Non-Securities Regulations Continue to Rain Down on Securities Firms: Regulation S-AM is the Latest

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It is no surprise to financial firms that because of the Madoff scandal, the market downturn and other recent events, they soon will have to comply with a slew of new securities regulations. What is surprising is that financial firms continue to be deluged with new non-securities regulations. Many of these regulations spawned from consumer protection laws enacted at the beginning of the decade. Financial firms generally were not involved in the activities that led to the enactment of these consumer protection laws. Nevertheless, the broad reach of these statutes swept financial firms within their ambit. It is also notable that state privacy and data protection laws, which are not the subject of this article, continue to proliferate and many are applicable to financial firms.[1]

The most recent example is Regulation S-AM. It is a sequel to two other consumer protection rules applicable to financial firms: Regulation S-P, a set of rules governing privacy protection and data security that were adopted in 2000, and the "red flag" rules governing identity theft that were adopted in 2008. Regulation S-AM was adopted by the Securities and Exchange Commission ("SEC") on August 4, 2009. As explained below, Regulation S-AM prohibits financial firms from using certain consumer information provided by their affiliates to market products or services, unless there is full disclosure to the consumer and the consumer does not "opt-out" of such marketing. Compliance with Regulation S-AM is required by June 1, 2010.[2]

Background

Congress recently has enacted a number of consumer protection laws, which in the last decade have crept into the financial services

industry. The federal agency rules they mandated originated from two legislative initiatives: the Gramm-Leach-Bliley Act ("GLBA") enacted in 1999 and the Fair Credit Reporting Act ("FCRA") enacted in 1971.

Section 504 of the GLBA required the SEC (and certain other federal agencies) to adopt rules implementing notice requirements and restrictions on a financial firm's ability to disclose nonpublic personal information about consumers. In response, the SEC in 2000 adopted Regulation S-P, which requires a financial firm to provide its customers with a notice of its privacy policies and practices.[3] Regulation S-P also requires financial firms to establish safeguards to protect consumer information. In addition, Regulation S-P prohibits financial firms from disclosing nonpublic personal information about a consumer to nonaffiliated third parties unless the financial firm provides certain information to the consumer and the consumer has not elected to opt out of the disclosure.[4] Importantly, especially with respect to Regulation S-AM, Regulation S-P generally allows a financial firm to share its consumer information with its affiliates.

FCRA, the second major legislative initiative, was enacted to regulate the collection, dissemination and use of consumer information, particularly consumer credit information used for credit evaluation.[5] Congress amended the FCRA on several occasions, most notably in 2003 when it passed the Fair and Accurate Credit Transactions Act ("FACTA"). FACTA has impacted financial firms two ways: the red flag rules and Regulation S-AM, which is the focus of this article.

Section 114 of FACTA, commonly referred to as the "red flag" provision, required the Federal Trade Commission ("FTC") and certain other federal agencies to promulgate rules requiring firms to have in place procedures and guidelines identifying patterns, practices and specific forms of identity theft, and to have identity theft prevention programs.[6] On January 1, 2008, the FTC adopted regulations as required by FACTA that required financial firms with "covered accounts" to implement written identity theft prevention programs. The FTC has delayed the effectiveness of these regulations several times.

In addition to the red flag provisions of Section 114, FACTA contains Section 214, which requires the SEC and certain other federal agencies to adopt rules imposing limitations on a financial firm's use of consumer information received from an affiliate to solicit consumers of the financial firm for marketing purposes unless the consumer has been given notice and an opportunity to opt out of having his or her information used for such purposes. Congress believed that since it allowed firms and affiliates to share consumer information among each other under the GLBA, consumers needed the ability to stop a company's affiliates from sharing customer data for marketing purposes. Thus, FACTA gives consumers a second kind of opt-out ability. This new opt-out choice as explained below allows consumers to stop information sharing among affiliates when the purpose is for marketing. It thus gives the consumer the ability to prevent the affiliate receiving his or her information from using such information in connection with solicitation for products and services.

Regulation S-AM

In compliance with FACTA, the SEC proposed Regulation S-AM in 2004 and later adopted it on August 4, 2009.[7] When Regulation S-AM is effective, a financial firm desiring to market its products and services to consumers of affiliates will have to have procedures in place that prevent the financial firm from using information about those consumers obtained from its affiliate unless certain conditions are met or exceptions to the rule are available.

