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Credit-based Insurance Score – Homeowners Insurance – P044804

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Federal Trade Commission
Room H-135 (Annex C)
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Washington, D.C. 20580

Dear Mr. Clark:

The American Insurance Association ("AIA") and the National Association of Mutual Insurance Companies ("NAMIC") provide these comments to the Federal Trade Commission (the "FTC" or "Commission") in response to the Commission's May 19, 2008 request for public comment pertaining to the draft model order the Commission proposed to issue pursuant to its May 16, 2008 resolution directing the use of compulsory process to obtain information for the homeowners insurance credit scoring study (the "Proposed Order").

The AIA and NAMIC member companies, as well as the members of the Property Casualty Insurers Association of America, previously submitted a proposal to the Commission in a cooperative effort to provide reasonably necessary information to the Commission for purposes of the homeowners study. (A copy of the proposal is attached as Exhibit A.) The insurers believe that the submitted proposal protects the public's interest by ensuring adequate and reliable data for the Commission and also protects the interests of policyholders and carriers in safeguarding sensitive confidential and proprietary information. That proposal remains pending, and the companies remain committed to working with the Commission to complete the study successfully.

The Proposed Order sweeps more broadly than necessary for the Commission to fulfill its obligations under section 215 of the Fair and Accurate Credit Transactions Act

of 2003, Pub. L. No. 108-159, § 215(a), 117 Stat. 1952, 1984-85 (2003) (codified at 15 U.S.C. 1681 note) (the "FACT Act" or "FACTA") and appears to underestimate the burden that would fall on the insurers subject the Proposed Order. Under the Commission's unprecedented, legally unjustified resolution, insurers would be required to compile and turn over to the Commission sensitive personal information pertaining to more than 40,000,000 policies and 60,000,000 insureds for each year of at least a four-year period. The Commission neither guarantees the safe-keeping of that information nor explains why its extraordinary information demand is necessary to perform the FACT Act study.

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I.
INTRODUCTION.

The AIA and NAMIC memberships represent approximately 70% of the private homeowner's insurance market in the United States. The two associations have a great interest in the Commission's homeowners insurance study, the Commission's assertion of authority to use compulsory process against insurers to undertake the study, and the scope of the Commission's Proposed Order itself.[1]

[1] In providing these comments, neither AIA nor NAMIC, nor any of their members, waive any right to later challenge the Commission's authority to invoke its compulsory process or the issuance of any specific order or any argument that might be raised in such a challenge.

The origins of this study are in section 215 of the FACT Act, signed into law on December 4, 2003. Section 215 directed the Commission, among other things, to submit a study within 24 months of enactment on "the effects of the use of credit scores and credit-based insurance scores on the availability and affordability of . . . property and casualty insurance." The Commission decided to conduct two studies, rather than one. The two separate studies were to cover automobile insurance and homeowners insurance. The first study examined automobile insurance. The Commission transmitted that report to Congress in July 2007.[2]

In the automobile insurance study, the Commission obtained the necessary information from insurers through a voluntary agreement, where the Commission was provided with a subset of the data used for the EPIC analysis of automobile insurance credit scoring,[3] and then added such additional information and analysis as it needed in order to complete the study. Even as the industry was providing follow-on information and actuarial assistance to the Commission in connection with the auto insurance database and report, the industry began working with the Commission on the specifications for, and implementation of, a homeowners insurance database. That work was advancing well until superceded by the Commission's apparent decision to use compulsory process.

Indeed, even after the Commission announced its likely use of compulsory process for the homeowners study, the industry continued its efforts to work voluntarily with the Commission by providing it with a full written proposal for the collection of data, with the goal of reaching a resolution that would provide the Commission with all the information it reasonably needed, while protecting customer privacy and competitively sensitive information. The Commission, however, has thus far failed to engage in a meaningful discussion of the proposal with the insurers. Nonetheless, we remain willing

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[2] Fed. Trade Comm'n, *Credit Based Insurance Scores: Impacts on Consumers of Automobile Insurance* (July 2007).

[3] *See* Michael J. Miller, FCAS, MAAA, and Richard A. Smith, FCAS, MAAA, *The Relationship of Credit-Based Insurance Scores to Private Passenger Automobile Insurance Loss Propensity: An Actuarial Study by EPIC Actuaries LLC* (June 2003) (Principal Peer Reviewer, Klayton N. Southwood, FCAS, MAAA). EPIC Consulting, LLC provides actuarial and management consulting services related to property/casualty insurance. *See generally* http://www.ask-epic.com.

to discuss a voluntary agreement and the scope of the information needed with the Commission at any time. We are prepared to engage in such discussions with the Commission immediately in order to help the Commission realize its stated goal of "minimizing any unnecessary burden on insurance firms participating in the study."

Although we remain willing to work with the Commission, we respectfully disagree with its decision to use compulsory process. We believe that the Commission's actions should be guided by its legal authority. In that context, we believe that the applicable legal authority does not permit the Commission to use compulsory process here. We also believe that even if the Commission had the legal authority to use compulsory process here, the scope of the Proposed Order in its current form is so intrusive, burdensome, costly, and time-consuming that it should not be finalized.

If ultimately sustained in its current form, the Proposed Order would require protracted and costly efforts by the Commission, as well as by submitting insurers, to try to retrieve data, rationalize the information derived from many different systems from the responding insurers, and digest and analyze the information. Based on quickly canvassing certain insurers in connection with the preparation of this letter, we estimate that at least six months to a year would be required to obtain, retrieve and provide the demanded information that insurers currently possess. Under the stated terms of the Proposed Order, insurers are also required to generate information they currently do not possess. If that occurs, the production of those data will certainly take more than a year and substantially delay completion of the study.

In many instances, compliance with the Proposed Order will also potentially require the hiring of new staff or retaining of contractors, or both, by the Commission and carriers alike and would likely divert resources from important business functions of the insurers. The attendant costs of these measures would also be substantial.

