered affiliate when it receives or uses its affiliate's eligibility information in connection with marketing the covered affiliate's financial products or services.

Proposed subparagraph (d)(4) describes two situations where a covered affiliate is deemed not to have made a solicitation subject to this subpart. In particular, this section provides that unless a covered affiliate uses a consumer's eligibility information received from an affiliate in a manner described in section 162.3(d)(1)(ii) (*i.e.*, identify the consumer, establish criteria to select the consumer, or decide which financial product or service to market to the consumer), the covered affiliate does not make a solicitation for the purposes of this subpart if the affiliate: (i) uses its own eligibility information obtained in connection with that relationship to market the covered affiliate's financial products or services; or (ii) directs its service provider to use the affiliate's own eligibility information to market the covered affiliate's financial products or services. Both situations (i) and (ii) assume that the covered affiliate whose financial products or services are being marketed has not used eligibility information received from the affiliate. In contrast, the core concept underlying situation (ii) is that the affiliate controls the actions of the service provider using that information. Since the affiliate controls the service provider's use of the eligibility information, the solicitation should not be attributed to the covered affiliate whose financial products or services will be marketed to the consumers. Instead, the solicitation should be attributed to the affiliate.

The Commission also recognizes that there may be situations where the covered affiliate whose financial products or services are being marketed does communicate and have contact

with the service provider of the affiliate. This situation might arise, for example, where the service provider performs services for various affiliates relying on information maintained in and accessed from a common database. In certain circumstances, the covered affiliate whose financial products or services are being marketed may communicate with the service provider, yet the service provider is still acting on behalf of the affiliate when it uses that affiliate's eligibility information in connection with marketing the covered affiliate's financial products or services. Proposed subparagraph (d)(5) describes the conditions under which a service provider (including an affiliated or third-party service provider) would be deemed to be acting on behalf of the affiliate that has or previously had a pre-existing business relationship with a consumer, rather than the covered affiliate whose financial products or services are being marketed, notwithstanding direct communications between the covered affiliate and the service provider.

Proposed subparagraph (d)(5) builds upon the concept of control of a service provider and thus is a natural outgrowth of proposed subparagraph (d)(4). Under the conditions set out in subparagraph (d)(5), the service provider is acting on behalf of an affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer because, *inter alia*, the affiliate controls the actions of the service provider in connection with the service provider's receipt and use of the eligibility information. This provision is designed to minimize uncertainty that may arise from application of the facts and circumstances test in subparagraph (d)(3) to cases that involve direct communications between a service provider and a covered affiliate whose financial products and services will be marketed to consumers.

In particular, proposed subparagraph (d)(5) provides that a covered affiliate does not make a solicitation subject to this subpart if a service provider receives eligibility information (regardless of whether such information is received through a common database or otherwise) from an affiliate and the service provider uses that eligibility information to market the covered affiliate's financial products or services to the consumer, only when five conditions are met.

Those five conditions are:

- First, the affiliate controls access to and use of its eligibility information by the service provider (including the right to establish specific terms and conditions under which the service

provider may use such information to market the financial products or services of the covered affiliate that does not have such relationship). This requirement must be set forth in a written agreement between the affiliate and the service provider. The affiliate may demonstrate control by, for example, establishing and implementing reasonable policies and procedures applicable to the service provider's access to and use of its eligibility information.

- Second, the affiliate establishes specific terms and conditions under which the service provider may access and use that eligibility information to market the financial products or services of the covered affiliate that does not have a pre-existing business relationship (or those of affiliates generally) to the consumer, and periodically evaluates the service provider's compliance with those terms and conditions. These terms and conditions may include 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. The affiliate must set forth in writing the specific terms and conditions, but need not set forth such terms and conditions in a written agreement. If a periodic evaluation by the affiliate that has or previously had a pre-existing business relationship with a consumer reveals that the service provider is not complying with those terms and conditions, the Commission expects the affiliate to take appropriate corrective action.

- Third, the affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses its eligibility information in accordance with the terms and conditions established by the such affiliate relating to the marketing of the financial products or services of the covered affiliate that does not have a pre-existing business relationship. This requirement must be set forth in a written agreement between the affiliate and the service provider.

