AMERICAN COUNCIL OF LIFE INSURERS
FINANCIAL SECURITY FOR LIFE

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Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Proposed Fair Credit Reporting Act Interpretations

Ladies and Gentlemen:

The American Council of Life Insurers ("ACLI") appreciates the opportunity to respond to your request for public comment on the Federal Trade Commission's (the "Commission's") proposed interpretations of the provisions of the Fair Credit Reporting Act ("FCRA"), as amended by the Gramm-Leach-Bliley Act ("GLB Act"), (the "Proposed Interpretations") 65 *Federal Register* 80802 (December 22, 2000). The Proposed Interpretations establish how companies are to comply with the affiliate information sharing provisions of the FCRA.

The ACLI is a national trade association whose 435 member companies represent approximately 73 percent of the life insurance and 87 percent of the long term care insurance in force in the United States. They also represent over 80 percent of the domestic pension business funded through life insurance companies and 71 percent of the companies that provide disability income insurance. As insurers, ACLI member companies have a strong interest in assuring that the Proposed Interpretations are consistent with the rules privacy rule adopted by the Commission under Title V of the GLB Act (the "Privacy Rule"). 65 *Fed. Reg.* 33646 (May 24, 2000) and reflect the language of the FCRA.

General Overview

We believe that certain provisions of the Proposed Interpretations do not promote the objective of achieving consistency with the Privacy Rule. Other provisions are of significant concern to us because they are ambiguous, do not accurately reflect the language of the FCRA, or inappropriately expand the scope of coverage of the Proposed Interpretations well beyond the language of the FCRA. As a result, we believe several aspects of the Proposed Interpretations could lead to confusion among consumers as well as insurers, and could have significant adverse effects on consumers and on the operations of insurers. We believe these results are unintended. Accordingly, we suggest below ways in which these provisions could be clarified. We also provide comments on questions you have raised.

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Specific Comments

Section 1 Purpose and scope

Section 1(a) provides that the Proposed Interpretations govern the *collection,* communication and *use* by depository institutions of certain information bearing on a consumer's credit worthiness and certain other characteristics. However, the Proposed Interpretations are intended to implement the 1996 Amendments to the FCRA, which addressed the *communication* of information with affiliates by excluding specified types of information communicated among affiliates from the definition of "consumer report." FCRA § 603(d). Expanding the purpose of the Proposed Interpretations to apply to the "collection" and "use" of information would extend them well beyond the express statutory language of the FCRA. Accordingly, we recommend that the Commission delete the words "collection" and "use" from § 1(a).

The Proposed Interpretations do not address the manner in which they will affect, or are affected by, the rules adopted by the Secretary of Health and Human Services ("HHS") under the Health Insurance Portability and Accountability Act of 1996. In their proposed rules to implement the affiliate sharing provisions of the FCRA, the Federal banking agencies indicated that they would consult with HHS to avoid the imposition of duplicative or inconsistent requirements. *See* 65 *Fed. Reg.* 63120, 63121 (October 20, 2000). The ACLI urges that the Commission also consult with HHS to avoid duplicative or inconsistent requirements, and seek public comment with regard to how the HHS rules and the Proposed Interpretations can be harmonized.

Section 2 Examples

You have asked whether the use of examples is appropriate or useful. We believe that the use of examples is helpful to companies in determining the scope and effect of the Proposed Interpretations. Examples provide a useful means by which companies can be assured that their practices comport with legal requirements. Accordingly, we support the use of examples, provided they are not exclusive. The ACLI also encourages the Commission to present additional examples, where appropriate, that clarify the manner in which companies may comply with the Proposed Interpretations.

Section 3 Definitions

(b) Affiliate and (i) Control. The Proposed Interpretations use the same definition of the term "control" used by the Commission in the Privacy Rule. 16 C.F.R. § 313.3(g). Use of this definition was necessary in the Privacy Rule because the term "affiliate," was defined in § 509(6) of the GLB Act as "any company that controls, is controlled by, or is under common control with another company." However, the FCRA does not define the terms "affiliate" or "control." Rather, the FCRA provides that the communication of certain information "among persons related by common ownership or affiliated by corporate control" may be treated differently from other communications. FCRA §§ 603(d)(2)(A)(iii), 624(b)(2). As a result, the scope of the FCRA is not coterminous with that of the GLB Act.

You ask if the use of the term "affiliate" is appropriate in scope. We believe that the definition of this term, in combination with the term "control," cause the Proposed Interpretations to extend beyond the scope of the FCRA. Accordingly, we do not believe that the proposed definition of the term "affiliate" is appropriate.

