

# Questions and Answers about the Affiliate Marketing Regulation

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On October 30, 2007, the Federal Trade Commission published final regulations implementing Section 214 of the Fair and Accurate Credit Reporting Act (“FACT Act”). The Federal banking agencies and the National Credit Union Administration published essentially similar final regulations in November of 2007.

In general, Section 214 provides that if a business receives information about a consumer from an affiliated company, it may not use that information for marketing purposes, unless the consumer is given notice and an opportunity to prohibit the use of the information for marketing purposes, or, in the language of the regulation, to “opt-out”. The new regulations are effective as of October 1, 2008.

## 1. What is an affiliate marketing notice?

An affiliate marketing notice is a concise notice that your firm sends to consumers explaining that certain information may be used by an affiliate for marketing purposes. The notice must also explain how the consumer can “opt out” of the marketing program.

## 2. What information triggers the notice requirement?

The notice is triggered if you want to provide “eligibility information” to an affiliate. The term “eligibility information” includes any information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. It also includes information regarding transactions between the consumer and your firm, so-called “experience” information. For instance, if you want to disclose to an affiliate the names of customers who pay their bills on time for purposes of marketing to these individuals, the affiliate marketing notice requirements apply.

## 3. What is meant by “marketing”?

Under the regulation, your affiliate will be deemed to be using information for marketing purposes if the affiliate identifies the names or types of potential customers from the data provided and the affiliate solicits business from those individuals. One example is sending the names of people who recently purchased a house and who have a FICO score of 700 or above to an affiliated securities broker, who then calls these

individuals and invites them to open a brokerage account. The information is used for marketing and therefore the notice requirement is triggered.

Another example is entering the names of selected customers into a database of high net worth individuals, and having an affiliated brokerage company ask you to send out information about their firm to people they select from the database. Even though your firm is doing the solicitation, the affiliate has selected the names of the prospects, and therefore the affiliate marketing notice is required.

### **4. I have business relationships with a number of companies. Are they affiliates?**

An affiliate is a company that you control, or a company that controls your firm. An affiliate is also a sister company. A sister company is a company that is controlled by the same parent organization that controls your company. Some examples will help clarify:

- a.) Your firm has a subsidiary company that provides property management services. The property services company is your affiliate.
- b.) An insurance company owns your firm. The insurance company is your affiliate.
- c.) A builder owns both your firm and a title company. The title company is an affiliate because you have the same parent, and the builder is an affiliate because that company owns your firm.

### **5. What is meant by “control”?**

One company controls another if it has the power to vote 25 percent or more of the voting shares of that company, or has the power to control the directors of that company, or has a controlling influence over the company in any other manner.

### **6. I have an arrangement with an independent home repair company. I refer individuals who recently purchased a home, and want to correct defects discovered during the inspection. If the repair company is hired, I receive a “finder’s fee.” Is the home repair company an affiliate?**

No. It is an independent company and your relationship with it does not give you any control over the company. The affiliate marketing notice is not required.

### **7. My real estate brokerage is a separate company, located in Washington, D.C. However, it is owned by a larger company**

**that controls real estate brokerages in several Mid-Atlantic States. I recently received a lead from one of these companies located in Richmond that they sold a home for a customer who is relocating to Washington and is well qualified to purchase a home in the D.C. area. Under the regulation, can I market my services to this individual?**

Before you can solicit this individual to use your services, the Richmond brokerage must provide an affiliate marketing notice to its customer with an opportunity to opt out. Until the notice and opt out period has expired, you may not solicit business from this individual based on the information provided by the Richmond brokerage.

If instead of the above facts, the Richmond brokerage was a freestanding company and not owned by your parent company, and your relationship with the Richmond company was based on belonging to a regional professional association or other cooperative arrangement, no affiliate marketing notice would be required.

**8. I already provide a privacy notice and opt-out form to all of my customers. Do I have to do anything further under this regulation?**

Yes. This regulation is separate from the privacy notices and opt-out forms that are required under the privacy rules. In this case you will have to give two notices to your customers: the privacy notice and a notice that information provided to an affiliate will be used for marketing, and an opportunity for the consumer to opt-out.

**9. Are you serious? I have to provide two notices?**

Yes. Two notices are required because they are serving two different purposes. The privacy notice informs consumers that their information may be *shared* with an affiliate. The mandated affiliate marketing notice under this regulation informs the consumer that the information will be *used* by an affiliate for marketing purposes. Thus, two notices and two opt-out opportunities are required.

**10. Can I combine both notices on one form?**

Yes, as long as the requirements for each notice are met.

### **11. Can the notice be provided by the affiliate that is going to use the information to market its products, or must my company provide the notice?**

The notice and opportunity to opt out has to be provided by the company that has a pre-existing customer relationship. Typically this is the company that is providing the information to the affiliate.

### **12. What does the notice have to say?**

The notice must provide a clear, conspicuous and concise statement that includes:

- The name of the company providing the notice.
- The name of the affiliate or types of affiliates that will receive the information.
- A general description of the types of information that may be used for marketing purposes.
- The consumer may limit or prohibit the use of the information for marketing purposes.
- That the election to opt out will apply for the time specified in the notice, and can be renewed when the period expires.
- A reasonable and simple method to opt out.

### **13. Is there a model form?**

Yes. The regulations include a model form. The Appendix to this Question and Answer document reproduces the model forms published in the Federal Register.

### **14. Can the notice be sent electronically? Can it be provided in person?**

The notice must be provided in a manner “so that each consumer can reasonably be expected to receive actual notice.” It may be hand delivered, mailed to the consumer’s last known address, or provided by email to a consumer who has agreed to receive electronic disclosures. It can also be posted on an Internet web site at which the consumer obtained a product or service, provided the consumer acknowledges receipt of the notice.