- Fourth, the affiliate that has or previously had a pre-existing business relationship with a consumer is identified on or with the marketing materials provided to the consumer. This requirement will be construed flexibly. For example, the affiliate may be identified directly on the marketing materials, on an introductory cover letter, on other documents included

with the marketing materials, such as a periodic statement, or on the envelope which contains the marketing materials.

- Fifth, the covered affiliate that does not have a pre-existing business relationship with the consumer does not directly use the eligibility information of the affiliate that does have such relationship in the manner described in section 162.3(d)(1)(ii). These five conditions together ensure that the service provider is acting on behalf of the affiliate because that affiliate controls the service provider's receipt and use of such affiliate's eligibility information.

#### Section 162.4—Scope and Duration of Opt Out

##### Scope of Opt Out

The scope of the opt-out election is derived from language of section 624(a)(2)(A) of the FCRA and generally depends upon the content of the opt-out notice. Proposed section 162.4(a)(1) provides that, except as otherwise provided in that section, a consumer's election to opt out prohibits any covered affiliate subject to the scope of the opt-out notice from using the eligibility information received from another affiliate as described in the notice to make solicitations for marketing purposes to the consumer. The scope of the election in the proposed regulations is consistent with the scope of the final regulations promulgated by the Agencies.

Proposed section 162.4(a)(2)(i) clarifies that, in the context of a continuing relationship, an opt-out notice may apply to eligibility information obtained in connection with a single continuing relationship, multiple continuing relationships, continuing relationships established subsequent to delivery of the opt-out notice, or any other transaction with the consumer. Proposed section 162.4(a)(2)(ii) provides the following examples of a continuing relationship: (i) 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; (ii) the covered affiliate is an introducing broker that solicits or accepts specific orders for trades; (iii) 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; (iv) 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; (v) the covered affiliate 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 (vi) the covered affiliate regularly effects or engages in commodity interest transactions with or for a consumer even if covered affiliate does not hold any assets of the consumer.

Proposed section 162.4(a)(3)(i) limits the scope of an opt-out notice that is not connected with a continuing relationship. This section provides that if there is no continuing relationship between the consumer and a covered affiliate or its affiliate, and if the covered affiliate or its affiliate provides an opt-out notice to a consumer that relates to eligibility information obtained in connection with a transaction with the consumer, such as an isolated transaction, the opt-out notice only applies to eligibility information obtained in connection with that transaction. The notice cannot apply to eligibility information that may be obtained in connection with subsequent transactions or a continuing relationship that may be subsequently established by the consumer with the covered affiliate or its affiliate. Proposed section 162.4(a)(3)(ii) provides the following examples of where no continuing relationship exists: (i) 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 (ii) 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.

Proposed section 162.4(a)(4) provides that a consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations. An opt-out notice may give the consumer the opportunity to elect to prohibit: solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice; solicitations based on certain types of eligibility information but not other types of eligibility information; or solicitations

by certain methods of delivery but not other methods of delivery, so long as one of the alternatives is the opportunity to prohibit all solicitations from all of the affiliates that are covered by the notice. The Commission believes that the language of section 624(a)(2)(A) of the FCRA requires the opt-out notice to contain a single opt-out option for all solicitations within the scope of the notice. The Commission solicits comments as to whether it would be burdensome for consumers to receive a number of different opt-out notices, even from the same affiliate, under the circumstances described above.

Proposed section 162.4(a)(5) contains a special rule for notice following termination of a continuing relationship. This proposed regulation provides that a consumer must be given a new opt-out notice if, after all continuing relationships with a covered affiliate or its affiliate have been terminated, the consumer subsequently establishes a new continuing relationship with the covered affiliate or the same or a different affiliate and the consumer's eligibility information is used to make a solicitation. In addition, this section affords the consumer and the company a fresh start following termination of all continuing relationships by requiring a new opt-out notice if a new continuing relationship is subsequently established.

The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. The new opt-out notice may apply more broadly to information obtained in connection with a terminated relationship and give the consumer the opportunity to opt out with respect to eligibility information obtained in connection with both the terminated and the new continuing relationships. Further, the consumer's failure to opt out does not override a prior opt-out election by the consumer applicable to eligibility information obtained in connection with a terminated relationship that is still in effect, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship. The Commission notes, however, that where a consumer was not given an opt-out notice in connection with the initial continuing relationship because eligibility information obtained in connection with that continuing relationship was not shared with affiliates for use in making solicitations, an opt-out notice provided in connection with a new continuing relationship would have to apply to any eligibility information obtained in

connection with the terminated relationship that is to be shared with affiliates for use in making future solicitations.