For the past five years, the financial industry has relied upon the language of the FCRA without a problem. Nor are we aware of any concerns that consumers may have with this language. Moreover, the range of companies treated as affiliates under the FCRA will likely differ from the range of companies treated as affiliates under the definition of affiliate contained in the GLB Act. The definitions of "affiliate" and "control" in the Proposed Interpretations run the risk of requiring companies to limit the range of companies which they now regard as affiliates. This would jeopardize existing relationships and force some companies to terminate existing information sharing arrangements.

We are confident the Commission recognizes that the GLB Act does not modify, limit or supersede the FCRA. GLB Act § 506(c). We believe adoption of the definitions of "affiliate" and "control" contained in the Proposed Interpretations inappropriately limits the range of entities which are affiliates under the FCRA simply in the interest of making the Proposed Interpretations identical to Title V of the GLBA. This runs the risk of violating § 506(c) of the GLB Act because it would limit the scope of the FCRA. Accordingly, we recommend that the Commission delete the definitions of "control" and "affiliate" from the Proposed Interpretations.

(c)(2)(iii) Notice on a web page. This section of the Proposed Interpretations is similar, but not identical, to the Privacy Rule. It is unclear whether the use of different language in the Proposed Interpretations is intended to establish standards which differ from those in the Privacy Interpretation. For example, the Privacy Rule refers to "notices on web *sites,*" whereas the Proposed Interpretations make reference to "notice on a web *page*." We believe that these differences in wording could give rise to confusion as to how extensive disclosures must be on web sites under the Proposed Interpretations, and how disclosures under the Proposed Interpretations differ from those under the Privacy Rule. Similarly, §§ 3(c)(2)(iii)(A) and (B) of the Proposed Interpretations refer to a notice on a *page* that consumers access *often*, whereas the Privacy Rule refers to a notice on a *screen* that consumers *frequently* access. While the differences between the terms may not be dramatic, they raise issues regarding why the Commission used different terminology. If the Commission desires to make the Proposed Interpretations and the Privacy Rule consistent, it should use identical language where possible, unless, of course, there is a reason for using different terminology because of differences between the FCRA and the GLB Act.

(k) Opt out information. The definition of "opt out information" in the Proposed Interpretations is derived from the definition of "consumer report" contained in the FCRA. The ACLI believes that a definition of the term "opt out information" is useful for companies. However, we believe the proposed definition of opt out information omits an important element of the definition of consumer report that we believe should be included.

The FCRA defines a consumer report as a communication of information *by a consumer reporting agency*. The definition of "opt out information" in the Proposed Interpretations does not contain this important qualification. Information is "opt out information" *only* if it is information communicated by a consumer reporting agency. To not include this qualification in the definition of opt out information could lead to the inappropriate conclusion that all information (other than transaction and experience information) which is used for the specified purposes is opt out information under the Proposed Interpretations. Accordingly, we urge that the first line definition of "opt out information" in 3(k) be amended to read as follows: "*Opt out information* means information communicated by a *consumer reporting agency* that: . . ."

Section 4 Communication of opt out information to affiliates

This section provides that an institution's communication of opt out information to an affiliate is not a consumer report if notice is provided to the consumer and the consumer is given a *reasonable* opportunity and *means* to opt out before the information is provided to the affiliate. There is nothing in the FCRA that requires "reasonable" opportunity and "means" to opt out. We believe that the terms "reasonable" and "means" should be deleted from § 4(b) because they are not used in the FCRA.

In addition, we believe that the Commission should clarify in the Proposed Interpretations that the only information that may become opt-out information subject to the opt out requirements is information that constitutes a consumer report as defined in § 603(d) of the FCRA. It is important to clarify this point in order to avoid expansion of the scope of the Proposed Interpretations beyond the scope of the FCRA and because of the possibility of confusion between the requirements of Proposed Interpretations, which apply to the sharing of "nonpublic personal information."

You have also stated that in a merger or acquisition situation, the surviving company need not provide new notices if the notices previously given reflect the policies and practices of the surviving entity. We agree with the Commission's conclusion. We also support the view that this point should be expressly included in the Proposed Interpretations.

The FCRA requires provision of notice and opportunity to opt out "before the time the information is *initially communicated*" rather than "before the company communicates the information to its affiliates" as provided in the Proposed Interpretations. FCRA § 604(d)(2)(A)(iii) and Proposed Interpretations § 4(b). We believe § 4(b) should be amended to add "initially" before the term "communicates."

