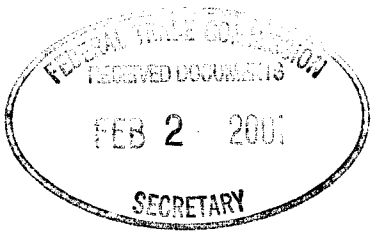

National Association of Independent Insurers ("NAII")

Comments to the

FEDERAL TRADE COMMISSION

16 CFR Part 600

65 FR 80802

Fair Credit Reporting Act Interpretations

February 2, 2001

Overview

The National Association of Independent Insurers (NAII) is a trade association of over 690 property and casualty insurers writing all lines of business in all states. For the most recent year data were available, NAII members wrote nearly $100 billion in premiums. NAII respectfully submits these comments to the proposed Fair Credit Reporting Act ("FCRA") Interpretations. NAII has submitted comments to the Federal Banking Regulators pursuant to their proposed FCRA Regulations. It appears that the FTC proposed interpretations generally mirror the banking regulators' proposed regulations. Thus these comments generally track with comments made to those regulators.

General Comments

NAII appreciates that underlying the Gramm-Leach-Bliley Financial Services Modernization ("GLB") Act is the concept of functional regulation. While the GLB Act leaves the regulation of the business of insurance to the states, NAII believes that to a large extent any regulations covering the FCRA as applied to entities falling under the jurisdiction of the federal regulators will impact the business of insurance. In addition, it is likely that under financial services modernization, banks, insurers, and securities firms will be dealing extensively with each other, whether on an affiliated basis or not. On this basis, it is appropriate for NAII to comment on the proposed interpretations. Finally, since the FTC traditionally has been the regulator with enforcement authority under the FCRA, we believe comment here is appropriate. In any event, for the ease of transaction of business in the post-GLB financial services industry, regulations at the federal level must also address the needs of the insurance segment of the financial services industry.

These comments are directed to the federal regulators as a unit to stress the need for uniformity across federal regulatory lines. One purpose of the GLB Act is to permit affiliations among financial entities, i.e., streamlining of financial services. Now that GLB is law, it is imperative that regulations and interpretations promulgated by each of the federal regulators be uniform to minimize unnecessary compliance costs which would accrue should one or more of the federal regulators "break ranks" to have a unique set of regulations. In effect, NAII urges all federal regulators, and this necessarily includes banking regulators and the Federal Trade Commission, to seek uniformity in FCRA regulation. NAII also urges the federal regulators to promote uniformity while balancing the need to protect consumer privacy with the need for a practical business approach toward the protection and use of that information. In addition, any regulations should be "technologically neutral" and consider the needs of business conducted through a variety of media.

Background and Comment: Affiliate Sharing within the Insurance Industry

Most insurers have but one source of information in relation to the determination and issuance of coverage. That source is the consumer via the application. The consumer is fully aware of the information that the insurer has in its possession, as it is the consumer who provided the information. Should the insurer not be affiliated with any other entity, then that information remains with that insurer.

In situations where the insurer is affiliated with other insurers and the initial company cannot write the coverage, perhaps due to state regulatory rules or the nature of the

resulting risk as determined from applicant data, it may be appropriate and to the consumer's benefit that the coverage be placed in an affiliated insurer. This might be done in two ways: first the information the consumer provided on the application might be shared directly with an affiliate; second, the information the consumer provided on the application might be placed into a common database which then may be the source of applicant information by which the coverage is written in the appropriate affiliate. It is of note here that the database is common to the insurer and its affiliated, not unaffiliated, organizations. While the fiction of corporate form technically places the data in differing organizations within a holding company structure, the practical reality is that the information is handled by common systems and personnel. The consumer does not care whether coverage is placed in affiliate insurer A, B, or for that matter, G. The consumer cares only about securing the product, often with time of the essence. Ultimately, affiliated insurers respond by placing that coverage in the appropriate company within the holding company system.

Where the consumer provides information, the consumer is fully aware of the personal information which forms the basis for a decision by the financial institution. That information is "transaction or experience" information under the FCRA and not subject to FCRA disclosure and opt-out.

There may be circumstances where the covered person might obtain consumer reports in order to issue the product. If the initial entity is unable to issue the product, it should have the ability to ask its affiliates if any one of them can issue what the consumer is asking for. The FTC is urged to take a position addressing the realities of holding companies comprised of numerous affiliates. For transactions where the consumer has

asked a company within a holding company structure to issue a product, **solely for the purposes of providing the product sought by the consumer,** emphasis added, information should be freely transferable among affiliates. In reality, dissemination to affiliates of such information is necessary to complete the transaction. NAII urges the FTC to consider circumstances where information may flow through affiliated companies, not for the purposes of cross marketing or marketing products the consumer never initially contemplated purchasing, but to secure the product the consumer sought from his or her initial contact with one of the affiliated companies.