#### Duration of Opt-Out Election

Proposed section 162.4(b) provides that 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. The Commission believes that this approach is consistent with the approach taken by the Agencies and the Commission's approach in the GLB Act privacy rule in Part 160. The Commission does not believe it is necessary or appropriate to permit oral revocation.

The Commission believes that this approach provides companies with flexibility in complying with the proposed regulations. For example, to avoid the cost and burden of tracking consumer opt outs over five-year periods with varying start and end dates and sending out extension notices in five-year cycles, some companies may choose to treat the consumer's opt-out election as effective for a period longer than five years, including in perpetuity, unless revoked by the consumer. A company that chooses to honor a consumer's opt-out election for more than five years would not violate the proposed regulations.

The Commission seeks comment on whether the consumers should be given the opportunity to opt-out permanently from receiving marketing solicitations from affiliates regardless of the opt-out period stated in the opt-out notice. This approach would provide consumers with the ability to avoid receiving and responding to extension notices every five years.

#### Time Period To Opt Out

Proposed section 162.4(c) provides that a consumer may opt out at any time. Indeed, a consumer may opt out even if the consumer did not opt out in response to the initial opt-out notice or if the consumer's election to opt out was not prompted by an opt-out notice. Regardless of when the consumer opts out, the opt out must be effective for a period of at least five years.

#### No Effect on Opt-Out Period

Proposed section 162.4(d) provides that 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.

## Section 162.5—Contents of Opt-Out Notice; Consolidated and Equivalent Notices

### Contents in General

The Commission believes that proposed section 162.5(a) reflects the intent of Congress, as expressed in section 624(a)(2)(B) of the FCRA, which provides that the notice required by this proposed regulation must be in writing, “clear, conspicuous, and concise,” and that the method for opting out must be “simple.” Specifically, section 162.5(a)(1)(i)(A) provides that all opt-out notices must identify, by name, the affiliate that has or previously had a pre-existing business relationship with a consumer and is providing the notice. Section 162.5(a)(1)(B) provides that a group of affiliates may jointly provide the notice. If the notice is 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. Acceptable ways of identifying the multiple affiliates providing the notice include stating that the notice is provided by “all of the XYZ companies,” or by listing the name of each affiliate providing the notice. A representation that the notice is provided by “the XYZ commodity trading advisors and commodity pools” applies to all companies in those categories, not just some of those companies. But if the affiliates providing the notice do not all 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.

Proposed section 162.5(a)(1)(ii) provides that an opt-out notice must contain a list of the affiliates or types of affiliates covered by the notice. The notice may apply to multiple affiliates and to companies that become affiliates after the notice is provided to the consumer. The rule for identifying the affiliates covered by the notice is substantially similar to the rule for identifying the affiliates providing the notice in section 162.5(a)(i), as described in the previous paragraph.

Proposed sections 162.5(a)(1)(iii)–(vii), respectively, require the opt-out notice to include the following: A general description of the types of eligibility information that may be used to make solicitations to the consumer; a statement that the consumer may elect to limit the use of eligibility information to make solicitations to the consumer; a statement that the consumer’s election will apply for the specified period of

time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires; if the notice is provided to consumers who may have previously opted out, that the consumer who has chosen to limit marketing offers does not need to act again until the consumer receives a renewal notice; and a reasonable and simple method for the consumer to opt out.

Proposed section 162.5(a)(2) provides that the opt-out notice must specify the length of the opt-out period, if the consumer is granted an opt-out period longer than five years. Proposed section 162.5(a)(3), however, provides that a company that subsequently chooses to increase the duration of the opt-out period that it previously disclosed or honor the opt out in perpetuity has no obligation to provide a revised notice to the consumer. In that case, the result is the same as if the company established a five-year opt-out period and then did not send a renewal notice at the end of that period. So long as no solicitations are made using eligibility information received from an affiliate, there would be no violation of the statute or regulation for failing to send a renewal notice in this situation. A covered affiliate receiving eligibility information from an affiliate would be prohibited from using that information to make solicitations to a consumer unless a renewal notice is first provided to the consumer and the consumer does not renew the opt out.