The practical reality is that insurers' data systems have been created for well-defined specific business purposes, which are not congruent with the demands of the Proposed Order, nor are they consistent from one company to the next. Therefore, compliance with the Proposed Order would cost insurers millions and potentially tens of millions of dollars—a cost ultimately borne by consumers. In addition, given that the

Commission intends to serve the Proposed Order on only certain market participants, the significant burdens imposed by the Proposed Order could competitively disadvantage the insurers that receive it.

Despite our concerns regarding the Commission's current approach, we fully support the conduct of a proper homeowners insurance study. We are confident that its outcome will demonstrate—as did the automobile insurance study—that the use of credit scores in establishing homeowner's insurance premiums makes those premiums more accurate for homeowners, without regard to their race or ethnicity and, therefore, reduces the premiums for millions of homeowners of all racial and ethnic groups.

The rest of this letter discusses the Commission's May 18th resolution and Proposed Order in some detail. In summary, those comments are as follows:

- The Commission's resolution and Proposed Order violate section 215 of the FACT Act and section 6 of the FTC Act and, therefore, are unenforceable;
- Even if the Commission did have legal authority to use compulsory process, it would be prohibited from doing so unless it complied with the requirements of the Paperwork Reduction Act;
- In adopting the resolution and Proposed Order, the Commission should adhere to the privacy and data security principles that the Commission has urged or required of non-governmental actors; and
- The Commission's Proposed Order seeking private information on 60 million consumers, each year of the study, is overly broad, burdensome, costly, and ultimately unnecessary to obtain the information required to complete the homeowners insurance study.

These conclusions are discussed in the following sections.

II.
PROPOSAL FOR CONTINUING EFFORTS FOR A VOLUNTARY RESOLUTION.

Based on our continuing desire to assist the Commission in undertaking a responsible study and avoid lengthy delays and possible litigation, we renew our offer to meet with the Commission staff to develop a mutually acceptable protocol for the homeowners study. We can use our April proposal to the Commission or the specifications contained within the Commission's Proposed Order as a baseline for discussions. While there is no guarantee that an agreement can be reached, it may be

possible to do so. If not, it may be possible to reduce the number and scope of issues that separate us. In any case, we will better understand each other's positions.

We urge that if the Commission is interested in such discussions we undertake them at an early date, prior to the Commission finalizing its Order.

III.

THE COMMISSION DOES NOT HAVE THE LEGAL AUTHORITY UNDER EITHER SECTION 215 OF THE FACT ACT OR SECTION 6 OF THE FTC ACT TO REQUIRE SPECIAL REPORTS FROM INSURERS FOR PURPOSES OF THE HOMEOWNERS INSURANCE STUDY.

(a) Introduction and Summary.

In adopting its May 16th resolution, the Commission invoked section 215 of the FACT Act and section 6(b) of the Federal Trade Commission Act as the legal authority for compulsory process against insurers to obtain company-specific information for the homeowners insurance credit scoring study.

We believe the Commission does not have the authority it asserts. There are two principal reasons for our conclusion. First, under the clear, unambiguous language of the FACT Act, Congress has not authorized the Commission to use compulsory process against any party, including insurers, for the conduct of the section 215 study. Neither section 215 itself nor any other section of the FACT Act expressly authorizes any use by the Commission of compulsory process against insurers. In our view, Congress's authorization of a study does not create a further authorization for the Commission to assert compulsory process to conduct the study. Nor do we believe it implies any such authority. If Congress had wanted to give compulsory process authority to the Commission in order to conduct the section 215 study, Congress knew how to write the requisite words into the legislation. Congress chose not to do so. Consistent with that Congressional decision, the Commission and other agencies have completed a number of FACT Act-authorized studies without it, including the Commission's original section 215 study of automobile insurance.

Second, under a specific, insurance-only provision in section 6 of the FTC Act, the Commission is prohibited from using compulsory process against insurers. The Commission is also prohibited from conducting any studies of the business of

insurance, except in one inapplicable circumstance. The Commission may conduct a study of the business of insurance only if either the House or Senate Commerce Committee requests such a study. No such request has come from either Committee. As the relevant legislative history makes clear, even assuming such a request had been made, the Commission may not issue compulsory process for its studies or make an inquiry of a segment of the insurance industry.

(b) Section 215 of the FACT Act Does Not Authorize the Use of Compulsory Process.

Compulsory process such as the Commission's resolution and proposed Order represents an extraordinary exercise of governmental power. As the Supreme Court long ago recognized, administrative orders, just like judicial subpoenas, are "subject to specific constitutional limitations . . . such as those against self-incrimination, unreasonable search and seizure, and due process of law." *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950). Because of these constitutional dimensions, compulsory process may not be invoked without authority.

1. The FACT Act's Plain Language Does Not Authorize the Commission to Compel Information from Insurers.

"It is axiomatic that administrative agencies are vested only with the authority given to them by Congress." *Brendsel v. Office of Fed. Housing Enter. Oversight*, 339 F. Supp. 2d 52, 64 (D.D.C. 2004) (internal quotation marks and citation omitted). The Commission, "like other federal agencies, literally has no power to act . . . unless and until Congress confers power upon it. The Commission has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Am. Library Ass'n v. Fed. Commc'n Comm'n*, 406 F.3d 689, 698 (D.C. Cir. 2005) (internal quotation marks and citations omitted). Accordingly, the Commission would have authority to issue compulsory process in connection with the credit scoring study only if Congress had expressly created such authority. However, neither the FACT Act's language, nor its legislative history, nor the contemporaneous construction of section 215 by the Commission and other administrative agencies in implementing other FACT Act-mandated studies supports the existence of such authority.

