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Via Electronic Mail to rule-comments@sec.gov

Jonathan G. Katz, Secretary,
Securities and Exchange Commission,
450 Fifth Street, NW., Washington, DC
20549–0609.

RE: File Number S7–29–04, Comments of the American Bankers Association Securities Association (ABASA) with respect to 17 CFR Part 247 Limitations on Affiliate Marketing, Proposed Regulation S–AM

Dear Secretary Katz:

The American Bankers Association Securities Association[1] ("ABASA") wishes to provide the following comments on the U.S. Securities and Exchange Commission's ("SEC") proposed Regulation S-AM promulgated under authority contained in the Fair Credit Reporting Act. ABASA supports, and incorporates by reference, the attached comment letter of its parent, the American Bankers Association ("ABA") submitted separately to federal banking regulators and the Federal Trade Commission ("FTC") as part of the same rulemaking, but would like the SEC to consider several special areas of concern unique to the operation of bank-affiliated securities enterprises.

I. Specific Comments from the Perspective of Securities Affiliates

The Final Regulation Should Not Address The Issue Of "Constructive Sharing," A Concept That Has Limited Utility For Securities Affiliates.

In the Proposed Rule, the SEC asks for comment on whether Section __.20(a), which establishes a duty on the person that communicates eligibility information to an affiliate, "should apply if affiliated companies seek to avoid providing notice and opt out by engaging in the 'constructive sharing' of eligibility information to conduct marketing." As described by the SEC,

[1] The ABA Securities Association (ABASA) is a separately chartered trade association and non-profit affiliate of the American Bankers Association whose mission is to represent the interests of banks underwriting and dealing in securities, proprietary mutual funds and derivatives before Congress, federal and state governments, and the courts.

constructive sharing occurs when a bank uses its own information to make marketing solicitations to its own customers concerning an affiliate's products or services and the consumers' responses provide the affiliate with discernible eligibility information about the consumers.

ABASA specifically supports ABA's comments explaining why the final regulation **should not** address the issue of "constructive sharing." In addition, it is important to recognize that constructive sharing of customer information would have limited utility given the requirement that marketing activities specifically intended to solicit securities business be performed by licensed individuals. With certain exceptions, banks engaged in the securities business must perform securities marketing operations in an affiliate either as a subsidiary of a financial holding company or a financial subsidiary of a bank. Unless a bank and its employees were to be licensed respectively as securities dealers and as broker/dealers, they could not market securities products on behalf of a securities affiliate without violating NASD and SEC[2] licensing laws. Consequently, it is unlikely that a bank would use information gained through "constructive sharing" to market the securities products of an affiliate, given the licensing requirements inherent in that activity.

The Definition Of "Pre-existing Business Relationship" Should Leave No Question That It Includes A Relationship Between A Consumer And A Securities Affiliate.

Section __.3(m) (see also FTC's Section __.3(i)) defines "pre-existing business relationship" as a relationship between a person and a consumer based on:

> (1) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by subpart C of this part;
>
> (2) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which a solicitation covered by subpart C of this part is made or sent to the consumer; or
>
> (3) An inquiry or application by the consumer regarding a product or service offered by that person during the 3-month period immediately preceding the date on which a

[2] National Association of Securities Dealers ("NASD") and the U.S. Securities and Exchange Commission ("SEC"), respectively.

solicitation covered by subpart C of this part is made or sent to the consumer.

We believe that in each of these three situations, the SEC's intent is that a securities transaction between a securities affiliate and a consumer qualifies as a pre-existing business relationship. Subsection (3) supports such an interpretation; it refers to a "product or service *offered* by that person [the securities affiliate]. . . ." (emphasis added) In the other two subsections, the language is not as clear. Subsections (1) and (2) refer to a financial contract or a financial transaction "*between* the person and the consumer. . . ." (emphasis added)

We think the proposed rule supports the conclusion that a pre-existing business relationship exists between a securities affiliate and a consumer when the consumer purchases a proprietary securities product like a bank's own mutual fund. However, we are concerned that securities transactions where a consumer purchases non-proprietary securities products from the securities affiliate could be considered outside the first two elements of the definition of a pre-existing business relationship. We would like the SEC to clarify that all three elements of the definition of "pre-existing business relationship" include a transactional based relationship between a consumer and a securities affiliate regardless of the issuer of the security purchased by the consumer.