NAII further believes that entities functionally regulated by the federal regulators may be similarly situated in their holding company systems as to the use of consumer provided information and consumer report information. Holding companies in general should be permitted to share information in such a manner as to expeditiously provide to the consumer the very product sought at the best of terms.

For convenience, NAII's comments track in order with elements of the proposed interpretation.

Comments to the Proposed Interpretation

The background section of the proposed interpretation states that:

"Specifically, it (one of the 1996 Amendments) excluded specified types of information sharing with affiliates from the definition of "consumer report," relieving companies making these communications (under certain circumstances) from the obligations of CRAs imposed by the FCRA. It excluded from the definition of "consumer report" the sharing of "other information" among affiliates, so long as the consumer, having been given notice and an opportunity to opt out, did not opt out. "Other information" refers to information that is covered by the FCRA and that is not a report containing information solely as to transactions or experiences between the consumer and the person making the report."

NAII believes that the proposed interpretation inappropriately goes beyond this wording to include as "consumer report", information provided by the consumer, information the consumer knows will be part of the decision making process of whether or not to issue the product.

Use of Examples

NAII believes that providing examples is appropriate and useful, when the examples are consistent with FCRA requirements. Recent FTC and other federal regulators' privacy rules and guidelines are more useful for their inclusion of examples and NAII urges the FTC to continue this practice as to the FCRA interpretation. Periodic interagency commentaries and questions and answers are also useful guidance to those seeking to comply, but must be consistent with the FCRA.

Definitions

"Transaction or experience information" is not defined in the interpretations. NAII is concerned that the interpretation defines opt-out information in such a manner as to redefine "transaction or experience information." NAII believes that the proposal goes beyond the FCRA use of those terms. Please refer to NAII's comments under the section "Opt-Out" Information.

Affiliate

NAII agrees that the definition of "persons" under the FCRA should not be used in defining what or who is an "affiliate" and that the definition contained in the proposed interpretations is sufficient.

Clear and Conspicuous

NAII applauds the position that "clear and conspicuous" means "reasonably understandable" and designed to call attention to the nature and significance of the information it contains. The GLB privacy regulations and the safeguarding information guidelines follow the "reasonableness" test. NAII urges that the same test be adopted regarding the FCRA.

Consumer Report

NAII believes it is necessary to state under "Exclusions" that excluded from the definition of "consumer report" is "communication among affiliates of a report containing information solely as to transactions or experiences between the consumer and the person making the report." NAII believes that the reference to the 1996 amendments to the FCRA permitting disclosure of information among affiliates (whether directly or through a database within the holding company structure) must be preserved by any resulting interpretations. That is not clear from the definition of opt-out information in the proposed interpretations.

Opt Out Information

The definition of opt out information is too broad in that it is not limited to consumer report information, i.e., that it be provided by a consumer reporting agency. As indicated in the "Background" section of these comments, often, the information at issue is information provided on the application by the consumer and no one else. NAII suspects that non-insurer financial institutions also may deal with consumer only provided application information. NAII believes that the proposed interpretation in Section 5(d)(2)(I) "from a consumer application" is beyond the scope of the FCRA and hence

beyond the authority of the FTC in promulgating interpretations implementing the FCRA. Even if there might be consumer report information, affiliates should be able to freely share information if the sharing is solely to provide the product sought by the consumer.

Contents of Opt Out Notice

While there is consistency in the content of opt out notice with the privacy regulations promulgated under GLB, the contents of the opt out notice set forth in the proposal far exceed the parameters of the FCRA. As stated in the section by section analysis, section-4 *Communication of Opt Out Information to Affiliates,* the FCRA merely states that the information may be shared among affiliates "if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons..." (FCRA 603 (d)(2)(A)(iii). NAII urges the FTC to limit the requirements to those contained in the definition of "clear and conspicuous" and not attempt to set standards for reasonableness that exceed the FCRA.

Contents of Opt Out Notice -Examples (5 (d)(2)(3))

The examples used as categories of opt out information exceed or incorrectly state the requirements of the FCRA in a number of ways. NAII believes that opt out information does not include information "(i) From a consumer application." This information is clearly "transaction and experience" information as the information is provided by the consumer and the consumer is aware that the information may be used in providing a financial product or service. If the interpretation is intended to cover "consumer report" information which may accompany an application, then there should be clarification to

the extent that such information is permissible if shared only to provide the product requested. Similarly, opt out information does not include information "(iii) obtained by verifying representations made by a consumer" unless third parties, rather than the consumer or other consumer representations, are used to verify the information.