The statute's plain language contains no reference to the use of compulsory process. Although section 215 of the FACT Act directs the Commission and the Board of Governors of the Federal Reserve System to "conduct a study" of the use of credit scores, it nowhere confers authority on the Commission to issue any type of compulsory process in conducting the study. Indeed, the statute structures the Commission's authority with respect to implementation of the required study, mandating that the Commission "seek public input about the prescribed methodology and research design of the study" and consult with "relevant Federal regulators, State insurance regulators, community, civil rights, consumer, and housing groups." § 215(b), 117 Stat. at 1985. In providing such specific guidance to the Commission concerning implementation of the study, Congress significantly did not confer any authority on the Commission to compel data from insurers or any other entity in connection with the study.

Congress's silence on this matter may not be interpreted as an accident or as an oversight or as an irrelevance. Rather, it must be read as a deliberate decision to withhold the power of compulsory process from the Commission, consistent with the specific limitations on the Commission's ability to issue such process as to "the business of insurance" contained in existing statutory provisions. Because administrative agencies may act only upon an express authorization from Congress, Congress's omission of authority precludes agency action. *See FAG Italia S.p.A. v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002) ("It is indeed well established that the absence of a statutory authority cannot be the source of agency authority."). By not expressly providing the Commission with the power of compulsory process, Congress denied that power to the Commission.

Had Congress wished to extend the Commission's authority under section 6(b) of the FTC Act to encompass the section 215 study, it easily could have done so. The fact that Congress legislated detailed guidance to the Commission regarding how the study was to be designed and the constituencies from whom the Commission was to seek input, while making no reference to section 6(b) reports, demonstrates Congress's intent not to make that tool—contained in a separate statute—available to the Commission. The United States Supreme Court has observed that "[i]t is presumable that Congress legislates with knowledge of our basic rules of statutory construction."

McNary v. Haitian Refugee Ctr., 498 U.S. 479, 496 (1991). As such, it is equally clear that the absence of any reference to the use of compulsory process or section 6(b) in section 215 of the FACT Act forecloses the Commission's reliance on such authority here.

2. The FACT Act's Legislative History Confirms that Congress Did Not Intend for the Commission to Use Compulsory Process in Connection with the Credit Scoring Study.

The FACT Act's legislative history reinforces the conclusion that Congress deliberately omitted authority to use compulsory process or any linkage to section 6 of the FTC Act. The report of the House Committee on Financial Services to accompany H.R. 2622 (the House version of the FACT Act) delineates the Committee's expectations regarding the Commission's conduct of the credit scoring study pursuant to section 505 of the bill, the analog to what became section 215 in the final bill: "The Committee expects that the Commission and HUD will seek assistance from the Federal and State financial regulators that have jurisdiction over financial services providers and shall take into account currently existing studies and legal analysis." H. Rep. No. 108-263, at 51 (2003). The House Committee's emphasis on "currently existing studies and legal analysis" furnishes further confirmation that Congress did not envision the use of compulsory process to obtain additional data for this new study.

The Report of the Senate Committee on Banking, Housing and Urban Affairs accompanying S. 1753, the Senate amendment to H.R. 2622, solely directs the Commission in implementing section 215 "to obtain public input." S. Rep. No. 108-166, at 20 (2003). The Conference Report refers back "to the Committee reports for the respective bills for further elaboration." H. Rep. No. 108-396, at 66 (2003). Thus, nowhere in either the House Committee's report, the Senate Committee report, or the Conference report pertaining to the FACT Act did Congress intimate that the Commission should have the power to use compulsory procedures in order to conduct the required studies.

3. The Past Practice in Implementing Studies Required under the FACT Act Demonstrates the Inapplicability of Compulsory Process.

The interpretation of section 215 by the Commission in conducting its initial section 215 study, as well as in the other studies conducted by the Commission and other agencies pursuant to the FACT Act, suggest that the Commission also understood that Congress's mandate in section 215 does not authorize compulsory process. As the Commission is aware, the first section 215 study completed by the Commission, which addressed the use of credit-based insurance scores in the private passenger automobile insurance market, relied on data voluntarily supplied to the Commission by the insurance industry—data the Commission determined and continues to affirm to be sufficient and reliable for compliance with Congress's directive in section 215.[4] The Commission's conduct and subsequent statements provide a practical gloss on section 215 fully consistent with our reading of the statute. It is therefore fair to assume that in conducting the automobile study, the Commission understood the plain language of the FACT Act as circumscribing the means by which data could be obtained.

The Commission's actions in connection with the automobile insurance study also comport with the practical construction applied to other FACT Act sections requiring studies by the Commission and other administrative bodies.[5] In conducting these other congressionally mandated FACT Act studies, both the Commission and

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[4] Statement of Chairman Deborah Platt Majoras, Commissioner William E. Kovacic, and Commissioner J. Thomas Rosch, *Study of Insurance Scores Pursuant to Section 215 of the Fair and Accurate Transactions Act of 2003 ("FACTA")*, FTC Project No. P044804, at 4 (July 2007) ("we have confidence in the quality of the process that the Commission staff used and soundness of the results obtained"); Letter from Deborah Platt Majoras, Chairman, Federal Trade Comm'n, to Hon. Melvin L. Watt, Chairman, House Subcomm. on Oversight & Investigation, Comm. on Fin. Servs. (Sept. 17, 2007) at 5 ("The critical question is not the particular method the Commission selected to obtain relevant information; instead, it is whether the data obtained is reliable. [¶] I am confident that the information that we received voluntarily from the insurance companies was reliable . . . ."); *Credit-Based Insurance Scores: Are They Fair?: Hearing Before the H. Comm. on Fin. Servs., Subcomm. on Oversight & Investigations*, 110th Cong. (Oct. 2, 2007) (statement of Commissioner J. Thomas Rosch on behalf of FTC) at 5 ("The FTC has given careful and thorough consideration to the methodological concerns that have been raised about our automobile insurance study. Following this consideration, a majority of the Commission continues to believe that the methods used were sound and that the findings made and conclusions reached were well-supported.").