Use of the model form in Appendix A, in appropriate circumstances, would comply with paragraph (a), but is not required.

### Joint Relationships

Proposed section 162.5(b) sets out a rule that would apply when two or more consumers jointly obtain a financial product or service from an affiliate subject to the rule (referred to in the proposed regulation as “joint consumers”). Under the proposal, an affiliate subject to the rule could provide a single opt-out notice to joint consumers. The notice would have had to indicate whether the affiliate would consider an opt out by a joint consumer as an opt out by all of the associated consumers, or whether each consumer would have to opt out separately. The affiliate could not require all consumers to opt out before honoring an opt-out election by one of the joint consumers. The revised provision is substantively similar to the joint relationships provision of the GLB Act privacy rule in Part 160, except to the extent that rule refers to the sharing of information among affiliates. The Commission

requests comments on whether information about a joint account should be allowed to be used for making solicitations to a joint consumer who has not opted out.

### Alternative Contents

Proposed paragraph (c) provides that if the consumer is afforded an alternative but broader right to opt out of receiving marketing than is required by this subpart, the requirements of proposed section 162.5(a) may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer’s opt-out rights.

### Consolidated and Equivalent Notices

Proposed section 162.5(d) provides that an opt-out notice required by this subpart could be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law, including but not limited to the notice required by Title V of the GLB Act. In addition, proposed section 162.5(e) provides that a notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, would satisfy the requirements of this section.

Including an affiliate marketing opt-out notice under this subpart and an initial or annual notice under the GLB Act raises special issues, however, because GLB Act notices typically state that the consumer does not need to opt out again if the consumer previously opted-out. This statement would be accurate if the company and its affiliates choose to make the affiliate marketing opt out effective in perpetuity. However, if the opt-out period is limited to a defined period of five years or more, such a statement would not be accurate with respect to the extension notice, and the notice would have to make clear to the consumer the necessity of opting-out again in order to extend the opt-out election.

The Commission solicits comments on the consolidation of the affiliate marketing notice under this subpart with the GLB Act privacy notices in Part 160.

### Model Notices

Proposed section 162.5(f) states that proposed model notices are provided in Appendix A of Part 162. The Commission has provided these proposed model notices to facilitate compliance with the proposed rule. It should be noted, however, that the

proposed rule does not require use of the model notices.

#### Section 162.6—Reasonable Opportunity to Opt Out

Proposed paragraph (a) sets forth the general rule prohibiting covered affiliates from using eligibility information about a consumer received 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 the proposed regulation. The general rule does not set a mandatory waiting period in all cases. Instead, proposed paragraph (b) sets forth several examples illustrating what constitutes a reasonable opportunity to opt out. Paragraph (b) does maintain, however, a safe harbor of 30 days to provide certainty to entities that choose to follow the 30-day waiting period. Although 30 days is a safe harbor in all cases, an affiliate subject to the rule providing an opt-out notice may decide, at its option, to give consumers more than 30 days in which to decide whether to opt out. A shorter waiting period could be adequate in certain situations, depending on the circumstances, in accordance with the general test for a reasonable opportunity to opt out.

#### Section 162.7—Reasonable and Simple Methods of Opting Out

Section 624 of the FCRA requires that consumers are given reasonable and simple methods of opting out. Proposed paragraph (a) prohibits covered affiliates from using eligibility information about a consumer received from an affiliate to make a solicitation to such consumer about the financial products or services of the covered affiliate, unless the consumer is provided a reasonable and simple method to opt out, as required by this proposed regulation.

Proposed paragraph (b) sets forth reasonable and simple methods of opting out. Such methods include designating a check-off box in a prominent position on an opt-out election form, including a reply form and a self-addressed envelope (in a mailing), providing an electronic means that can be electronically mailed or processed through an Internet Web site, providing a toll-free telephone number, or exercising an opt-out election through whatever means are acceptable under a consolidated privacy notice required under other laws.

Proposed paragraph (c) clarifies that each consumer may be required to opt out through a specific medium, as long

as that medium is reasonable and simple for that consumer.