Marketing Activities by the Financial Firm Subject to Regulation S-AM

Regulation S-AM applies to broker-dealers, investment companies, investment advisers and transfer agents, which, for purposes of this article, are called "financial firms." If any of these entities propose to use eligibility information obtained from affiliates to solicit consumers of affiliates, such firm will have to comply with Regulation S-AM.[8] It is possible that both the financial firm and its affiliate will be subject to the regulation. For example, an investment adviser may desire to use eligibility information obtained from an affiliated broker-dealer about the broker-dealer's consumers to market its advisory product to those

consumers; such broker-dealer may desire to use eligibility information obtained from the affiliated adviser about the adviser's consumers to market it's brokerage services to those consumers. In both cases, the solicitation activities would be subject to Regulation S-AM. Such an occurrence is more likely if their respective consumers' data is housed in a common data base.

When Regulation S-AM Applies

If the financial firm proposes to engage in marketing activities involving its affiliate's consumers' eligibility information, it must determine: (i) whether the proposed marketing activities are subject to Regulation S-AM; and (ii) whether the manner in which the firm will use the information will cause Regulation S-AM to apply.

Marketing activities subject to Regulation S-AM include telemarketing calls, direct mail, e-mails, or other forms of marketing communication directed to a particular consumer.

Assuming it's specific activities are subject to Regulation S-AM, that rule will apply to a financial firm under the following three conditions:

1. The financial firm receives eligibility information from its affiliate;
2. The financial firm uses that eligibility information to:
   - identify the consumer or type of consumer to receive a marketing solicitation;
   - establish criteria used to select the consumer to receive a marketing solicitation; or
   - decide which products or services to market to the consumer, or to tailor a marketing solicitation for that consumer; and
3. As a result of the use of the eligibility information, the financial firm promotes its products or services to consumers with the intent of encouraging that consumer to obtain such products or services (the "3 Conditions").[9]

The following example illustrates the application of the rule. Assume Wal-Mart has an affiliated investment adviser called Sam's Adviser located in Arkansas. Sam's Adviser would potentially be subject to Regulation S-AM because it is an SEC-registered investment adviser.[10] Sam's Advisor desires to market its advisory services to Wal-Mart consumers located in Arkansas. Sam's Adviser seeks the names of the Wal-Mart consumers and certain information about them so that it can have a more effective marketing campaign (e.g., consumer's location and purchases in a given year).

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Wal-Mart provides the requested information to Sam's Adviser about those customers, satisfying Condition 1. Sam's Adviser processes the Wal-Mart consumer information to identify those consumers most likely to need advisory services, satisfying Condition 2. Sam's Adviser sends its brochures to the targeted Wal-Mart consumers located in Arkansas, satisfying Condition 3. Thus, under these facts, Regulation S-AM prohibits Sam's Adviser from using the Wal-Mart information about the Arkansas consumers to market its advisory services to those consumers unless it meets the notice and opt-out requirements of the rule and the consumers have not opted out from such affiliate marketing solicitations. This example assumes that no exceptions are available.

Service Providers

Certain financial firms use affiliated or third-party companies to market their products or services. The SEC in Regulation S-AM labels these companies as "service providers." Under paragraph (b)(3) of Regulation S-AM, an arrangement whereby the service provider acting on behalf of the financial firm that receives an affiliate's consumer eligibility information, uses that information to develop marketing criteria and markets the financial firm's services to the affiliate's consumers services, will

be subject to Regulation S-AM.[11] In such a case, the service provider steps into the shoes of the financial firm and the service provider's marketing activities are attributed to the financial firm. In the Wal-Mart example above, Regulation S-AM would apply if Wal-Mart provides the requested information to Sam's Adviser's service provider, the service provider processes the Wal-Mart consumer information to identify those consumers most likely to need advisory services, and the service provider sends Sam's Adviser's brochures to the targeted Wal-Mart consumers.

Constructive Sharing

A financial firm often is part of a group of affiliated companies. It is common for this group of companies to establish a common database as the repository of consumer eligibility information gathered by the companies, which the SEC calls "constructive sharing" in paragraph (b)(2) of Regulation S-AM. Each of the affiliated companies can access the common data base. In addition, the affiliated companies often contract with the same service provider to perform marketing services.