[5] The FACT Act contains numerous provisions obligating various administrative bodies to conduct studies of various issues and report the findings to Congress. *See* Pub. L. No. 108-159, §§ 157, 213, 214, 215, 313, 318, & 319.

other agencies have relied exclusively on information gathered through consultation and voluntary production. In discussing their methodology, these reports never suggest that the authoring agencies utilized or drew upon any type of compulsory process or any means of gathering information other than consensual ones. The Commission's December 2004 report pursuant to sections 318 and 319 of the FACT Act regarding improvements in accuracy of credit reports identifies "a variety of means to obtain information for these studies" including Commission staff interviews, "*Federal Register* Notices seeking relevant information," and "a roundtable meeting of experts."[6]

Similarly, in conducting its section 215 study regarding the impact of credit scores on the availability of credit, the Federal Reserve's Board of Governors relied on data provided by TransUnion, "commercially available generic credit history scores," and, like the Commission, Social Security Administration records.[7] Neither these, nor several other studies undertaken pursuant to the FACT Act provide any precedent for the use of compulsory process.[8] The import of this consistent administrative practice is clear: use of compulsory process to complete studies called for by the FACT Act is neither authorized nor necessary to fulfill the Congressional mandate.

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[6] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, at ii (Dec. 2004).

[7] Board of Governors of the Federal Reserve System, *Report to the Congress on Credit Scoring and Its Effects on the Availability & Affordability of Credit: Submitted to the Congress Pursuant to Section 215 of the Fair and Accurate Credit Transactions Act of 2003*, at 57 (Aug. 2007).

[8] *See* Federal Trade Commission & Board of Governors of the Federal Reserve System, *Report to Congress on the Fair Credit Reporting Act Dispute Process: Submitted to the Congress Pursuant to Section 313(b) of the Fair and Accurate Credit Transactions Act of 2003*, at 1-2 (Aug. 2006) (identifying information sources as public comment letters, meetings with affected constituencies, consumer complaint information in currently maintained databases, and review of "existing literature, including studies, reports, and industry manuals, as well as research conducted by the Board's staff economists"); Department of the Treasury, *The Use of Technology to Combat Identity Theft: Report on the Study Conducted Pursuant to Section 157 of the Fair and Accurate Credit Transactions Act of 2003*, at 3-4 (Feb. 2005) (relying on public comments, "consultations" with specified constituencies, and "review of literature pertinent to this study . . . drawn primarily from publicly available sources"); Board of Governors of the Federal Reserve System, *Report to the Congress on Further Restrictions on Unsolicited Written Offers of Credit and Insurance: Submitted to the Congress Pursuant to Section 213(e) of the Fair and Accurate Credit Transactions Act of 2003*, at 2-3 (Dec. 2004) (identifying information sources as credit records obtained from a national credit reporting agency, nationwide survey of consumers, and public comments in order "to obtain the views of creditors, insurers, and other interested or concerned parties").

4. The FACT Act's Temporal Limitations Preclude Resort to Compulsory Process.

Notwithstanding the absence in section 215 of an express authorization for use of compulsory process and a course of conduct reflecting that omission, we understand that the Commission may believe that the FACT Act provides implicit authority for use of section 6(b) orders. We respectfully disagree. Whatever may be the case regarding inquiries relating to industries within the Commission's investigative authority, as explained more fully below, section 6 of the FTC Act prohibits the Commission from exercising its investigative powers with respect to the "business of insurance"—an area that unquestionably encompasses the proposed homeowners study. Beyond that critical jurisdictional limitation, section 215 cannot serve as the basis for the Commission's invocation of section 6(b) powers because section 215 itself contains a significant restriction.

Section 215(c) provides that "the Commission shall submit a detailed report" to the relevant committees "[b]efore the end of the 24-month period beginning on the date of enactment of this Act." Pub. L. No. 108-159, § 215(c)(1), 117 Stat. at 1985. As the FACT Act was enacted on December 4, 2003, the two-year period specified by Congress expired in December 2005, more than two and a half years ago. Assuming *arguendo* that the mandate to complete the study required under section 215 could be construed as implicit authority to issue orders under section 6 of an entirely separate Act, any such authorization could exist only so long as expressly specified by Congress. Accordingly, when the two-year period specified in section 215 expired, so would have any arguably implicit authorization to use compulsory process.

(c) The Exemption of the "Business of Insurance" From Section 6 Precludes the Issuance of the Commission's Proposed Order.

1. Section 6 of the FTC Act Bars the Commission from Compelling Information from Insurers for the Study.

The Commission bases its assertion of authority to compel submission of the homeowners study data on section 6(b) of the FTC Act, which empowers the Commission "[t]o require, by general or special orders, . . . to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and

special, reports or answers in writing to specific questions." 15 U.S.C. § 46(b). However, amendments to section 6 by the Federal Trade Commission Improvements Act of 1980, foreclose the Commission from exercising its section 6(b) powers (assuming they apply to the FACT Act at all) with respect to "the business of insurance." Thus, because the homeowners study involves the business of insurance, the Commission lacks the authority to require the filing of special reports pursuant to section 6(b). Any alternate construction of the statute would require the conclusion that Congress intended for section 215 of the FACT Act to implicitly repeal *sub silentio* the specific insurance-related prohibition contained in section 6. This would be a conclusion disfavored by "cardinal rules" of statutory construction and devoid of support in the legislative history.