#### Section 162.8—Acceptable Delivery of Opt-Out Notices

Proposed section 162.8(a) provides that an affiliate that has or previously had a pre-existing business relationship with a consumer must deliver an opt-out notice so that each consumer can reasonably be expected to receive actual notice. For opt-out notices that are delivered electronically at the consumer's election, proposed section 162.8(b) provides that opt-out notices may be delivered either in accordance with the electronic disclosure provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq. or in accordance with CFTC Regulation 1.4.

#### Section 162.9—Renewal of Opt Out

Proposed section 162.9 describes the procedures for renewal or extension of an opt-out election. Proposed subparagraph (a)(1) provides that, after the opt-out period expires, and unless an exception in section 162.3(c) applies, a covered affiliate may not make a solicitation to a consumer based on eligibility information received by an affiliate unless: The consumer has been given a renewal notice that complies with requirements of this section and the other sections 162.6 through 162.8; the consumer is given a reasonable opportunity and a reasonable and simple to renew the opt-out election; and the consumer does not opt out. Proposed subparagraph (a)(2) provides that the renewal period for each renewal shall be a period of not less than five years. Proposed subparagraph (a)(3) outlines which affiliates may provide notice required by this section. A renewal notice must be provided either by: The affiliate that provided the previous opt-out notice or its successor; or 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. The Commission believes that this subparagraph will provide flexibility to account for changes in the corporate structure, which may result from mergers and acquisitions, corporate names changes, and other events.

Proposed paragraph (b) addresses the contents of a renewal or extension notice. The Commission recognizes that the content of the renewal notice differs from the content of the initial notice. Nothing in the FCRA, however, requires identical content in the initial and renewal notices. Moreover, the FCRA

requires the Commission to provide specific guidance to ensure that opt-out notices are clear, conspicuous and concise. The Commission believes that it is unreasonable to expect consumers, upon receipt of a renewal notice, to remember that they previously opted out five years ago (or longer) or, even if they do remember, to know that they must opt out again in order to renew their opt-out election. Therefore, to ensure that the renewal notice is meaningful, the Commission is proposing that the renewal notice must remind the consumer he or she must opt out again to renew the opt-out election and continue to limit the solicitations from covered affiliates. In addition, proposed paragraph (b) requires that the notice must accurately disclose the same items required to be disclosed in the initial opt-out notice under proposed section 162.5(a), along with a statement explaining that the consumer's prior opt-out election has expired or is about to expire, as applicable, and that if the consumer wishes to keep the consumer's opt-out election in force, the consumer must opt out again.

Proposed paragraph (c) addresses the timing of the renewal notice and provides that a renewal notice can be given to the consumer either a reasonable period of time before the expiration of the opt-out 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. Providing the renewal notice to a consumer within a reasonable period of time before the expiration of the opt-out period is appropriate to facilitate the smooth transition of consumers that choose to change their election. A renewal notice given too far in advance of the expiration of the opt-out period, however, may be confusing to consumers. The Commission does not propose to set a fixed time for what would constitute a reasonable period of time before the expiration of the opt-out period to send a renewal notice, because a reasonable period of time may depend upon the amount of time afforded to the consumer for a reasonable opportunity to opt out, the amount of time necessary to process opt outs, and other factors. Nevertheless, providing a renewal notice on or with the last annual privacy notice required by the GLB Act privacy provisions sent to the consumer before the expiration of the opt-out period shall be deemed reasonable in all cases.

Proposed paragraph (d) clarifies that sending a renewal notice to the consumer before the expiration of the opt-out period does not shorten the five-

year opt-out period, even if the consumer does not renew the opt-out election.

### B. Disposal Rules

As noted above, section 1088 of the Dodd-Frank Act also amends section 628 of the FCRA, which directs the Commission to adopt comparable and consistent rules with the Agencies regarding the disposal of sensitive consumer report information. The purpose of these rules is to reduce the risk of identity theft and other consumer harm from improper disposal of a consumer report or any record derived from one. The proposed disposal rules apply to any CFTC registrant that, for a business purpose, maintains or otherwise possesses such consumer report information.

The general disposal requirement provides that CFTC registrants covered by the proposed regulation “take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.” The standard for disposal is flexible to allow CFTC registrants to determine what measures are reasonable based on the sensitivity of the information, the costs and benefits of different disposal methods, and relevant changes in technology over time. The proposed disposal rule’s flexibility should also facilitate compliance for smaller CFTC registrants.

