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Deadline Approaching for Affiliate Marketing Rule Compliance

On October 1, 2008, the Affiliate Marketing Rule ("Rule") will become effective. By that date, entities accessing or using their affiliates' consumer eligibility information to make marketing solicitations to consumers must do so in compliance with the Rule.

"Eligibility information" is broadly defined.

The term includes any information the communication of which would be a "consumer report" as defined by the Fair Credit Reporting Act but, unlike the Act, also includes information about an affiliate's transactions or experiences with the consumer. In general, eligibility information could include information an affiliate obtained from consumer transactions or relationships, consumer applications for its products and services, and credit reports or other third-party sources.

Restrictions on the Use of Consumer Eligibility Information

The Rule generally prohibits affiliates from using each other's consumer eligibility information to make solicitations for marketing purposes to those consumers unless: (1) the consumers were given notice that their information might be used by affiliates to make solicitations for marketing

purposes; (2) the consumers were given a reasonable opportunity, via a reasonable and simple method, to opt out of receiving such solicitations; and (3) the consumers have not opted out. The notice must be provided by the affiliate with which the consumer has or had a business relationship (or jointly by that affiliate and others) and must include the names of the affiliates that will use consumer eligibility information for marketing solicitations (or the common name of the affiliates, if they share a common name). The Rule prescribes additional contents for the notice, and addresses acceptable delivery and opt-out means. It also includes an appendix of model forms intended to facilitate compliance with the notice and opt-out requirements.

Exceptions and Activities that Do Not Constitute Solicitations

The Rule includes several exceptions to the general prohibition on marketing to an affiliate's consumers in the absence of notice and an opportunity to opt out, including when the marketing affiliate itself has a "pre-existing business relationship" with the consumer to whom it will market, or has received a communication from

that consumer regarding its products or services.

In addition, the Rule describes examples of arrangements that would not result in "solicitations" subject to its requirements. For example, an affiliate may use its own eligibility information to provide consumers with marketing material regarding other affiliates' products and services, but pursuant to marketing criteria established by those affiliates without reference to the eligibility information. The Rule also contemplates the use of service providers to engage in the provision of marketing materials,

provided certain specified protections are in place and the consumer eligibility information is not used to: (1) identify consumers, identify types of consumers or develop criteria to select consumers who will receive the materials, (2) decide which products or services to market, or (3) tailor materials to the consumers. Compliance with the examples detailed in the Rule constitutes compliance with its requirements.

We Can Help

Hunton & Williams' Privacy and Information Management practice

assists clients in complying with myriad federal and state privacy and information security laws. We have assisted various clients in several industries in complying with the Rule, both via the provision of appropriate notice and opt-out mechanisms, and by structuring marketing activities so as not to make a solicitation subject to the Rule. If you would like assistance with any aspect of your organization's handling and securing of personal information, including compliance with the Rule, please contact us.

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