The final provision of section 6 of the FTC Act articulates a clear legislative prohibition against the Commission's exercise of its powers of compulsory process in the circumstances present here. Section 6 says that the Commission shall have no authority over the "business of insurance," with one exception. That exception arises if either the House or Senate Commerce Committee requests a report or study, in which case the Commission is required to provide that study by the end of that Congress. Since neither of these committees ever requested such a study, the section 6 prohibition is an absolute bar to the Commission's attempt to exercise special report authority here. Section 6 ends with the following words:

> Nothing in this section (other than the provisions of clause (c) and clause (d))[9] shall apply to the business of insurance, except that the Commission shall have the authority to conduct studies and prepare reports relating to the business of insurance. The Commission may exercise such authority only upon receiving a request which is agreed to by a majority of the members of the Committee on Commerce, Science, and Transportation of the Senate or the Committee on Energy and Commerce of the House of Representatives. The authority to conduct any such study shall expire at the end of the Congress during which the request for such study was made.

[9] These clauses pertain to investigation of compliance with antitrust decrees and of violations of antitrust statutes. *See* 15 U.S.C. §§ 46(c) & (d).

15 U.S.C. § 46. Based upon the plain statutory language, the provisions of section 6(b) do not apply "to the business of insurance." The proviso renders the entire section—including subparagraph (b)—inapplicable to the business of insurance.

The legislative history of the FTC Improvements Act underscores the clear import of this provision. The report accompanying the 1979 Senate amendment, which served as the basis for the final language, specifies that "[u]nder the amendment, the FTC's *investigative and reporting powers* are made explicitly inapplicable to the business of insurance (except to the extent authorized under subsections 6(c) and 6(d) relating to antitrust investigations)." S. Rep. No. 96-500, at 13 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 1102, 1114 (emphasis added). The Senate Committee further declared that "[f]or purposes of this amendment, the term 'business of insurance' has the same meaning as used in the McCarran-Ferguson Act." *Id.* The 1980 legislation was passed in response to the Commission's initiation of several investigations that the Committee believed "focus[ed] on ratemaking and related activities which the Supreme Court has consistently held to be the 'business of insurance' within the meaning of the McCarran Act." *Id.* at 14, 1980 U.S.C.C.A.N. at 1115. That same concern would, of course, apply to any new Commission effort to use compulsory process to obtain data about insurance rating and underwriting practices.

2. The Homeowners Study and Requested Data Constitute the Business of Insurance.

The data sought by the Commission unquestionably concerns the "business of insurance." The Commission is evaluating the data in connection with an assessment of how insurers set rates. As the 1979 Senate Committee report noted, such ratemaking and related underwriting of risk has consistently been held to lie at the heart of the "business of insurance" under the McCarran-Ferguson Act. Under Supreme Court precedent, the "three criteria relevant in determining whether a particular practice is part of the 'business of insurance' are

> *First*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982). The practice at issue here—the use of credit score in the setting of insurance rates and underwriting decisions—satisfies these criteria. The evaluation of risk and setting of premiums for insurance contracts is the quintessential "practice . . . of transferring or spreading a policyholder's risk." The setting of premiums and the insurer's decision whether to enter into a contract with a policyholder at all undeniably forms "an integral part of the policy relationship": underwriting criteria determine whether the insurer will issue a policy and on what terms. Finally, the homeowners insurance study is by definition "limited to entities within the insurance industry" as only an insurer or its agents can set premiums or make underwriting decisions.

Because the requested data and the subject of the Commission's study directly concerns the "business of insurance," the Commission's section 6(b) powers simply cannot apply here. The relevant proviso to Section 6 removes the "business of insurance," and thus the homeowners study, from the reach of the Commission's compulsory process powers.

It is implausible to contend that, in the face of this specific limitation on the Commission's power to compel production of information, Congress would have relied on an unspoken, "implicit" grant of power if it had intended the Commission to use compulsory process in conducting this study. Where the FTC Act itself exempts an activity or class of persons from the scope of Commission's investigative jurisdiction, the Commission has no authority to use the investigative tools provided by section 6(b).[10]

In enacting the FTC Improvements Act of 1980, Congress delineated a boundary that the Commission is not to cross. The Senate Committee report explained that the "business of insurance" proviso to section 6 "is made necessary because the FTC is misconstruing the jurisdictional limitations clearly set forth in the McCarran-Ferguson Act and is engaging in unauthorized activities which cannot effectively be challenged or halted in the federal courts." S. Rep. No. 96-500, at 13, 1980 U.S.C.C.A.N. at 1114. By

[10] *See Fed. Trade Comm'n v. Miller*, 549 F.2d 452, 456-57 (7th Cir. 1977) (construing sections 5 and 6 of FTC Act and holding that "the words of the Act plainly exempt from the agency's investigatory jurisdiction any corporation holding the status of a common carrier"; denying enforcement of subpoenas issued to common carrier).

proceeding to issue compulsory process in connection with the section 215 study, the Commission would enter an area that the 1980 legislation specifically cordoned off.

3. The Limited Exceptions to Section 6's Insurance-Related Prohibition Do Not Apply Here.

As noted above, section 6 does contain an exception to the "business of insurance" proviso that permits the Commission "to conduct studies and prepare reports relating to the business of insurance." 15 U.S.C. § 46. However, that exception does not furnish the Commission any basis for the issuance of 6(b) orders here. The statute goes on to impose conditions on the conduct of studies by the Commission that have not been met. And more fundamentally, the limited authority "to conduct studies and prepare reports" conferred upon the Commission in the event that those conditions are met does not include use of investigative tools such as 6(b) reports.[11]

First, the section 6 exception for studies and reports applies only to "a request which is agreed to by a majority of the members" of either the Senate Committee on Commerce, Science, and Transportation or the House Committee on Energy and Commerce. 15 U.S.C. § 46. To our knowledge, neither of those committees has made the required request. Second, like section 215 of the FACT Act, section 6 of the FTC Act provides that any request conveys authority valid only for a limited duration. Under section 6, "[t]he authority to conduct any such study shall expire at the end of the Congress during which the request for such study was made." 15 U.S.C. § 46. Even if there were an inappropriate assumption that section 215 of the FACT Act could be construed as a "request" within the meaning of Section 6, such a request was made

