



NATIONAL AUTOMOBILE DEALERS ASSOCIATION  
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**Legal & Regulatory Group**

July 28, 2004

**Via E-Mail**

Federal Trade Commission  
Office of the Secretary  
Room H-159 (Annex Q)  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580

Re: FACT Act Affiliate Marketing Rule, Matter No. R411006

Dear Sir/Madam:

The National Automobile Dealers Association (“NADA”) submits the following comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) notice and request for comment on the proposed Affiliate Marketing Rule as required under Section 214 of the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) which amends the Fair Credit Reporting Act (FCRA) by adding a new provision which restricts a person from using certain information received from an affiliate about a consumer, to make or send marketing solicitations to the consumer without a notice and opportunity to opt-out.

NADA represents approximately 20,000 franchised automobile and truck dealers who sell new and used vehicles and engage in service, repair and parts sales. Our members employ more than 1.3 million people nationwide. A significant number of our members are small businesses as defined by the Small Business Administration.

Responsibility for Providing Notice

The Commission is seeking comment on whether the affiliate receiving the information should be permitted to give the notice solely on its own behalf, or whether the party giving the information should maintain the responsibility. The Commission should permit either party to provide the notice, so long as the consumer receives it properly. This recognizes the possibility that when the information was first provided, there may not have been any intent to solicit to the consumer. This also recognizes that many financial institutions, such as automobile dealers that routinely assign their retail installment sales contracts and leases to a third party bank or finance company, may not have a convenient means of delivering the required opt-out notice since they are not required to deliver an annual privacy notice. Allowing the receiving affiliate to provide the notice would avoid the sending affiliate from having to create a process for providing such notices from scratch.

### Key Definitions

The Commission requests comment on whether there are other communications that it should determine do not meet the definition of “solicitation.” One example in the automotive industry involves vehicle recall communications. Consumers often do not learn that their vehicle has been recalled for safety or emissions defects. Dealers will frequently notify the consumer of the recall and encourage the customer to have the vehicle deficiency repaired at their service facility (at no cost to the consumer). These communications, which serve the important public policy goal of increasing consumer awareness of the presence of a defect to their vehicle, should not be limited by a consumer’s decision to opt-out of affiliate solicitations.

### Use of Eligibility Information by Affiliates for Marketing- Exceptions

We support the Commissions’ efforts to clarify that the statutory exception from the opt-out requirement for eligibility information used “in response to a communication initiated by the consumer” extends to an “oral, electronic, or written authorization or request by the consumer.” 69 Fed. Reg. 33,330. In automobile dealerships, customers often request additional information in person or over the telephone. Thus, it is important that oral communication be recognized as a communication initiated by the consumer.

### Reasonable Opportunity to Opt-Out

Consistent with the FTC Privacy Rule, the final rule should not require opt-out notices to disclose how long a consumer has to respond to the notice. Such a requirement is unnecessary since a consumer’s opt-out request must be honored even if it is received after a specified response period.

The language in proposed Section 680.23(a)(2) states that a reasonable method of opting-out is to “include a reply form and a self-addressed envelope together with the opt-out notice required by this part.” 69 Fed. Reg. 33, 339. The example should not suggest that a “self-addressed envelope” must accompany an opt-out reply form. Such a requirement is not mandated by the statute (and similarly is not required under the analogous FTC Privacy Rule).

### Model Notices

NADA appreciates the Commission’s efforts in developing model forms and providing safe harbor language and non-exclusive examples of how to comply with the section 214 notice requirement.

However, the Commission did not develop a model form that combines various opt-out notices, as that is considered beyond the scope of the rulemaking. Since it is anticipated that some companies currently subject to the FTC Privacy Rule will combine the opt-out form in the privacy notice, we urge the Commission to consider model combination notices in separate business guidance or as part of its rulemaking pertaining to “Alternative Forms of Privacy Notices.” 68 Fed. Reg. 75,164 (December 30, 2003). The reality is that small businesses will require additional guidance on how to combine affiliate information sharing, affiliate marketing

and privacy notices and would certainly benefit from the Commission's development of model notices for this purpose.

Effective Date

The FACT Act provides that the regulations implementing this section become effective no later than 6 months after the date on which they are issued in final form. While the Commission does not have the authority to establish a different effective date, we urge it to carefully consider a later mandatory compliance date to allow affected industries sufficient time to comply. Given the time needed to educate dealerships on the new requirements, revise notice procedures and train dealership staff, we ask the Commission to establish a mandatory compliance date that is a minimum of 9 months after the effective date.

NADA appreciates the opportunity to comment on this matter.

Sincerely,

Smitha Koppuzha  
Staff Attorney