If the term "initially communicates" is not used in the Proposed Interpretations, institutions may believe that they are required to provide FCRA notices every time they plan to share information with affiliates, which would be a result not required under the FCRA. Accordingly, we urge the Commission to make this change, and in general, to use the precise language of the FCRA wherever possible in order to avoid extending the Proposed Interpretations beyond the scope of the language of the FCRA and requiring companies to change the standards they have long used in fulfilling their FCRA responsibilities.

Section 5 Contents of opt out notice

The ACLI strongly objects to the requirement in the Proposed Interpretations that the FCRA notice contain the extensive information required in § 5. There is no similar requirement in the FCRA. In contrast with the GLB Act, the FCRA provides companies with a great deal of flexibility with regard to what the notices should say and the type of information they should contain. The Privacy Rule requires privacy notices to contain extensive information because § 503(b) of the GLB Act requires it.

A requirement that companies provide the same extensive information under their FCRA notices that they provide under their privacy notices is likely to confuse and needlessly concern consumers, and will increase the burden imposed on companies. Accordingly, we urge you not to adopt the rigid standard contained in § 5 of the Proposed Interpretations. If the Commission determines to retain this requirement, in order to reduce the burden, we recommend that you amend it by stating that compliance with § 313.6 of the Privacy Rule (or a similar rule adopted by a State or Federal with authority to enforce the GLB Act) will constitute compliance with § 5 of the Proposed Interpretations.

The ACLI also objects to the requirement contained in § 5(e) that requires companies to include specific examples of the categories of affiliates to which it may share information. We believe that the use of categories such as "financial services providers" should be sufficient without having to add examples such as those suggested, *i.e.*, mortgage bankers, securities broker-dealers and insurance agents. Requiring such specificity will impose a burden on companies to develop an exhaustive list of categories of affiliates in order to ensure compliance with the Proposed Interpretations. We believe that such detail is unnecessary and not called for by the FCRA.

The ACLI also strongly objects to the use of "information from a consumer's application" as an example in § 5(d)(2)(i). This example suggests that all information on an application form is opt out information. This most certainly is not the case. For example, since a consumer's name and address appearing on an application are not used as a basis for eligibility for credit, insurance or employment, they should not be regarded as opt out information. Only information from an application that is used to determine eligibility for credit, insurance, or employment is opt out information. Furthermore, use of information from an application as an example of opt out information may confuse consumers. Accordingly, we recommend that you eliminate "application information" from the examples presented in the Proposed Interpretations.

You also ask whether the notice should disclose (a) how long a consumer has to respond to the opt out notice before information will be disclosed to affiliates, and (b) the fact that consumers may opt out at any time. The Privacy Rule does not contain such requirements. In the interest of maintaining consistency between the Privacy Rule and the Proposed Interpretations, we believe that this additional burden should not be imposed under the Proposed Interpretations.

Section 5(d)(3)(vi) uses the term "medical history" as an example of information within a category of opt out information. However, § 5(d)(4) provides that a company that communicates "individually identifiable health information" satisfactorily describes this type of information if it provides illustrative examples of the health information it intends to communicate with its affiliates. We find that these two requirements are in conflict. It is unclear whether a company is required to provide specific examples of individually identifiable health information which it intends to share with affiliates, or whether the term "medical history" would be sufficient, as suggested in § 5(d)(3)(vi) of the Proposed Interpretations.

If a financial institution involved in the sale of insurance is required to list the types of individually identifiable health information it intends to share with affiliates, the requirement will prove extremely burdensome. Different types of insurance policies require that different types of medical information be disclosed to affiliated insurance companies for underwriting, among other legitimate insurance business, purposes.

Requiring companies to specify examples of health information they may disclose is not required under the FCRA. Further, such a requirement is likely to needlessly confuse and possibly concern consumers. It will impose significant costs on companies, which will have to make different disclosures based upon a variety of factors, as explained above. It will also present difficult compliance problems. In order to avoid any confusion as to companies' obligations under the Proposed Interpretations, we strongly urge you to delete § 5(d)(4) and to clarify that use of the term "medical history" will be sufficient.

Section 6 Reasonable opportunity to opt out

The Proposed Interpretations do not permit a consumer to waive the opt out period immediately after receiving the FCRA notice. The inability to waive the opt out period could frustrate consumers who wish to receive timely information from affiliated companies. We believe that consumers should be given an opportunity to waive the opt out period. This would enable a company to provide information to an affiliate which, in turn, could provide consumers with timely information concerning the affiliate's products and services.