### **15. What is a reasonable opportunity to opt out?**

A reasonable opportunity to opt out would be to permit the consumer 30 days to mail back an opt out form in a stamped and addressed envelope. Alternatively, you can provide a toll free phone number for purposes of the opt out. If the consumer has agreed to accept electronic notices, and the consumer has acknowledged receipt of the affiliate marketing notice, then an electronic opt out would also be considered reasonable. If the affiliate marketing notice is provided in person, the customer can be asked to sign a form at the same time and to either check a box (yes or no to the opt out), or to write the words “yes” or “no.” If the affiliate marketing notice is combined with a privacy notice, the consumer should be allowed to opt out of the marketing arrangement in the same manner as the opt out under the privacy notice.

### **16. For how long does the opt out notice apply?**

The opt out is not permanent, but must last at least five years. After the opt out expires, the consumer must be given a new affiliate marketing notice with a new opt out opportunity before information can be used by an affiliate for marketing purposes.

### **17. My affiliate already has a relationship with the consumer. Do I still have to provide an affiliate marketing notice?**

No. If the affiliate has a pre-existing relationship with the consumer, you may share information with the affiliate for marketing purposes without complying with the affiliate marketing notice requirement. A pre-existing relationship includes relationships that ended within 18 months of the date in which the solicitation is going to be made. For example, if the affiliate is an insurance company, and the consumer has a policy with that company, the insurance company may use your information for additional marketing to that consumer without providing the affiliate marketing notice. If the insurance policy was cancelled within 18 months of the solicitation, no affiliate marketing notice is required even though the consumer is no longer a customer of the insurance company.

### **18. What are the rules if the consumer made an inquiry to purchase goods or services from my affiliate?**

If the consumer made an inquiry to purchase goods or services within 3 months of the solicitation, an affiliate marketing notice is not required. For example, if your affiliate is a lender, and the consumer inquired about a loan product less than 3 months before the

planned date of the solicitation, your affiliated lender may use your information without the need to comply with the notice provisions required under this regulation.

### **19. I use a service provider to help me market. What are the rules relating to these companies?**

A company that provides services for you, such as marketing your products to consumers, is considered your agent, and is thus subject to the same rules that apply to you directly. If you obtain eligibility information from an affiliate, your service provider can use that information for soliciting new business, but only if the affiliate marketing notice and opt out requirements have been met.

### **20. Can I provide certain criteria to an affiliated company and ask that company to market my products to its customers who meet the standards I have set up? For example, can I ask an affiliated mortgage lender to market my brokerage services to its customers with a FICO score in excess of 680?**

Yes, under the regulation an affiliate can use the information it has obtained from an existing customer to market your products and services, provided you do not select the names of the people to be solicited. Further, subject to certain technical restrictions, the affiliate can even ask its servicing company to market your products, based on criteria you have established.

### **21. Who can I call for more information about the affiliated marketing regulation?**

The FTC Bureau of Consumer Protection, Division of Privacy and Identity Protection, can be reached at (202) 326-2252. You may also call Scott Rinn at NAR's office in Washington, DC at (202) 383-7508.

## *Appendix*

### *Model Forms*

#### 1. C-1 Model Form for Initial Opt-out Notice (Single-Affiliate Notice)

##### **[Your Choice to Limit Marketing]/[Marketing Opt-out]**

- [Name of Affiliate] is providing this notice.
- [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]
- You may limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].
- Your choice to limit marketing offers from our affiliates will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years]/[at least another 5 years].
- [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

##### **To limit marketing offers, contact us [include all that apply]:**

- **By telephone:** 1-877-###-####
- **On the Web:** [www.—.com](http://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.

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## 2. C-2 Model Form for Initial Opt-out Notice (Joint Notice)

### **[Your Choice to Limit Marketing]/[Marketing Opt-out]**

- The [ABC group of companies] is providing this notice.
- [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]
- You may limit the [ABC companies], such as the [ABC credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].
- Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years]/[at least another 5 years].
- [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from the [ABC] companies, you do not need to act again until you receive the renewal notice.

### **To limit marketing offers, contact us [include all that apply]:**

- **By telephone:** 1-877-###-####
- **On the Web:** [www.—.com](http://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.

### 3. C-3 Model Form for Renewal Notice (Single-Affiliate Notice)

**[Renewing Your Choice to Limit Marketing]/[Renewing Your Marketing Opt-out]**

- [Name of Affiliate] is providing this notice.
- [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]
- You previously chose to limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].
- Your choice has expired or is about to expire.

**To renew your choice to limit marketing for [x] more years, contact us** [include all that applies]:

- **By telephone:** 1-877-###-####
- **On the Web:** [www.—.com](http://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.

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#### 4. C-4 Model Form for Renewal Notice (Joint Notice)

##### **[Renewing Your Choice to Limit Marketing]/[Renewing Your Marketing Opt-out]**

- The [ABC group of companies] is providing this notice.
- [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]
- You previously chose to limit the [ABC companies], such as the [ABC credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].
- Your choice has expired or is about to expire.

**To renew your choice to limit marketing for [x] more years, contact us** [include all that applies]:

- **By telephone:** 1-877-###-####
- **On the Web:** [www.—.com](http://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.

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## 5. C-5 Model Form for Voluntary “No Marketing” Notice

### Your Choice to Stop Marketing

- [Name of Affiliate] is providing this notice.
- You may choose to stop all marketing from us and our affiliates.

**To stop all marketing offers, contact us** [include all that apply]:

- **By telephone:** 1-877-###-####
- **On the Web:** [www.—.com](#)
- **By mail:** check the box and complete the form below, and send the form to:

[Company name]

[Company address]

Do not market to me.