



## Regulation S-AM: Limitations on Affiliate Marketing A Small Entity Compliance Guide<sup>1</sup>

### Introduction

The Securities and Exchange Commission ("Commission") recently adopted new Regulation S-AM under the Fair Credit Reporting Act ("FCRA") as amended by the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") and under the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. Regulation S-AM allows a consumer, in certain limited situations, to block affiliates of covered persons (*i.e.*, brokers, dealers, investment companies, investment advisers registered with the Commission, and transfer agents registered with the Commission) 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 covered person) received from the covered person. Unlike Regulation S-P, which implements the financial privacy provisions of the Gramm-Leach-Bliley Act, Regulation S-AM does not limit a covered person's ability to share information. Instead, it limits a covered person's ability to use eligibility information received from an affiliate to solicit a consumer for marketing purposes.

Regulation S-AM was adopted in consultation and coordination with the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration and the Federal Trade Commission ("other agencies"). As required by Section 214 of the FACT Act and in order to avoid any regulatory confusion, Regulation S-AM is consistent and comparable with the similar regulations adopted by the other agencies.

### How Does Regulation S-AM Operate?

Under Regulation S-AM, a covered person is prohibited from using eligibility information that it receives from an affiliate to make a marketing solicitation unless: (1) the potential marketing use of that information has been clearly, conspicuously and concisely disclosed to the consumer; (2) the consumer has been provided a reasonable opportunity and a simple method to opt out of receiving the marketing solicitations; and (3) the consumer has not opted out.

### Notice and Opt Out Requirement

The notice and opt out opportunity must be provided to a consumer before an affiliate uses eligibility information to make a marketing solicitation. The notice and opt out opportunity must be provided to the consumer either: (1) by a company with which the consumer has or had a pre-existing business relationship; 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 providing the joint notice has or had a pre existing business relationship with the consumer.

### **Scope and Duration of the Opt Out**

The scope of the opt out depends upon the content of the opt out notice. A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit marketing solicitations, such as electing to prohibit marketing solicitations from certain types of affiliates or to prohibit certain types of delivery methods. One of the alternatives, however, must allow the consumer to prohibit all marketing solicitations from all affiliates that are covered by a notice. In addition, the opt out must be effective for at least 5 years and the consumer must be allowed to opt out at any time. A covered person can, however, choose to set an opt out period that does not expire unless revoked by the customer.

### **Contents of the Opt Out Notice; Consolidated and Equivalent Notices**

The notice and opt out opportunity must be clear, conspicuous and concise. It must identify the affiliate providing the notice, or, if it is a joint notice, the company or group of companies providing the notice. If two or more consumers jointly obtain a product or service, a single opt out notice may be provided to the joint consumers. In addition, the notice and opt out required under Regulation S-AM may be consolidated or coordinated with other notices and opt out opportunities required by law, such as a privacy notice required by Regulation S-P.

### **Reasonable Opportunity to Opt Out**

Regulation S-AM requires that consumers be given a reasonable opportunity to opt out. Examples of reasonable opportunities to opt out include:

- By mail;
- By electronic means, such as a posting at an Internet Web site or through e-mail where the consumer has agreed to receive disclosure by e-mail;
- At the time of an electronic transaction, such as a transaction conducted on an Internet Web site as a necessary part of proceeding with the transaction;
- At the time of an in-person transaction, in writing, as a necessary part of proceeding with the transaction; or
- By including the notice and opt out as part of a privacy notice required by Regulation S-P.

### **Reasonable and Simple Method of Opting Out**

In addition to being given a reasonable opportunity to opt out, consumers must also be given a reasonable and simple method of opting out. Examples of reasonable and simple methods of opting out include:

- Designating a check-off box in a prominent position on an opt out form;
- Including a reply form and self-addressed envelope together with the opt out notice;
- Providing an electronic means to opt out, such as a form that can be e-mailed or processed at an Internet Web site (if the consumer agrees to electronic delivery of information);
- Providing a toll-free telephone number that consumers can call to opt out; or
- Allowing consumers to exercise all of his or her opt out rights, as described in a consolidated notice by a single method, such as by calling a single toll-free telephone number.

A covered person may require each consumer to opt out through a specific means as long as that means is reasonable and simple for the consumer.

### **Delivery of Opt Out Notices**

The opt out notice must be provided so that each consumer can reasonably be expected to receive actual notice. Examples of delivery methods that a consumer may reasonably be expected to receive actual notice include:

- Hand delivery of a printed copy of the notice to the consumer;
- Mail delivery of a printed copy of the notice to the last known mailing address of the consumer;
- E-mail delivery of the notice if the consumer has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or
- Posting the notice on the Internet Web site where the consumer obtains a product or service electronically, and requiring the consumer to acknowledge receipt of the notice.

### **Renewal of Opt Out Elections**

After expiration of an opt out period, a covered person cannot make marketing solicitations to a consumer who has previously opted out unless the consumer has been given a renewal notice and a reasonable opportunity to renew the opt out and the consumer does not renew the opt out. Each renewal must be effective for at least 5 years and must be provided either: (1) by the affiliate that provided the previous opt out notice, or its successor; or (2) as part of a joint notice from two or more members of an affiliated group of companies, or their successors that jointly provided the previous opt out notice. In addition, the renewal notice must:

- Identify the company or companies providing the renewal notice;
- Identify the affiliate or types of affiliates whose use of eligibility information is covered by the notice;

- Include a general description of the types of eligibility information that may be used to make marketing solicitations;
- Indicate that the consumer has previously opted out;
- Indicate that the previous opt out has or is about to expire;
- Indicate that the consumer may elect to renew the previous opt out;
- Indicate, if applicable, that the consumer's opt out would apply for a specified period of time (*e.g.*, 5 years) and that the consumer will be allowed to renew the opt out once that period of time expires; and
- Provide a reasonable and simple method for opting out.

The renewal notice may be provided within a reasonable time before the expiration of the opt out period or any time after the expiration of the opt out period, provided marketing solicitations are not sent during the intervening time period. The renewal notice may be provided as part of an annual privacy notice required by Regulation S P. However, the opt out period may not be shortened by sending a renewal notice before the expiration of the opt out period, even if the consumer does not renew the opt out.

### Model Forms

Model forms have been included in an appendix to Regulation S-AM. Covered persons may choose to use or not use the model forms, or modify the forms, provided the requirements of Regulation S-AM are met. However, covered persons that modify the forms or use different forms to satisfy their affiliate marketing notice obligations should ensure that their notices are clear, conspicuous, and concise.

### Other Resources

The adopting release for new Regulation S-AM can be found on the SEC's website at <http://www.sec.gov/rules/final/2009/34-60423.pdf>.

### Contacting the SEC

The SEC's Division of Trading and Markets and Division of Investment Management are happy to assist small companies with questions regarding new Regulation S-AM. Both divisions can answer questions submitted by e-mail or telephone. You can submit a question by e-mail to the Division of Trading and Markets at [tradingandmarkets@sec.gov](mailto:tradingandmarkets@sec.gov) and to the Division of Investment Management at [IARules@sec.gov](mailto:IARules@sec.gov), and a staff member will call you to discuss your question. You can also contact the Division of Trading and Markets at (202) 551-5777 and the Division of Investment Management at (202) 551-6865.

<http://www.sec.gov/divisions/marketreg/tmcompliance/34-60423-secg.htm>