The examples cited in (d)(3), while conceivably accurate, are inaccurate unless the context in which the information is given to the financial institution is part of the example. If the information is supplied by the consumer on an application or by the consumer in order to verify other application information, that information should not be "opt out" information.

Additionally, the FTC seeks comment as to how long a consumer has to respond to the opt out notice before the institution may begin disclosing the information, that the consumer can opt out at any time, whether additional disclosures would outweigh the benefits, and whether the financial institution should wait 30 days before sharing the information (see also comments below on "Reasonable Opportunity to Opt Out"). The FCRA does not set such standards other than reasonableness; neither should the FTC. Comment was sought regarding the extent to which the proposed categories in (d)(2) can be treated as consistent with categories in the privacy regulations. NAII again believes that stating categories of information and entities in an interpretation of the FCRA is inappropriate, as the FCRA test is simply "reasonableness."

Reasonable Opportunity to Opt Out (6)

The privacy rules under GLB imposed a "reasonable" time standard under which a financial institution may share information or cease sharing information if an opt out was

later received. "Reasonable" under the circumstances of the transaction should be the test under the FCRA interpretation rather than the 30 days as indicated.

There is a practical aspect to calling for a reasonable time rather than a set time. From the insurance perspective, the 30-day proposed standard would effectively eliminate telephone and internet quotes. Consumers with expired coverage would be forced to violate state mandatory insurance laws, while they waited for information to be shared with entities affiliated with the affiliate from which they sought coverage in the first place. It is NAII's belief that consumers of banking entities would be similarly situated in circumstances where the consumer sought a mortgage commitment.

Delivery of Opt Out Notices (8(a)(c))

There is no requirement under the FCRA regarding affiliate sharing that there be a written notice, only that there be a "clear and conspicuous" disclosure. NAII believes that the requirement of a written notice under the proposed FCRA rules exceeds the authority granted under GLB to implement the FCRA. NAII respectfully disagrees with the position stated in paragraph (c), for under FCRA an oral notice can suffice. Also, for reasons stated earlier, the requirement of a writing will hamper situations where immediate closing of the transaction is actually the consumer preference, as with needed insurance coverage or mortgage commitment.

Joint Opt Out Notice (8 (e))

The provision for joint notice is an excellent one, but the proposed interpretations go too far in requiring identification of each of the affiliates. NAII's concern is twofold. First of all, in a given holding company structure (whether insurer only or insurer and other financial institutions), there may be a very large number of affiliated companies.

Specifically naming all affiliated companies in the holding company structure would add little but perhaps consumer confusion to the notice. NAII recommends that this section be changed to permit categorization or description of the category(ies) of affiliates that may be involved (much like the privacy notice categorization of entities to whom information may be disclosed and categories of information collected and disclosed). The consumer should be sufficiently on notice if the disclosure indicates, for example, "insurer members of the XYZ Group." Secondly, the realities of mergers and acquisitions, an underlying purpose of GLB, are such that affiliations are constantly changing. The interpretation would require constant, and needless updating, whereas general categorizations remain accurate even post acquisition or sale of an affiliate.

Time by which Opt Out Must be Honored (10)

"Reasonably practicable", the standard in the interpretations, is appropriate to set the time under which an institution must honor opt out. Any attempt to fix a number of days will be, under some circumstances, unreasonable for the consumer or the institution. "Reasonably practicable" is also consistent with the GLB privacy rules.

Affiliate use of Information to Obtain the Product Requested

NAII would like the FTC to consider the scenario where a consumer approached a company for a specific product, but that company is part of a holding company structure, with one or more affiliates. Consumer comes to Company A seeking the product. Company A has numerous affiliates, but the consumer opts out of such information sharing (putting aside the issue of what information under FCRA should be subject to opt out of affiliate sharing) with the affiliates. By ill fortune, the consumer has chosen the one company, Company A, in the holding company structure which provides products or

services to consumers which constitute greater financial risks. Thus, Company A, while agreeing to provide the product to the consumer, as part of its pricing structure for accepting greater financial risks, charges more (whether in interest rates, related costs, or premiums) than its affiliate, Company B. The consumer would pay a higher rate by choosing not to permit sharing of information. Or in a reverse scenario, Company B might reject a loan or insurance application, which Company A would issue. But Company A cannot due to opt out. NAII believes that it is in the best interest of the consumer and reflective of business practices that the information solely for the purpose of providing the product the consumer requested, be freely shared among affiliates, and that application information, i.e., information provided by the consumer, not be subject to opt out at all.

NAII appreciates the opportunity to comment to the proposed interpretations. Should there be any questions relating to these comments, please contact Michael Koziol, Senior Director and Counsel, NAII, 2600 S. River Road, Des Plaines, Illinois 60018. Phone: 847 297 7800. Fax: 847 297 5064. Email: mkoziol@naii.org.

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