In the discussion that follows, the Commission solicits comment on specific aspects of the proposed disposal rules on a section-by-section basis.

### Section 162.2—Definitions

In addition to the definitions previously discussed above, the proposed regulations to implement section 628 of the FCRA require the addition of the following terms to the definition section of the new Part 162.

#### Consumer Information

Proposed paragraph (h) defines the term “consumer information” to mean any record about an individual, whether in paper, electronic, or other form that is a consumer report or is derived from a consumer report.<sup>14</sup> 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. The Commission believes that a broad definition of the term, which includes all types of records that are consumer reports, or contain consumer information derived from consumer reports, will best effectuate the purposes of the FCRA. However, under this definition, information which does not identify a particular consumer would not be included. The Commission believes that limiting the definition to information which identifies particular consumers is consistent with the purpose of the FCRA.

#### Dispose or Disposal

Proposed paragraph (i) defines the terms “dispose” or “disposal” to mean the discarding or abandonment of consumer information or the sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored. The sale, donation, or transfer of consumer information would not be considered “disposal” under the proposed regulation. For example, an entity subject to the proposed disposal rule that transfers consumer information to a third party for marketing purposes would not be discarding the information for the purposes of the proposed disposal rule. If the entity donates computer equipment on which consumer information is stored, however, the donation would be considered a disposal under the proposed disposal rule. The Commission requests comments on this definition.

### Section 162.21—Disposal Rules

Proposed section 162.21 implements section 628(a)(1) of the FCRA. Proposed paragraph (a) would require any covered affiliate to adopt must adopt reasonable, written policies and procedures that address administrative, technical, and physical safeguards for the protection of consumer information. The proposal requires these written policies and procedures to 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.

Proposed paragraph (b) would require that any person that maintains or

otherwise possesses consumer information to take “reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.” The Commission recognizes that there are few foolproof methods of record destruction. Therefore, the proposed regulation does not require persons subject to the rule to ensure perfect destruction of consumer information in every instance; rather, it requires covered entities to take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.

In determining what measures are “reasonable” under this subpart, the Commission expects that entities within the scope of the proposed regulation would consider the sensitivity of the consumer information, the nature and size of the entity’s operations, the costs and benefits of different disposal methods, and relevant technological changes. “Reasonable measures” are very likely to require elements such as the establishment of policies and procedures governing disposal, as well as appropriate employee training.

The flexible standard for disposal in the proposed rule would allow persons subject to the rule to make decisions appropriate to their particular circumstances and should minimize the disruption of existing practices to the extent that they already provide appropriate protections for consumers. It is also intended to minimize the burden of compliance for smaller entities.

Despite the benefits of a flexible “reasonableness” standard, the Commission recognizes that such a standard could leave entities within the scope of the proposed regulations with some uncertainty about compliance. While each entity would have to evaluate what is appropriate for its size and the complexity of its operations, proposed paragraph (c) sets forth the following examples of what the Commission believes constitute “reasonable” disposal measures for purposes of the proposed regulation:

- 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;
- Implementing and monitoring compliance with policies and procedures that require the destruction or erasure of electronic media containing consumer information so

<sup>14</sup> The term “consumer report” is defined in section 603(d)(1) of the FCRA as “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 [several purposes, including employment, the provision of credit or insurance].”

that the information cannot practically be read or reconstructed; and

- 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 information in a manner that is consistent with this rule.

The Commission invites comment on the proposed standard for disposal. In particular, the Commission seeks comment on whether the proposed “reasonableness” standard provides sufficient guidance to CFTC registrants. The Commission also seeks comment on whether the proposed disposal rule should include alternative standards, specify particular disposal methods, or should provide examples, and what those examples should be.

Proposed paragraph (d) makes clear that nothing in the proposed disposal rule is intended to create a requirement that a covered entity maintain or destroy any record pertaining to an individual. The rule also is not intended to affect any requirement imposed under any other provision of law to maintain or destroy such records, particularly the record keeping requirements located in Part 1 of the Commission’s Regulations.

