American Insurance Association

ORIGINAL

January 31, 2001

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 Insurance Association is pleased to provide its views in response 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.

AIA is a trade association of major property and casualty insurance companies, representing more than 375 insurers that provide all lines of property and casualty insurance throughout the United States and write more than $60 billion in annual premiums. AIA members have a strong interest in privacy requirements which are adopted by State and Federal agencies pursuant to the GLB Act and the FCRA.

OVERVIEW

AIA believes that the Commission has done an admirable job with regard to integrating the notices and opt-out provisions in the Proposed Interpretations with those required under the GLB Act. However, certain provisions of the Proposed Interpretations are not entirely consistent with those contained in the privacy rule adopted by the Commission under Title V of the GLB Act (the "Privacy Rule"). 65 *Fed. Reg.* 33646 (May 24, 2000). Certain other provisions do not accurately reflect the language of the FCRA. In addition, certain provisions appear to expand the scope of coverage of the Proposed Interpretations beyond that of the FCRA. Accordingly, as discussed more fully below, we believe that certain areas in the Proposed Interpretations need to be modified to more accurately reflect the terms of the FCRA.

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COMMENTS

1. Purpose and scope

Section 1(b) provides that the Proposed Interpretations apply to information that is used or expected to be *used* or *collected* for the purpose of establishing a person's eligibility for credit, insurance, employment or any other purpose authorized under § 604 of the FCRA. However, as the Commission's preamble to the Proposed Interpretations states, the subject of the Proposed Interpretations is a 1996 amendment to the FCRA that allowed businesses to *share* information with affiliated companies without becoming credit reporting agencies. 65 *Federal Register* at 80803. The Purpose and Scope section of the Proposed Interpretations must reflect the purpose of the 1996 FCRA amendment, which was limited to the sharing of information with affiliated companies, not the use or collection of information. For similar reasons, the term "sharing" needs to be substituted for the terms "collection, communication and use" in section 1(a).

The Proposed Interpretations do not define the term "consumer." We suggest the Commission include a definition in the Proposed Interpretations. We recommend that the term "consumer" be defined as an individual, consistent with the terms of the FCRA.

2. Examples

You ask whether the Proposed Interpretations should include additional or different examples, and whether examples are appropriate or useful. AIA believes that the use of appropriate examples may be helpful to companies in presenting ways in which to comply with the FCRA. Companies may rely upon examples for assurance that their practices comply with the requirements of the act.

3. Definitions

(b) Affiliate and (i) Control. You ask if the use of the term "affiliate" contained in the Proposed Interpretations is appropriate in scope. The Commission has proposed that the term "affiliate" in the Proposed Interpretations be defined as "any company that is related or affiliated by common ownership, or affiliated by corporate control, or common corporate control, with another company." This is similar to the coverage of the term used in the FCRA. FCRA §§ 603(d)(2)(A)(iii), 624(b)(2). However, the FCRA does not contain a definition of the term "control." The Proposed Interpretations contain a definition of "control" which is the same definition of "control" contained in the Privacy Rule. We see no reason why the Commission should adopt a definition of control for purposes of the FCRA because Congress has not deemed it necessary or appropriate for the term to be defined in the FCRA.

The financial industry has applied the term "affiliate" contained in the FCRA without problem since 1996. It is possible that use of the term control could require companies to modify their longstanding practices of which companies they regard as affiliates. As a result, the range of companies that financial institutions treat as affiliates under the FCRA may differ from the range of companies treated as affiliates under the definition of affiliate contained in the Proposed Interpretations. This could adversely affect existing relationships and cause some financial institutions to terminate existing information sharing arrangements.

The GLB Act does not modify, limit or supersede the FCRA. GLB Act § 506(c). AIA believes that use of the term "control" contained in the Proposed Interpretations inappropriately limits the range of entities that are affiliates under the FCRA. This could violate § 506(c) of the GLB Act because it would limit the scope of the FCRA. Accordingly, we recommend that the Commission delete the definition of "control" from the Proposed Interpretations.