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Constructive sharing raised several issues under Regulation S-AM. Most notably, the SEC had to grapple with the issue of whether a financial firm that received information from an affiliate through constructive sharing, used that information in developing its marketing plan and made a "marketing solicitation" (*i.e.,* marketed it services) to the consumers of that affiliate (*i.e.,* it satisfied the 3 Conditions), was subject to the opt-out provisions of Regulation S-AM.

Paragraph (b)(2) provides that the receipt of eligibility information by a financial firm from an affiliate through constructive sharing constitutes the receipt of eligibility information for purposes of condition 1 of the 3 Conditions. It follows that if the financial firm uses such eligibility information in connection with a marketing plan (*i.e.,* it satisfies condition 2 of the 3 Conditions) and engages in a marketing solicitation directed towards the affiliate's consumers (*i.e.,* it satisfies condition 3), this marketing activity by the financial firm will be subject to Regulation S-AM. The one exception, provided by paragraph (b)(4)(i) of Regulation S-AM, is if the financial firm uses its own eligibility information that it obtained in connection with a pre-existing relationship it has had with the affiliate's consumer.

An example illustrates how Regulation S-AM applies to constructive sharing arrangements. A broker-dealer, a financial firm covered by Regulation S-AM, is affiliated with an investment adviser. Eligibility information about the investment adviser's consumers is maintained in a common data base that the broker-dealer can independently access. The broker-dealer uses the adviser's eligibility information about the adviser's consumers to develop selection criteria (e.g., adviser consumers with $1 million or more of assets under management). The broker-dealer provides the selection criteria and its marketing materials to the adviser. After applying the selection criteria to its consumers, the adviser sends the broker-dealer marketing materials to the adviser's consumers.

Regulation S-AM would apply to this arrangement because the 3 Conditions are met: (i) the broker-dealer through the common data bases receives eligibility information from an affiliate; (ii) it develops marketing criteria based on the eligibility information of the adviser's consumers; and (iii) the broker-dealer through the adviser engages in a market solicitation activity. If, however, the broker-dealer had not developed its selection criteria by using eligibility information provided by the adviser, condition (ii) would not have been met and Regulation S-AM would not apply to the arrangement. In such a case, the adviser would have used the broker's selection criteria (which was not developed based on the adviser's

consumer eligibility information) to screen its consumers and ultimately to provide the consumers meeting the criteria with its broker-dealer's marketing materials.

Exceptions

The complexity of Regulation S-AM, as demonstrated above, is further magnified by the exceptions to the regulation. The three general types of exceptions are: (i) a general marketing exception; (ii) an exception applicable to service providers; and (iii) an exception available in constructive sharing arrangements.

General Marketing Exception

Regulation S-AM does not apply to financial firms making communications that are directed at the general public. The SEC explained in the Adopting Release that a marketing solicitation excludes radio, television, magazines of general circulation, and billboard advertisements, as well as publicly available Web sites that are directed at the general public. Thus, even if the 3 Conditions are present in a marketing arrangement, Regulation S-AM will not apply if the marketing solicitation only involves general marketing.

Service Provider Exception

As noted above, an arrangement whereby a financial firm employs a service provider to use eligibility information about an affiliate's consumers, the service provider develops marketing criteria using such information and markets the financial firm's products or services to the affiliate's consumers, would be subject to Regulation S-AM. Paragraph (b)(5) of Regulation S-AM provides an exception to this arrangement that turns on whether the affiliate had a pre-existing business relationship with the consumer and the affiliate, not the financial firm, controls the marketing solicitation. If the service provider obtains eligibility information from the affiliate about the affiliate's consumers and that eligibility information had been obtained by the affiliate in connection with a pre-existing relationship the affiliate had with the consumer, the service provider can market the financial firm's products or services to the affiliate's consumer without causing the financial firm to be subject to Regulation S-AM. Importantly, this exception is only available if the following 5 conditions are met:

(i) 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 financial firm's products or services;[12]
(ii) the affiliate establishes specific terms and conditions under which the service provider may access and use the affiliate's eligibility information to market the financial firm's products or services to the affiliate's consumers, and periodically evaluates the service provider's compliance with those terms and conditions;
(iii) the affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the affiliate relating to the marketing of the financial firm's products or services;
(iv) the affiliate is identified on or with the marketing materials provided to the consumer; and
(v) the financial firm does notdirectly use the affiliate's eligibility information to make a marketing solicitation.