The GLB Act and the Privacy Rule permit companies to share information with nonaffiliated third parties with the consumer's consent. GLB Act § 502(e)(2) and Privacy Rule § 313.15(a)(1). We believe that if a consumer is permitted to consent to a company's sharing of information with a nonaffiliated party, the consumer should have the ability to consent to a company's communication of information with an affiliate. This would enable consumers to benefit from information that can be made available to them immediately, rather than having to wait for a period of time to pass before information may be shared with affiliates. Accordingly, we recommend that you provide consumers with the opportunity to waive the requirement that a company provide a reasonable opportunity to the consumer to opt out before information is shared with affiliates.

Section 8 Delivery of opt out notices

This section states that providing oral notice over the telephone or in person to a consumer of the opportunity to opt out is not sufficient. The ACLI believes that companies should have the flexibility to provide such notices orally, particularly when a transaction takes place by telephone. There is nothing in the FCRA that requires that notices be in writing. If the opt out notice were provided orally, a company could maintain a record of the conversation and whether or not the consumer chose to opt out. We believe that the decision to provide written or oral notices under the FCRA is one that should be left up to each company. In this regard, § 313.4(e)(2)(ii) of the Privacy Rule permits a company to provide the initial notice required under that rule within a reasonable time after the establishment of a customer relationship if providing notice would substantially delay the delivery of the product or service. A similar type of exception is appropriate for the disclosures required by the Proposed Interpretations.

You also ask how the delivery of notice requirement under the FCRA should be applied to electronic communications in light of the Electronic Signatures in Global and National Commerce Act (the "E-SIGN Act"). The ACLI believes that the Commission should recognize that the E-SIGN Act permits electronic disclosures to satisfy disclosure requirements such as those imposed under the FCRA if the consumer affirmatively consents and certain requirements are satisfied. Accordingly, we recommend that the Proposed Interpretations recognize the effect of the E-SIGN Act.

Section 10 Time by which opt out must be honored

You have asked whether the Proposed Interpretations should establish a fixed number of days by which a company must comply with a consumer's opt out direction. The ACLI believes that no fixed period should be specified. The determination as to the period by which a company should comply with a consumer's opt out is highly dependent upon when the opt out is given (*e.g.*, at the time the relationship is established or substantially after the consumer has become a customer). It may be easier to comply with a consumer's direction earlier in the relationship before any information has been shared with affiliates. If the consumer chooses to opt out long after information has been shared, it may take longer for a company to comply with the opt out direction because it must undo the routine disclosures that had been put in place prior to the consumer's direction.

Section 12 Sample notice

The ACLI believes that the sample notice contained in the Proposed Interpretations is sufficient to convey the required FCRA disclosures. We believe that such a notice is helpful to companies because it presents a graphic example of how to comply with the FCRA disclosure requirements. You also ask if the sample notice should contain additional disclosures that do not appear to be required by the Proposed Interpretations. The sample notice appears to present all of the information necessary to inform consumers of the material requirements of the FCRA relating to sharing information with affiliates. Accordingly, we do not believe that there is any need to modify the sample notice to add additional disclosures.

Effective date

The *Federal Register* notice provides that the Commission plans to enforce any interpretations it may issue only after any similar regulations issued by the Federal banking agencies have become effective. However, the Federal banking agencies did not indicate an effective date for their proposed rules. We recognize that companies are required to comply with the requirements of the GLB by July 1, 2001, and companies are well along in implementing the Privacy Rule or similar rules to which they are subject. Indeed, many institutions have already developed their privacy notices and made arrangements for printing and distribution. By the time the Commission adopts the Proposed Interpretations, most companies will have made these arrangements, and many will have sent disclosure notices out to customers. To require them to go back and revise their notices and make new printing and distribution arrangements will result in undue burden and unnecessary costs.

Because of the arrangements financial institutions are making to comply with the Privacy Rule and similar rules, it is our recommendation that Commission make the Proposed Interpretations effective no earlier than July 1, 2002. That date represents the date by which financial institutions must send customers their first annual notice under the Privacy Rule and similar rules. A July 1, 2002 effective date will have no adverse effect on consumers because the notices financial institutions send to consumers by July 1, 2001 under the Privacy Rule will contain FCRA disclosures under existing standards, as required by the GLB Act. Establishing an effective date of July 1, 2002 for the Proposed Interpretations will also provide financial institutions with an orderly phase-in period and will not disrupt existing arrangements.

We appreciate the Commission's consideration of our concerns in relation to the Proposed Interpretations and would be pleased to answer any questions you may have relating to our comments.

Sincerely,

Roberta B. Meyer