(c) Clear and conspicuous. This definition is identical to that used in the Privacy Rule. We believe it is acceptable in this instance to use the same term as that used in the Privacy Rule.

(c)(2)(iii) Notice on a web page. Although this section of the Proposed Interpretation is similar to that of the Privacy Rule, it is not identical. For example, the Privacy Rule refers to "notices on web *sites*," whereas the Proposed Interpretations refer to "notice on a web *page*." Differences in wording could give rise to confusion as to whether the Commission intends that different standards should apply. We recommend that the Commission consistently use the term "web site" when it uses the same examples so as to avoid confusion.

(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. We believe that a definition of the term "opt out information" is useful and should be of value to companies because it provides greater certainty as to the type of information that is subject to the Proposed Interpretations. We do not believe that companies or consumers will confuse this term with "nonpublic personal information," which is the term that applies to information that may be subject to the opt out provisions of the Privacy Rule and the GLB Act.

4. Communication of opt out information to affiliates

The Proposed Interpretations provide that an institution's communication of opt out information to an affiliate is not a consumer report if notice is provided to the consumer, the consumer is given a *reasonable* opportunity and *means* to opt out before the information is provided to the affiliate, and the consumer has not opted out. The FCRA does not use the terms "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 and are unnecessary.

The Commission also proposes that in instances involving mergers or acquisitions, the surviving company does not have to provide new notices if the notices previously provided reflect the policies and practices of the surviving entity. We agree with the Commission's proposal and recommend that this position be expressly included in the Proposed Interpretations.

Section 4(b) provides that an opportunity to opt out must be provided before the company communicates the information to its affiliates. The FCRA requires provision of notice and opportunity to opt out before the time the information is *initially communicated* to affiliates. FCRA § 604(d)(2)(A)(iii). Section 4(b) should be amended to add "initially" before the term "communicates." If the term "initially" is not included, institutions may believe that they are required to provide FCRA notices every time they plan to share information with affiliates, which is not the case. Accordingly, we recommend that the Commission use the precise language of the FCRA so as not to change existing requirements.

5. Contents of opt out notice

AIA objects to the extensive information that is required in § 5 of the Proposed Interpretations. No such requirement appears in the FCRA. We see no reason to impose the requirements that are found in the GLB Act on companies in the FCRA context. The FCRA provides companies with considerable flexibility as to what notices to consumers should say and the types of information they should contain. We see no reason why companies should be required to make such disclosures in the context of the FCRA simply because the Privacy Rule requires privacy notices under the GLB Act to provide it. Indeed, § 313.6 of the Privacy Rule already requires disclosure of essentially the same information. Such a requirement merely increases the burden imposed on companies without significant benefit to consumers. AIA strongly recommends that you not adopt the burdensome requirements of § 5 of the Proposed Interpretations. If the Commission decides 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 provision adopted by the appropriate State or Federal agency under the GLB Act) constitutes compliance with § 5 of the Proposed Interpretations.

AIA also opposes the requirement contained in § 5(e) that companies must include specific examples of the categories of affiliates to which it may share information. Use of categories such as "financial services providers" should be sufficient without having to add examples such as those proposed, *i.e.*, mortgage bankers, securities broker-dealers and insurance agents. The Proposed Interpretation imposes 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 is not called for by the FCRA.

We also urge that the Commission delete from the example contained in § 5(d)(2)(i) the term "information from a consumer's application" as a category of opt out information. The example suggests that all information on an application form is opt out information, which is not the case. For example, a consumer's name and address appearing on an application are not used as a basis for eligibility for credit, insurance or employment and 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.

We also believe it is clear from the Proposed Interpretations that the Commission views as insufficient a general statement to the effect that the company may share any information it obtains on a consumer with any affiliate. Accordingly, we see no reason to add this to the Proposed Interpretations.