These 5 conditions are intended to ensure that the service provider is acting on behalf of an affiliate that obtained the eligibility information in connection with a pre-existing business relationship.

In the Adopting Release, the SEC clarified the meaning of "pre-existing business relationship" to include not only relationships based upon a consumer's contract or account with a person, but also relationships based upon a consumer's inquiry or an application regarding a person's products or services within three (3) months before the marketing solicitation is made. Capturing a consumer's telephone number, return mail address, or Internet address (or data contained in an Internet "cookie") of a consumer contacting the affiliate does not constitute an "inquiry" for purposes of the service provider exception.[13] A call in response to an advertisement for a free promotional item does not constitute an inquiry about a product or service that would establish a pre-existing business relationship.[14] Consumer initiated inquiries unrelated to a product or service (e.g., to ask about an affiliate's

location and hours of service) do not qualify for the exception either.[15] However, if the consumer-initiated conversation evolves into a discussion of products or services and the consumer agrees to receive marketing materials and provides or confirms contact information at or by which he or she can receive those materials, then the marketing solicitation would be deemed to respond to a consumer-initiated communication and, therefore, come within the exception to the notice and opt-out requirements.[16] Visiting the publicly available Web site of a Covered Person should not, by itself, constitute an "inquiry" for purposes of the exception.[17]

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The service provider exception is also available in a constructive sharing arrangement, as illustrated by the following example.

The financial firm is a retail broker-dealer. An investment company is affiliated with the broker-dealer. Consumer information is maintained in a shared data base, which the investment company, the retail broker-dealer and a service provider can each independently access. The investment company has the ability to control the access and use of its consumers' (shareholders') eligibility information by the service provider. The retail broker-dealer desires to enter into an arrangement with the service provider, under which the service provider will use the investment company's consumer eligibility information to market the retail broker-dealer's products and services to the investment company consumers. The retail broker-dealer develops its own marketing selection criteria and provides those criteria and its marketing materials to the service provider. The service provider applies these criteria to the investment company's consumer eligibility information contained in the shared data base. Provided the other conditions of paragraph (b)(5) are met, including the creation of a written list of affiliated companies (that includes the retail broker-dealer) that may market their products and services to the investment company consumers), the broker-dealer through the arrangement with the service provider will not be deemed to be making a marketing solicitation to the investment company consumers and thus Regulation S-AM would not apply to it.

When Regulation S-AM Applies

When Regulation S-AM applies because a financial firm receives and uses eligibility information from an affiliate to making solicitations and none of the exceptions discussed above is available, a financial firm must satisfy the regulation's opt-out requirements and deliver the opt-out notice in an acceptable manner. It should also check to see if any of the opting-out and notice exceptions apply.

Opting Out

Prior to engaging in the marketing arrangement with particular consumers subject to Regulation S-AM, the financial firm must ensure that:

(1) the potential marketing use of the information has been clearly, conspicuously, and concisely disclosed to the consumer in an opt-out notice;
(2) the consumer has been provided a "reasonable opportunity" and a "simple method" to opt-out of receiving the marketing solicitation (the "opt-out notice"); and
(3) the consumer has *not* opted out.

Opt-Out Notice

Opt-out notices must be delivered electronically or in writing. They must:

- accurately disclose the name of the entity delivering the notice;[18]
- list the affiliates or types of affiliates whose use of eligibility information is covered by the notice;
- generally describe the types of eligibility information that may be used to make marketing solicitations to the consumer;[19] and
- state that the consumer's election will apply for the period of time specified in the notice and, if applicable, that the consumer can renew the election once that period expires.