### C. Effective Date

Pursuant to section 1100H of the Dodd-Frank Act, the Commission proposes to make the proposed regulations—the affiliate marketing rules and the disposal rules—become effective on the “designated transfer date” of authority from various Federal agencies to the Bureau. Section 1062 of the Dodd-Frank Act provides that the “designated transfer date” is a date designated in the **FEDERAL REGISTER** no later than 60 days after the enactment of the Dodd-Frank Act by the Secretary of the Treasury, the Chairman of the Board of Governors, the Chairman of the Federal Trade Commission, and several other Federal agencies.<sup>15</sup> On September 20, 2010, these Federal agencies issued a notice designating July 21, 2011 as the designated transfer date.<sup>16</sup> As a result, the Commission proposes to adopt the affiliate marketing rules and the disposal rules on that date.

<sup>15</sup> The heads of the other Federal agencies are: The Comptroller of the Currency; the Director of the Office of Thrift Supervision; the Secretary of the Department of Housing and Urban Development; the Director of the Office of Management and Budget; the Chairman of the National Credit Union Administration Board; and the Chairperson of the Corporation.

<sup>16</sup> See 75 FR 57252–02 (Sept. 20, 2010).

### III. Cost-Benefit Analysis

Section 15(a) of the CEA<sup>17</sup> requires the Commission to consider the costs and benefits of its actions before issuing an order under the CEA. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission “consider” the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

The proposed regulations would implement new statutory provisions enacted by Title X of the Dodd-Frank Act. These proposed regulations would require CFTC registrants to do two things with respect to certain consumer information. First, the proposed regulations would require CFTC registrants to provide consumers with the opportunity to prohibit affiliates from using certain information to make marketing solicitations to consumers. Second, the proposed rules would require CFTC registrants that possess or maintain consumer report information in connection with their business activities to develop and implement a written program for the proper disposal of such information.

With respect to costs, the Commission has determined that costs to market participants would be *de minimis* because: (1) The Commission is providing model notices in the proposed regulations in order to assist these participants in complying with the affiliate marketing rules; (2) the affiliate marketing rules only require periodic notice (*i.e.*, at a maximum, companies would have to provide notice to a consumer once every five years; at a minimum, companies would have to provide notice only once per consumer); (3) market participants can file

<sup>17</sup> 7 U.S.C. 19(a).

consolidated and equivalent notices in order to comply with the affiliate marketing rules; and (4) the disposal rules were designed to provide market participants with the greatest flexibility in the development and implementation of a disposal program (which may vary according to a company’s size and the complexity of its operations, the costs and benefits of available disposal methods, and the sensitivity of information involved). The Commission also has determined that the costs to the general public are: (1) Absent the implementation of the affiliate marketing rules, consumers would have no control over both the use of their personal information, and the number of solicitations such consumers would receive from affiliates of company with which they have a pre-existing business relationship; and (2) absent the implementation of the disposal rules, would increase the chances that consumer information would be accessible to third parties who may use such information for identity theft or other unlawful purposes.

With respect to benefits, the Commission has determined that, through the implementation of the affiliate marketing rules, consumers generally will be able to opt out of receiving unsolicited and targeted materials from businesses with which the consumers have no pre-existing business relationship. In addition, the Commission has determined that, as a result of the implementation of the disposal rules, the potential for the misuse of consumer information will greatly decrease.

The Commission invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposed regulations with their comment letters.

### IV. Paperwork Reduction Act

Provisions of proposed Part 162 would result in new collection of information requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”). The Commission therefore is submitting this proposal to the Office of Management and Budget (“OMB”) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is “Part 162—Protection of Consumer Information Under the Fair Credit Reporting Act.” If adopted, responses to this new collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of

Information Act and 17 CFR part 145, "Commission Records and Information." In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

### 1. Information Provided by Reporting Entities/Persons

Under proposed Part 162, reporting or recordkeeping CFTC registrants, which presently would include approximately 3,172 persons (including an estimate of the number of new CFTC registrants pursuant to Title VII of the Dodd-Frank Act),<sup>18</sup> would be required to collect information and keep records for the purposes of providing opt-out notices to consumers at a maximum of at least every five years. The proposed collection for the affiliate marketing rules is estimated to involve 0.01 burden hours per report or record. The estimated number of opt-out notices per five-year period is 412,000. The estimated aggregate number of burden hours each five-year period is 13,068.64 burden hours for the affiliate marketing rules.