[11] The Commission and its staff have repeatedly recognized that "[t]he Commission's authority to conduct studies and prepare reports relating to the business of insurance is limited, however." FTC Staff Advisory Op. / Comment Letter to the U.S. Dep't of Health & Human Servs., Asst. Sec'y for Planning & Evaluation, at 1 n.6 (Feb. 17, 2000), *available at* 2000 WL 197232 (F.T.C.); Prepared Statement of the Fed. Trade Comm'n on Financial Privacy, the Fair Credit Reporting Act, and H.R. 10, at 1 n.4 (July 21, 1999) (statement of Robert Pitofsky before the House Banking Comm., Subcomm. on Financial Institutions & Consumer Credit), *available at* 1999 WL 518092 (F.T.C.); Prepared Statement of the Fed. Trade Comm'n on "Self-Regulation and Privacy Online," at 1 n.4 (July 13, 1999) (statement of Robert Pitofsky before the House Comm. on Commerce, Subcomm. on Telecomms., Trade, and Consumer Protection), *available at* 1999 WL 494056 (F.T.C.); Prepared Statement of the Fed. Trade Comm'n on "Identity Theft," at 1 n.12 (May 20, 1998) (statement of David Medine before the Senate Judiciary Comm., Subcomm. on Technology, Terrorism & Gov't Info.), *available at* 1998 WL 254796 (F.T.C.).

upon the FACT Act's enactment in December 2003 during the 108th Congress. That term of Congress ended in 2004.

Third, nowhere does section 6 suggest that the "authority to conduct studies and prepare reports relating to the business of insurance" restores the 6(b) compulsory process powers completely eliminated in the first sentence of the section. To the contrary, the exception by its terms effects a limited carve-out from the categorical prohibition against Commission activity with respect to insurance. Had Congress intended to give the Commission compulsory process authority to be used in conjunction with an authorized study, it could have easily inserted such language into section 6. It did not. Instead, Congress empowered the Commission to "*prepare* reports" itself, not to *require* them from others.

Once again, the legislative history of the FTC Improvements Act confirms Congress intended to essentially prohibit the Commission from exercising any authority with respect to insurance unless it expressly provides otherwise. Moreover, where the Improvements Act gave the Commission limited authority, it made clear that that authority did not extend to the issuance of compulsory process. The Joint Explanatory Statement of the Conference Committee provided guidance on this very question: "Finally, the conferees intend in authorizing the Commission to conduct studies that this authority be limited to general review and analysis of insurance policy issues[,] not 'investigations' of the industry or segments of the industry." H. Conf. Rep. No. 96-917, at 29 (1980), *reprinted in*, 1980 U.S.C.C.A.N. 1143, 1146.

By carefully distinguishing the Commission's authority to undertake "studies" from its prohibition of conducting "investigations," Congress communicated a clear intent to deprive the Commission of its investigative powers available as to other businesses—powers that include compulsory process under section 6(b). As the Commission itself explicitly recognizes in its own operating protocols, compulsory procedures such as "[o]rders to file special reports are an investigative tool." FTC Operating Manual § 3.3.6.7.8.1.[12] Congress clearly prohibited the Commission from

[12] *See also id*. § 3.3.6.7.1 "Compulsory procedures consist of investigational subpoenas, civil investigative demands, orders of access and orders to file special, or § 6b FTCA reports. The circumstances surrounding a particular investigation will suggest whether voluntary compliance or compulsory process should be used to conduct an investigation."

conducting "investigations" as to one business, the "business of insurance." Section 6(b) special reports are available to the Commission only as part of its power to conduct investigations. Accordingly, the authority to conduct "studies" does not permit the Commission to issue section 6(b) orders.

4. Congress's Section 215 Directive Did Not Repeal Section 6's Proscription Against Investigations of the Business of Insurance by Implication.

Given Congress's clear intent to foreclose use of investigational procedures such as 6(b) reports in conducting authorized insurance-related studies under Section 6, an interpretation of section 215 of the FACT Act restoring the power of compulsory process in conjunction with such a study would effect an implicit repeal of the section 6 proviso. Under well established Supreme Court precedent, the Court "assume[s] that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp*., 498 U.S. 19, 32 (1990). Here, in enacting the FACT Act, Congress was surely well aware of the express and unique proscription against Commission investigation of the business of insurance and limited carve-back for "studies" requested by either the House or Senate Commerce committees contained in section 6 of the FTC Act. In light of this knowledge, section 215 cannot be construed as authorizing compulsory procedures that are prohibited under section 6 in connection with a study. To do so would mean that Congress intended to repeal the unusually precise section 6 prohibition without a clear expression of such intent in section 215. In fact, there is not even a hint of such intent.

The Supreme Court has "repeatedly stated . . . that absent a clearly expressed congressional intention, repeals by implication are not favored. An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (internal quotation marks and citations omitted). Here, neither circumstance permitting an implied repeal exists. Section 6 of the FTC Act and section 215 of the FACT Act are not in "irreconcilable conflict" To the contrary, the FACT Act's requirement of a credit scoring study under section 215 can be accomplished—just as the auto study and other the FACT Act-related studies have been—through consultation with affected constituencies and

voluntary cooperation with regard to data. By averting resort to compulsory process, the Commission can execute its obligation under section 215 without running afoul of the legislative prohibition contained in section 6. Nor can it reasonably be argued that the FACT Act "is clearly intended as a substitute" for the Commission's organic law.