The Appendix to Regulation S-AM provides model forms that, when used properly, will satisfy the requirement that an affiliate marketing notice be clear, conspicuous and concise. The financial firm may combine opt-out notices with other disclosures required by law, such as the initial and annual privacy notices required by Regulation S-P

Opting Out

Regulation S-AM requires the financial firm to give the consumer a reasonable opportunity to opt-out. The reasonableness requirement applies to both the timing and the methods of opting out. If the opt-out notice is mailed to the consumer, then the consumer should be given at least 30 days from the date the notice is mailed to opt-out. Thirty days, according to the SEC, is also a reasonable period for opting out when notices are provided electronically. If the consumer elected to receive disclosures by e-mail, the period would begin to run once the e-mail is sent to the consumer. If the notice is posted at an Internet Web site, the 30 days would begin to run after the consumer acknowledges receipt of the electronic notice. For electronic transactions, it would be reasonable according to the SEC to provide the opt-out notice to the consumer at the time of the transaction and to require that the consumer decide whether to opt-out before completing the transaction. For opt-out notices provided in writing at the time of an in-person transaction, it would also be reasonable according to the SEC to require that the consumer decide whether to opt-out before completing the transaction.

Regulation S-AM lists a number of examples of "reasonable and simple" ways to exercise the opt-out right, including:

(i) designating a check-off box in a prominent position on the opt-out form;
(ii) including a reply form and a self-addressed envelope with the opt-out notice;
(iii) providing an electronic means to opt-out for consumers who agree to electronic delivery of information; and
(iv) providing a toll-free telephone number.

Notice and Opting Out Exceptions

Regulation S-AM contains a number of exceptions to its notice and opt-out requirements potentially available to a financial firm.

Previous Delivery of an Opt-Out Notice by an Affiliate

A financial firm subject to Regulation S-AM will not have to deliver an opt-out notice to a consumer it is targeting in a marketing solicitation if that consumer had previously received an opt-out notice from an affiliate. Specifically, the opt-out notice must have been either:

(i) provided by an affiliate that currently has, or previously had, a pre-existing business relationship with the consumer; [20] or
(ii) part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates currently has, or previously had, a pre-existing business relationship with the consumer.

Joint Consumers

A financial firm may provide a single opt-out notice to two or more consumers who jointly obtain a product or service, if the following conditions are met:

- Any of the joint consumers may exercise the right to opt-out;
- the opt-out notice explains that the financial firm will permit one of the joint consumers to opt-out on behalf of all of the joint consumers, or whether each joint consumer must opt-out separately; and
- the financial firm does not require that all joint consumers opt-out before honoring an opt-out direction by any of the joint consumers.[21]

Employee Benefit Plans

The notice and opt-out requirements of Regulation S-AM generally do not apply to an employee benefit plan arrangements.[22]

Insurance Company Exception

Regulation S-AM does not apply if compliance would prevent a financial firm from complying with any provision of state insurance laws pertaining to "unfair discrimination" in any state in which the Covered Person is lawfully doing business.[23] This exception would apply to the use by an insurance company affiliate of a broker-dealer of eligibility information obtained from that broker-dealer to make marketing solicitations to a consumer with a brokerage account with the broker-dealer who had authorized or

requested information about life insurance offered by the broker-dealer's insurance company affiliate. The exception also would apply in situations in which the consumer checks a box on an application for an online brokerage account to authorize or request information from the broker-dealer's affiliates. The exception would not apply, however, if a brokerage account agreement with a consumer contains preprinted boilerplate language to the effect that by applying to open an account the consumer authorizes or requests to receive marketing solicitations from affiliates of the broker-dealer.

Effectiveness of Opt-Outs and Renewal Notice

With respect to the last requirement, each opt-out election must be effective for at least 5 years ("opt-out period"), beginning when the consumer's opt-out election is received and implemented. A consumer may elect to opt-out at any time. A consumer may revoke his/her opt-out election in writing or, for consumers who agree to electronic delivery of information, electronically.

After the opt-out period expires, however, a financial firm may not make marketing solicitations to that consumer unless the financial firm has provided that consumer with a renewal notice, given the consumer a reasonable way to renew his or her opt-out right, and the consumer has not exercised his or her right to opt out. Regulation S-AM specifies the content of the renewal notice.

Recordkeeping

Regulation S-AM contains extensive recordkeeping requirements. As noted earlier, before an affiliate can use eligibility information received from another affiliate to make marketing solicitations to a consumer, the consumer must be provided with notice of his or her right to opt out of such marketing. As a practical matter, Covered Persons must keep accurate records of any opt-out elections in order to honor the opt-out elections and to track the expiration of the opt out period. The opt out period expires after five years, at which point the consumer has the option to opt out again and extend this period. Records of any opt-out renewal notices and elections must also be kept.

