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August 16, 2007

Communications Division
Office of the Comptroller of the Currency
Public Information Room
Attention: OMB Control # 1557-0230
250 E Street, S.W.
Washington, D.C. 20219

Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
OMB Control # 3064-0149

Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attention: OMB Control # 1550-0112

OMB Desk Officer for OCC, FDIC
and OTS
Office of Information and
Regulatory Affairs
Office of Management and Budget
New Executive Office Building
Washington, D.C. 20503

Re: Affiliate Marketing/Consumer Opt-Out Notices

Ladies and Gentlemen:

INTRODUCTION

This comment is being submitted in connection with the proposal of the Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation and Office of Thrift Supervision (the "Agencies") to extend the current OMB clearance for information collection requirements contained in the Agencies' proposed Affiliate Marketing Rule. 72 *Fed. Reg.* 33505 (June 18, 2007). We believe that it is inappropriate to extend the information collection requirements contained in the Agencies' proposed Affiliate Marketing Rule in view of the fact that the Affiliate Marketing Rule has not as yet been finalized by the Agencies and in view of the lack of clarity as to how the information required in the Agencies' model form ("Model Form") proposed under the privacy

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provisions of the Gramm-Leach-Bliley Act (“GLB Act”)¹ is to be harmonized with the undetermined requirements of the Affiliate Marketing Rule.

Interested parties cannot possibly provide meaningful comment on the proposed information collection requirements when the regulations upon which the requirements are based have yet to be finalized. Moreover, meaningful assessment of the collection requirements is further complicated by the fact that the Agencies have proposed to incorporate the requirements into the Model Form that was proposed in connection with depository institutions’ notice and disclosure obligations under the GLB Act. *72 Fed. Reg.* at 14952.

Because the information collection requirements of the proposed GLB Act Model Form proposed by the Agencies in March will incorporate the information collection requirements which are currently under consideration, we believe it is appropriate for the Agencies to defer action on this request until such time as the scope and content of the Model Form is finally resolved. Moreover, good public policy suggests that the Agencies should re-solicit public comment when a final Affiliate Marketing Rule and Model Form are promulgated. Deferral of this matter until the Affiliate Marketing Rule and Model Form are finalized, and re-solicitation of public comment at that time would provide interested parties the opportunity to assess regulatory burden in light of the requirements of concrete regulatory requirements and provide more meaningful comment than is possible at this time.

DISCUSSION

The Agencies’ Affiliate Marketing Rule was proposed in 2004 in accordance with § 214 of the Fair and Accurate Credit Transactions Act (“FACT Act”). *See 69 Fed. Reg.* 33324 (June 15, 2004). The proposed Affiliate Marketing Rule specifies disclosure requirements for certain affiliated companies subject to the Agencies’ jurisdiction. These requirements constitute “collections of information” for purposes of the Paperwork Reduction Act. *See 44 U.S.C. § 3502(3)*. Specifically, the FACT Act and the proposed Affiliate Marketing Rule require certain companies to provide consumers with notice and

¹ *See 72 Fed. Reg.* 14940 (March 29, 2007).

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an opportunity to opt out of the use of certain information by affiliates before their affiliates send marketing solicitations to them.

The Agencies' proposed Affiliate Marketing Rule includes model disclosures and opt-out notices that could be used to satisfy the requirements of the FACT Act and the proposed Affiliate Marketing Rule. Depository institutions could also satisfy the notice and opt-out requirement by sending consumers a free-standing opt-out notice or by adding the opt-out notice to the privacy notices already provided to consumers in accordance with the provisions of the GLB Act.

The Agencies' Affiliate Marketing Rule and Model Form proposals were controversial. Numerous commenters expressed substantial concerns with both proposals. As a result, it is likely that the Agencies will consider significant modifications before they are finalized. Given the uncertain nature of the changes that may be forthcoming in the scope of the notices as well as their formats, we believe the Agencies' estimates of the likely burden are likely to need substantial revision. Accordingly, common sense would suggest that it is inappropriate to move forward with the proposed collection requirement.

CONSISTENCY WITH PAPERWORK REDUCTION ACT

One important purpose of the Paperwork Reduction Act is to minimize the paperwork burden for small businesses and others resulting from the collection of information by the government. 44 U.S.C. § 3501(1). Congress directed the Office of Management and Budget to minimize the information collection burden on those entities most adversely affected by the requirements. 44 U.S.C. § 3504(c)(3). Federal agencies such as the Agencies are to provide the public with an opportunity to evaluate whether the proposed collection of information is necessary for the proper performance of their functions, evaluate the accuracy of their burden estimate, enhance the quality, utility and clarity of the information to be collected, and minimize the burden of the information collection requirement. 44 U.S.C. § 3506(c)(2)(A). In this regard, we note that the

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Agencies' burden estimate varies quite markedly from the burden estimate of the Federal Trade Commission (the "Commission") for the exact same information collection. *72 Fed. Reg.* 28491 (May 21, 2007). The Agencies estimate that the total annual burden is 18 hours per institution and 5 minutes per customer. *See 72 Fed. Reg.* at 33505. The Commission, however, estimates that entities subject to the GLB Act will incur an annual burden of 6 hours for the first year of the clearance period and a burden of 4 hours in subsequent years. *See 72 Fed. Reg.* at 28493 (May 21, 2007). Because their information collection requirements are virtually identical, it is difficult to explain the large (12-14 hour per year per institution) discrepancy between the burden estimates of the Agencies and the Commission. This variance alone should compel OMB to defer action on these requests and suggest that the Agencies go back to the drawing board.

In view of the uncertain scope of the proposed Affiliate Marketing Rule, the lack of understanding as to how the information collection requirements of the proposed Affiliate Marketing Rule will be harmonized with the requirements of the proposed Model Form, and material questions regarding the reasonableness of the burden estimates we believe that the public cannot possibly provide meaningful comments that address the factors set forth in the Paperwork Reduction Act.

Accordingly, we believe that the Agencies' should defer continuation of the information collection requirements contained in the proposed Affiliate Marketing Rule until the rule and the GLB Act Model Form are finalized.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Schwartz", with a long horizontal flourish extending to the right.

Gilbert T. Schwartz