No justification exists here for violation of the rule against finding repeal by implication. Section 215 of the FACT Act does not contain authority to resort to compulsory procedures. Section 6 of the FTC Act specifically removes the "business of insurance" from the ambit of the Commission's general investigational powers. As the automobile insurance study demonstrates, the Commission can fulfill its congressionally delegated function of completing its study of credit scores using data voluntarily supplied by the insurance industry.

IV.

THE COMMISSION HAS NOT FOLLOWED THE STATUTORILY MANDATED REQUIREMENTS OF THE PAPERWORK REDUCTION ACT.

Even if the FACT Act or the FTC Act did provide the Commission with authority for issuance of compulsory process in connection with a section 215 study, it could not do so here without first completing the Office of Management and Budget ("OMB") review process pursuant to the Paperwork Reduction Act ("PRA"). Violating the PRA creates an independent basis for preventing the Commission from enforcing compliance with its proposed 6(b) orders because such a violation provides a complete defense to any Commission attempt to impose a penalty for non-compliance.

(a) Agency Obligations and Procedures.

Under the PRA, before an agency may conduct a "collection of information," that agency must comply with a series of review and clearance procedures. *See generally* 44 U.S.C. § 3507. The agency must:

- Conduct a review of the proposed collection to, *inter alia*, evaluate the need for it and establish an objectively supported estimate of its burden, as well as ensure that it is inventoried, displays a control number, indicates that it complies with the PRA clearance procedures, and informs the proposed recipient of why the information is being sought and how it is to be used, of the estimated burden in complying with the

collection, and of whether responses are mandatory. *See* 44 U.S.C. §§ 3507(a)(1)(A), 3506(c)(1).

- Provide 60-day notice in the *Federal Register* to solicit, and then review, comments to help it: evaluate whether the information collection is necessary; evaluate the accuracy of the agency's burden estimate; minimize the burden; and enhance the quality and utility of the information to be collected. *See* 44 U.S.C. §§ 3507(a)(1)(B), 3506(c)(2).
- Submit to OMB (1) a certification stating, *inter alia*, that the proposed collection of information is necessary, reduces the burden of compliance to the extent practicable, and is written using plain and unambiguous terminology; (2) the proposed collection of information itself; (3) and copies of pertinent statutory authority, regulations, and other related materials as required. *See* 44 U.S.C. §§ 3507(a)(1)(C) & 3506(c)(3).
- Publish a notice in the Federal Register stating that it has submitted the proposed collection of information to OMB and describe, inter alia, the collection itself, the need for it, its likely respondents, and the estimated burden. *See* 44 U.S.C. § 3507(a)(1)(D).
- Wait until OMB gives notice of its approval (after it allows at least 30 days for public comment but within 60 days after it receives the submission or the agency publishes the notice, whichever is later) and obtains a control number to be displayed on the collection of information. *See* 44 U.S.C. §§ 3507(a)(2)-(3), 3507(b), 3507(c)(1)-(2).

If OMB does not approve a proposed collection of information, the Commission, as an "independent regulatory agency administered by two or more members of a commission," may, by majority vote, void the disapproval. *See* 44 § U.S.C. 3507(f)(1)(A); *see also* 44 § U.S.C. 3502(5) (defining "independent regulatory agency" to include "the Federal Trade Commission").[13] But, the Commission may not evade the OMB clearance process or exempt itself from other PRA procedures. The override provision merely allows the Commission to reject an OMB disapproval *after* the Commission has completed the steps discussed above. *See* 44 U.S.C. § 3507(a) (providing that "an agency shall not conduct or sponsor the collection of information unless in advance" it has gone through the review, notice and public comment, and OMB clearance processes).

[13] If OMB provides no notification at all (whether approval or disapproval), after the 60-day period has expired, approval may be inferred and a control number is assigned. *See* 44 U.S.C. § 3507(c)(3).

Indeed, all collections of information must display a control number, and that number is obtained from OMB only after a proposed collection of information is submitted for review. *See* 44 U.S.C. § 3507(3). In the event that OMB disapproves the proposed collection and an independent regulatory agency such as the Commission votes to override the disapproval, OMB will then assign a control number "without further delay." 44 U.S.C. § 3507(f)(2).

(b) Applicability of PRA to the Commission's Proposed Order.

A "collection of information" under the PRA, in relevant part, means "the obtaining, causing to be obtained, [or] soliciting . . . of facts or opinions by or for an agency, regardless of form or format, calling for . . . answers to identical questions posed to . . . ten or more persons, other than agencies, instrumentalities, or employees of the United States." 44 U.S.C. §§ 3502(3)(A), 3502(3)(A)(i); *see also* 5 C.F.R. § 1320.3(c). The Proposed Order clearly constitutes a "collection of information."

The Commission's Proposed Order, containing fourteen "specifications" (plus subparts) seeking policyholder and insurance data, clearly involves "obtaining," "causing to be obtained," and "soliciting" "facts" that call for answers to "identical questions."[14] This is to be done "for an agency," as the term "agency" under the PRA includes "any independent regulatory agency," whose definition in turn expressly includes the Commission. *See* 44 U.S.C. §§ 3502(1), 3502(5). As corporations, insurers are "persons" under the act as well. *See* 44 U.S.C. § 3502(10).

The only potential question regarding PRA applicability is whether the order would be sent to "ten or more persons." The Commission has stated that it intends to issue its proposed order to nine insurance firms. In doing so, the Commission may be under the impression that the PRA "ten or more persons" threshold would not be triggered. However, applicable OMB regulations and available case law clearly demonstrate that "ten or more persons" indeed would be involved because: (1) separately incorporated subsidiaries of the firms receiving the order constitute

[14] Further, a collection of information "may be in any form or format," including the use of "report forms," "questionnaires," "surveys," "directives," or "instructions." *See* 5 C.F.R. § 1320.3(c)(1).

separate persons under the statute and OMB regulations; and (2) under its regulations, OMB must presume that the Commission's attempt to collect information involving a substantial majority of the homeowners insurance industry requires information from "ten or more persons."