The same number of persons would be required to develop written disposal plans only once. The proposed collection for the disposal rules is estimated to involve between three to 10 burden hours per plan, at an average of

3.5 burden hours, for an aggregate of 11,102 burden hours.

### 2. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566 or by e-mail at [OIRAsubmissions@omb.eop.gov](mailto:OIRAsubmissions@omb.eop.gov). Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the **ADDRESSES** section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting [RegInfo.gov](http://RegInfo.gov). OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking.

### V. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")<sup>19</sup> requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.<sup>20</sup> The regulations proposed by the Commission shall affect only futures commission merchants, introducing brokers, commodity trading advisors, commodity pool operators,

swap dealers and major swap participants. The Commission has determined that the notice obligations under this proposed regulation will not create a significant economic impact on a substantial number of small entities. Moreover, the Commission previously has determined that futures commission merchants and commodity pool operators are not small entities for purposes of the RFA.<sup>21</sup> Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules, will not have a significant impact on a substantial number of small entities.

### VI. Text of Proposed Rules

#### List of Subjects in 17 CFR Part 162

Consumer protection, Privacy.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to add 17 CFR part 162 to read as follows:

#### 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.

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 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.

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

#### § 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,

<sup>18</sup> See the National Futures Association's ("NFA") Internet Web site at: <http://www.nfa.futures.org/NFA-registration/NFA-membership-and-dues.HTML> for the most up-to-date number of CFTC registrants. For the purposes of the PRA calculation, Commission staff used the number of registered futures commission merchants, commodity trading advisors, commodity pool operators and introducing brokers on the NFA's Web site as of August 31, 2010.

Commission staff estimated the number of swap dealers and major swap participants, which staff believes will register with the Commission following the issuance of final rules under the Dodd-Frank Act further defining the terms "swap dealers" and "major swap participants" and setting forth a registration regime for these entities. While staff believes that there may likely be approximately 200 swap dealers, we have taken a conservative approach in estimating that there will be 250 swap dealers for Paperwork Reduction Act purposes.

Some of the entities that were registered as futures commission merchants as of August 31, 2010 will soon register as retail foreign exchange dealers. Consequently, the total number of CFTC registrants will not be affected as a result of the change in registration from future commission merchants to retail foreign exchange dealers.

<sup>19</sup> 5 U.S.C. 601 *et seq.*

<sup>20</sup> 5 U.S.C. 601 *et seq.*

<sup>21</sup> Previous determinations for FCMs at 47 FR 18618, 18619 (1982) and CPOs at 47 FR 18618, 18619 (1982).

swap dealers and major swap participants, 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, swap dealers and major swap participants 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” of a means any company that is under 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” 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.* The term “consumer” means an individual person.

(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. 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, swap dealer or major swap participant, 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 includes 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. No. 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 person’s 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 a solicitation 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 market 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 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 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 regularly 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.

(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 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 Sec. 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 Secs. 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 Sec. 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 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 pursuant to a written disposal plan.

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

(i) 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;

(ii) 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

(iii) 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 information 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.

### 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

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

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

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

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

[Company name]

[Company address]

Do not market to me.

By the Commission,  
Dated: October 19, 2010.

**David A. Stawick,**

*Secretary.*

#### **Statement of Chairman Gary Gensler**

##### **Business Affiliate Marketing and Disposal of Consumer Information Rules**

**October 19, 2010**

I support today's Commission vote on the proposed rulemaking providing privacy protections to nonpublic, consumer information held by entities that are subject to the jurisdiction of the Commission. The proposed rulemaking provides customers of Commission-regulated entities with the same privacy protections now enjoyed by the customers of entities regulated by other Federal agencies.

The proposal includes two important rules. The first allows customers to prohibit Commission-regulated entities from using certain consumer information obtained from an affiliate to make solicitations to that customer for marketing purposes. This will be done by means of a customer opt out. The second rule requires Commission-regulated entities to develop and implement a written program and procedures for the proper disposal of consumer information. I believe that these rules will help prevent the unauthorized use and disclosure of nonpublic, consumer information.

[FR Doc. 2010-26893 Filed 10-26-10; 8:45 am]

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