6. Reasonable opportunity to opt out

You also ask whether the FCRA notice should state how long a consumer has to respond to the opt out notice before information will be disclosed to affiliates, and the fact that consumers may opt out at any time. Neither the FCRA nor the Commission's Privacy Rule impose such requirements, and we see no reason to change this position here. Accordingly, we believe that there is no reason for the Commission to impose such a burdensome requirement in the Proposed Interpretations.

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 thwart the ability of consumers to receive timely information from affiliated companies. Consumers should be given an opportunity to waive the opt out period at the time they receive their notices. This would enable a company to provide information to an affiliate, which could then promptly 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). 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 to an affiliate. This too, 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, the Proposed Interpretations should permit consumers to waive the requirement that a company provide a reasonable opportunity to the consumer to opt out before information is shared with affiliates.

8. Delivery of opt out notices

The Proposed Interpretations provide that oral notice in-person or by telephone of a consumer's ability to opt out is not sufficient. AIA believes that companies should have the ability to provide opt out notices orally, particularly when a transaction takes place by telephone. There is nothing in the FCRA that requires that notices be in writing. If a company is able to provide opt out notices orally, it could maintain a record of the conversation and the results, *i.e.*, whether or not the consumer chose to opt out. The decision to provide written or oral notices under the FCRA should be left up to each financial institution.

We also note that § 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"). We believe that it is important to the progress of electronic communications that the Proposed Interpretations acknowledge the process established by the E-SIGN Act. AIA believes that the Commission should recognize that the E-SIGN Act permits electronic disclosures to satisfy disclosures such as those required under the FCRA if the consumer affirmatively consents and the requirements of the E-SIGN Act are satisfied.

10. Time by which opt out must be honored

You also ask whether the Proposed Interpretations should establish a fixed number of days by which a company must comply with a consumer's opt out direction. AIA 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 depends 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 after information has already been shared, it may take longer for a company to comply with the opt out direction because it must unwind the routine disclosures that had been put in place prior to the consumer's direction. Accordingly, we believe it is inappropriate to establish a fixed time.

12. Sample notice

AIA believes that the sample notice contained in the Proposed Interpretations conveys the required FCRA disclosures in a satisfactory manner. Such a notice is helpful because it presents a real life example of how to comply with the FCRA

disclosure requirements. The notice presents all of the information needed to inform consumers of the material requirements of the FCRA relating to sharing information with affiliates and we do not believe that there is any need for additional disclosures.

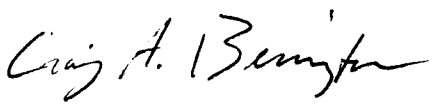
13. Effective date

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. We note that the Federal banking agencies did not indicate an effective date for their proposed rules. Financial institutions are required to implement the GLB Act and privacy regulations by July 1, 2001, and financial institutions are well along with their implementation plans. Numerous institutions have already developed their privacy notices and made arrangements for printing and distribution. By the time the Commission adopts the Proposed Interpretations, most financial institutions will have made these arrangements, and many will have already sent disclosure notices to customers. To require them to 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 GLB Act and privacy regulations, we believe the Commission should establish an effective date for the Proposed Interpretations no earlier than July 1, 2002. This would enable companies to co-ordinate their FCRA notices with the annual notices under the GLB Act and privacy regulations that would be issued by the first anniversary of the Rule's effective date. A July 1, 2002 effective date would not adversely affect customers because notices companies send by July 1, 2001 will, as required by the GLB Act, contain appropriate FCRA disclosures. A July 1, 2002 effective date for the Proposed Interpretation will also provide companies with an orderly phase-in period without disrupting the extensive arrangements they may already have in place for the printing and distribution of disclosures they are making under the rules adopted by Federal and State authorities under the GLB Act.

AIA appreciates the opportunity to provide its comments on the Proposed Interpretations. If you have any questions, please do not hesitate to call.

Sincerely,



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