Such an interpretation would be consistent with the policy behind the pre-existing business relationship exception. As expressed in the preamble to the Proposed Rule, the scope of the pre-existing business relationship exception is based on "the reasonable expectations of the consumer." A consumer whose securities and investment transactions are managed through a bank-owned securities affiliate will not be surprised and may later expect to receive solicitations for other securities products based on eligibility information the securities affiliate has received from an affiliated bank. Therefore, a pre-existing business relationship should be deemed to be created when a consumer transacts securities business with a securities affiliate.

Use Of Eligibility Information Following A Consumer's Affirmative Authorization Or Request.

The example in Proposed Rule Section _.20(d)(3) describes a situation in which a "consumer who has a securities account with a broker-dealer makes a telephone call to the broker-dealer's insurance affiliate and requests information about insurance, the insurance affiliate could use information about the consumer it obtains from the broker-dealer to make or send marketing solicitations in response to the telephone call."

The example permits the insurance affiliate to use the customer's eligibility information received from the broker/dealer for marketing purposes in

responding to the customer's request without the customer having been given an opt out opportunity. The customer's request for such information may be given in writing, orally, or electronically.

ABASA supports the SEC's interpretation of the "affirmative request" exception to the opt out requirement, given that it is common for a bank customer to ask a bank for information about products and services offered by an affiliate, especially a securities affiliate. In those situations, there is no need for the customer to be provided with a notice and opt out.

II. Other Comments

The Final Regulation Should Not Impose Additional Duties On Entities That Share Eligibility Information.

The ABASA agrees with ABA's comments on two related issues: (1) that the final regulation should not impose duties on the entity that shares information with an affiliate; and (2) that the final regulation should not dictate whether the giver or receiver of eligibility information should provide the notice and opt out. The notice and opt out is not required to be given when an exception applies, such as when the user of the information has a pre-existing business relationship with a consumer. Only the user of the information knows whether a notice and opt out is required to be given before eligibility information received from an affiliate is used. Any duty, therefore, should fall only on the user of the information. The user should be responsible for assessing whether the duty must be fulfilled and, if so, how it should be fulfilled – either by arranging for the affiliate that shared the information to provide the notice and opt out or by satisfying that requirement itself.

The Definition Of "Eligibility Information" Should Not Include A Bank Customer's Name, Address, Or Account Number That A Bank Shares With An Affiliate.

The Proposed Rule regulates the use of "eligibility information" and defines eligibility information as information described in Section 214 of the Fair and Accurate Credit Transactions ("FACT") Act. Section 214 of the FACT Act defines that type of information as information that would constitute a "consumer report" pursuant to the Fair Credit Reporting Act ("FCRA") but for the exclusions from that definition for "transaction or experience" information and "other" information. Section 603(d)(1) of the Fair Credit Reporting Act defines a "consumer report" as "any written, oral or other communication of any information by a consumer reporting agency bearing on the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which

is used or expected to be used or collected in whole or in part *for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance* to be used primarily for personal, family, or household purposes, employment purposes, or any other purposes authorized in Section 604 of the FCRA." (emphasis added)

A bank customer's name, address, and account number do not bear on the customer's eligibility for credit or investment opportunities. Such information merely identifies the bank customer and any associated accounts.[3] The Agencies should make clear that eligibility information does not include customer name, address, or account number.

Thank you for considering these comments. Please contact the undersigned at (202) 663-5277, if you have any questions concerning these comments.

Sincerely,

Beth L. Climo

Attachment (ABA comment letter)

[3] A bank customer's name, address, and account number constitute "nonpublic personal information" pursuant to Title V of the Gramm-Leach-Bliley Act. That act and its associated privacy regulations restrict the disclosure of such information to a nonaffiliated third party. The disclosure of customer account numbers to a nonaffiliated third party for marketing purposes is further restricted. *E.g.*, 12 C.F.R. §§ 216.3(n)(1); 216.10; 216.12.