

**NEW SEC REGULATION S-AM TO LIMIT CONSUMER MARKETING BY  
REGISTERED INVESTMENT ADVISERS, BROKERS, DEALERS, INVESTMENT  
COMPANIES AND REGISTERED TRANSFER AGENTS BASED UPON INFORMATION  
RECEIVED FROM THEIR AFFILIATES**

Commencing January 1, 2010, SEC-registered investment advisers, brokers, dealers, investment companies and registered transfer agents will be limited in their ability to market products or services to “Consumers” based upon certain information received from their “Affiliates” as a consequence of the SEC’s recently adopted Regulation S-AM.<sup>1</sup>

**Overview**

Regulation S-AM applies to an SEC-registered investment adviser, broker, dealer, investment company or registered transfer agent (each a “Covered Person”) making a “Marketing Solicitation” using “Eligibility Information” that the Covered Person initially received from an “Affiliate”<sup>2</sup> about an individual, including an individual acting through a legal representative (a “Consumer”).<sup>3</sup> The SEC adopted Regulation S-AM pursuant to Section 214 of the Fair and Accurate Credit Transactions Act of 2003, which requires the SEC and other federal agencies<sup>4</sup> to adopt rules implementing limitations on affiliate marketing.

“Marketing Solicitation” is defined in Regulation S-AM as marketing initiated by a Covered Person directed at a particular Consumer based on Eligibility Information communicated to that Covered Person by its Affiliate, and that is intended to encourage the Consumer to purchase or obtain a product or service. Any form of communication, such as a telemarketing call, direct mail or electronic mail, that is directed to a specific Consumer based on that Consumer’s Eligibility Information constitutes a Marketing Solicitation. For purposes of this restriction, “Eligibility Information” includes information bearing on a Consumer’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or

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<sup>1</sup> Regulation S-AM: Limitations on Affiliate Marketing, 17 C.F.R. Part 248 (Release No. 34-60423), August 4, 2009, <http://www.sec.gov/rules/final/2009/34-60423.pdf>.

<sup>2</sup> An “Affiliate” is defined in Regulation S-AM as any person that is related by common ownership or common control to another person, and “control” is defined as the power to exercise a controlling influence over the management or policies of a company, whether through ownership of securities, by contract or otherwise. Ownership of more than 25 percent of a company’s voting securities creates a presumption of control of the company.

<sup>3</sup> It is important to note that the definition of “Consumer” under Regulation S-AM is much broader than the definition of this term under the Gramm-Leach-Bliley Act (“GLBA”) and Regulation S-P, the latter two focusing on individuals (or such individuals’ legal representative) who obtain or have obtained a financial product or service from the entity that is to be used primarily for personal, family or household purposes.

<sup>4</sup> The other federal agencies that have adopted similar affiliate marketing regulations include: Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration and the Federal Trade Commission.

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 other purposes as authorized by the Fair Credit Reporting Act.<sup>5</sup>

### **Marketing Permitted with Proper Notice and Opt-Out**

Under Regulation S-AM, the Covered Person may solicit a Consumer using Eligibility Information that it receives from its Affiliate only if the Consumer (i) has been provided by the Affiliate (alone or jointly with the Covered Person) with a "Clear and Conspicuous" notice that the Covered Person may use shared Eligibility Information to make Marketing Solicitations to the Consumer; (ii) has been given a reasonable opportunity to opt out and (iii) has not elected to opt out.

A notice will satisfy the "Clear and Conspicuous" standard if it is reasonably understandable and designed to call attention to the nature and significance of the information presented, and includes the following information: (i) the name of the Affiliate(s) providing the notice; (ii) the categories of Affiliates (such as the Covered Person) that may make Marketing Solicitations to the Consumer; (iii) the duration of the opt-out period (minimum of five years); (iv) the contact information of the Affiliate providing the notice (telephone and/or address and/or website); (v) a check-off opt-out box; and (vi) a statement that the Consumer may elect to limit Affiliate marketing when using Eligibility Information. The SEC has provided optional model notices that may be used to satisfy the Clear and Conspicuous notice requirement.

The Regulation S-AM notice and opt-out may be combined with a notice and opt-out for the SEC's privacy regulation, Regulation S-P.<sup>6</sup> The Regulation S-AM notice and opt-out may be provided through the mail, through a writing delivered in person, through electronic means<sup>7</sup> (if agreed to by the Consumer) or as part of an electronic transaction. As noted above, the notice and opt-out may also be provided jointly by the Covered Person and its Affiliate(s) as long as one of the Affiliates on the notice has a Pre-existing Business Relationship with the Consumer.

### **Exceptions to Notice and Opt-Out Requirements**

Regulation S-AM contains exceptions from the requirement to provide the required notice and opportunity to opt out for (i) a "Pre-Existing Business Relationship,"<sup>8</sup> (ii) a Consumer-initiated

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<sup>5</sup> Eligibility Information includes a Covered Person's own transaction or experience information, such as information about a Consumer's account history with the Covered Person and information from consumer reports or applications, but does not apply to aggregate or blind data that does not contain personal identifiers.

<sup>6</sup> Although it is permitted to combine the Regulation S-AM notice and opt-out with the Regulation S-P notice and opt-out, it should be noted that each of these regulations serves a separate and distinct purpose. While Regulation S-P limits the **sharing** of *nonpublic personal information*, Regulation S-AM limits the **use** by a Covered Person of *Eligibility Information* from Affiliates for marketing purposes.

<sup>7</sup> Delivery by electronic means may be accomplished through either an e-mail or a website posting.

<sup>8</sup> The Pre-Existing Business Relationship between the Consumer and the Covered Person must be based upon (i) a financial contract in force at the time of solicitation; (ii) the purchase, lease or rental of goods and services or a financial transaction within 18 months preceding the solicitation; or (iii) an inquiry or application regarding a product or service within the three months prior to the solicitation.

communication;<sup>9</sup> (iii) a Consumer authorization or request;<sup>10</sup> and (iv) marketing directed at the general public.<sup>11</sup>

**Practical Implications**

Regulation S-AM was adopted following the adoption of similar regulations by various federal agencies. Accordingly, it is possible that a financial institution with affiliates may have to comply with both Regulation S-AM and similar affiliate marketing regulations of one or more other regulators. Therefore, it is important for financial institutions with affiliates to review their affiliate marketing practices and to draft or conform their compliance procedures and consumer notices in accordance with their applicable affiliate marketing regulations, such as Regulation S-AM for Covered Persons.

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<sup>9</sup> This can be accomplished through an oral, electronic or written authorization or request by the Consumer.

<sup>10</sup> A pre-selected check box or boilerplate language provided to the Consumer would not constitute a Consumer authorization or request.

<sup>11</sup> Marketing directed at the general public includes radio, television, general circulation magazine and billboard advertisements, and publicly available websites that are not directed to particular Consumers. Regulation S-AM also includes a "service provider exception," which allows a service provider to do what the Covered Person on whose behalf it is acting may do, such as using shared Eligibility Information to make Marketing Solicitations to Consumers to whom the Covered Person is permitted to make such Marketing Solicitations.