Conclusion

Regulation S-AM is a complex set of rules grounded in consumer protection laws, a set of laws unfamiliar to most financial firms that primarily focus on complying with securities laws. The SEC recognized this complexity, as evident by the numerous hypothetical examples it includes in the rules as a means of explaining their application and scope. Fortunately, the SEC delayed its effective date to June 1, 2010. Financial firms should use this extra time to examine their marketing arrangements that involve the use of information about consumers of affiliates, especially when such information is housed in shared data bases. Once it grasps the scope of these marketing arrangements, the financial firm should analyze the extent to which Regulation S-AM applies, and if so, begin planning how it will comply with the regulation.

ENDNOTES

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1 For example, Massachusetts enacted the data protection law 201 CMR 17.

2 See Investment Company Act Rel. No. 28990 (Nov. 5, 2009), which extended the compliance date from January 1, 2010 to June 1, 2010.

3 See Privacy of Consumer Financial Information (Regulation S-P), Investment Company Act Release No. 24543 (June 22, 2000); 65 Fed. Reg. 40334 (June 29, 2000).

4 Consumer legislation and the rules adopted by federal agencies implementing the legislation refers to "consumers" or "customers" instead of "clients" and "investors."

5 This law, originally passed in 1970, ensures that consumers have access to information about them that lenders, insurers, and others obtain from credit bureaus and use to make decisions about providing credit and other services.

6 This identity protection requirement differs from a similar requirement in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (also known as the USA PATRIOT Act). That Act focuses primarily on money laundering and terror-

ism and includes a requirement mandating strong customer identification programs which serve as a first-line deterrent against identity theft.

[7] On July 8, 2004, the SEC proposed Regulation S-AM. See Investment Company Act Rel. No. 49985 (July 8, 2004).

[8] An "affiliate" is defined as any person that is related by common ownership or common control with the broker, dealer or investment company, or the investment adviser or transfer agent registered with the SEC. Section 248.120(a) of Regulation S-AM. "Control" of a company 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. Thus, the parent company, subsidiary or sister subsidiary (*i.e.,* a company that shares the same parent company) will be affiliates of the financial firm. A broker, dealer, or investment company, or an investment adviser or transfer agent registered with the SEC will also be deemed an affiliate of a company if (i) that company is regulated under section 214 of the FACTA, by a government regulatory other than the Commission; and (ii) rules adopted by the other government regulator under section 214 of the FACTA treat the broker, dealer, or investment company, or investment adviser or transfer agent registered with the Commission as an affiliate of that company. Id.

[9] *See* § 248.120(o) (definition of "marketing solicitation") and § 248.121(b) (describing how marketing solicitations are made).

[10] Firms covered by the rule are called "Covered Persons" in the rule.

[11] The SEC in the Adopting Release states that whether a particular company is acting as the financial firm's service provider will depend on the facts and circumstances of the arrangement.

[12] These terms and conditions must be set forth in a written agreement between the service provider and the affiliate. § 248.121(b)(5)(ii)(A).

[13] *See* Adopting Release at 35-36.

[14] *See* § 248.120(q)(3)(iii).

[15] *See* § 248.120(q)(3)(ii).

[16] Id § 248.120(q)(3)(ii).

[17] *See* Adopting Release at 36.

[18] If a notice is provided jointly by multiple affiliates that share a common name (e.g., "ABC"), the notice may indicate that it is being provided by multiple companies with the ABC name, or by multiple companies within the ABC group or family of companies. However, if the affiliates providing the joint notice do not all share a common name, then the notice must either (i) identify each affiliate by name, or (ii) identify each of the common names used by the affiliates.

[19] Section 248.122(a)(4) provides that a consumer may be given a "menu of alternatives" when electing to prohibit marketing solicitations, for example, prohibiting solicitations from only certain types of affiliates covered by the notice, prohibiting solicitations based on certain types of eligibility information, or prohibiting solicitations by certain methods of delivery. One of the alternatives must allow the consumer to prohibit all marketing solicitations from all affiliates covered by the notice.

[20] A pre-existing business relationship terminates when an investor redeems or sells investment company shares or closes or transfer an account.

[21] *See* Adopting Release at 82-83.

[22] *See* Section 247.20(c) of Regulation S-AM does not present an example of this exception.

[23] Section 247.20(c)(6) of Regulation S-AM.