1. "Ten or More Persons" and Subsidiaries.

OMB's PRA implementing regulations explain that "ten or more persons" refers to the persons to whom a collection of information is addressed by the agency within any twelve-month period, and to any independent entities to which the initial addressee may reasonably be expected to transmit the collection of information during that period, including independent State, territorial, tribal or local entities and separately incorporated subsidiaries or affiliates." 5 C.F.R. § 1320.3(c)(4). Thus, by definition, every separately incorporated insurer affected by the Commission's Proposed Order is a person pursuant to the "ten or more persons" requirement. The Commission is aware of this provision, and, indeed, has explained that it likely would have resulted in the PRA's application to 6(b) orders it might have issued for the automobile study.[15]

Although intended recipients have not been specified, based on the Commission's plans, it appears to be a foregone conclusion that at least one, if not many, of the insurer recipients would need to involve their subsidiaries in order to comply with the proposed Order. The Commission's model Order defines "Company" as "[FIRM NAME], including *all entities* which may possess responsive material in [FIRM NAME] custody or control." *See* FTC Matter No. P044804, Model Order to File a Special Report at 11 (emphasis added). The order seeks a variety of policyholder data "[f]or each policyholder who was a named insured under the *Company's* Policies In Place or In Force during the Relevant Time Period," and it seeks policy origination and renewal data "[f]or each of the *Company's* Policies In Place or In Force during the Relevant Time Period." *See id.* at 2 (discussing Specifications 2 & 3) (emphasis

[15] *See* Letter from Deborah Platt Majoras, Former Chairman, Federal Trade Comm'n, to Melvin L. Watt, Chairman, Subcommittee on Oversight & Investigations, Committee on Financial Services, U.S. House of Representatives, at n.13 (Sept. 17, 2007) (noting that under the PRA, "each subsidiary of a parent corporation that produces information may be treated as a separate entity, which increases the probability that the FTC would have had to have served orders to ten or more entities, thus triggering an obligation to comply with the PRA").

added). "Policy" means "any and all of the *Company's* non-commercial homeowners insurance policies." *Id.* at 11 (emphasis added).[16] The Proposed Order thus seeks specified policyholder and policy origination and renewal data for every homeowners policyholder and every homeowners policy of an insurer, including materials held by entities that are in the insurer's custody or control. The Proposed Order itself therefore calls for participation by the insurer's subsidiaries, and, consequently, calls on "ten or more persons" to respond.

In what appears to be the only decision interpreting the PRA's "ten or more persons" requirement and OMB's corresponding regulations, the D.C. Circuit concluded that the National Highway Transportation and Safety Administration (NHTSA) violated the PRA when it issued a collection of information to nine companies without OMB clearance, when, in fact, the information request would actually go to "10 or more" companies. *See Ctr. for Auto Safety v. Nat'l Hwy. Traffic Safety Admin.*, 244 F.3d 144, 148-49 (D.C. Cir. 2001). In determining whether the "nine companies" receiving the information notices were, in reality, "10 or more" companies, the court cited a declaration by NHTSA's director in which he stated that the agency expected recipients to send the request to their foreign parents, subsidiaries, and affiliates. *Id.* Although the fact patterns are not identical, the Commission seemingly has the same expectation here: the Proposed Order would direct the recipients to involve such subsidiaries and affiliates.

2. "Ten or More Persons" and Majority of Industry.

In addition, when such a large segment of an industry is targeted, it is presumed that "ten or more persons" are recipients, as another OMB regulation makes clear. *See* 5 C.F.R. § 1320.3(4)(ii) ("Any collection of information addressed to all or a substantial majority of an industry is presumed to involve ten or more persons."). The Commission has stated that it intends to issue its model order to the nine "largest private providers of homeowners insurance in the United States" that held "roughly a 60 percent market share of the private homeowners insurance market in 2006." *See The Impact of Credit-*

[16] *See also id.* (defining "document(s)" to include "all other data compilations in the Company's possession, custody or control or to which the *Company* has access.") (emphasis added).

Based Insurance Scoring on the Availability & Affordability of Insurance: Hearing Before the H. Comm. on Fin. Servs., Subcomm. on Oversight & Investigations, 110th Cong. (May 21, 2008) (statement of Lydia Parnes on behalf of FTC at 5). These insurers also hold significant shares of the market in every state with a sizeable racial or ethnic population. *See id.* at 4. Because the Commission proposes to issue orders to such a substantial majority of the market, the involvement of ten or more insurers must be presumed. Given, as discussed, the scope of the Proposed Order and the likelihood that subsidiaries would be involved in responding, the Commission cannot rebut this presumption.

3. Violation of the PRA Renders the Proposed Order Unenforceable.

If the Commission were to nonetheless move forward with its collection of information without obtaining OMB clearance and complying with the other PRA procedures, recipients of the Proposed Order would be entitled, without penalty, to choose not to comply.[17] Further, this protection "may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto." *Id.* § 3512(b).[18] Therefore, the Commission's proposed order, without PRA compliance, is not enforceable.

V.
THE PERSONAL INFORMATION SOUGHT BY THE COMMISSION CONFLICTS WITH THE COMMISSION'S OWN PRIVACY AND SECURITY PRINCIPLES.

The Proposed Order essentially gathers two categories of information. First, in Specification 2, it requires production of detailed information about the policyholders of homeowners insurance policies. This data request includes not only identifying information such as name and address, but also especially sensitive information such as Social Security numbers and drivers license numbers. The Commission itself has

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[17] *See* 44 U.S.C. § 3512(a)(1) ("Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information … if … [it] does not display a valid control number assigned by [OMB].").

[18] *See also* 5 C.F.R. §1320.6(d) (noting that when a person is protected from imposition of a penalty under § 3512, such a penalty "may not be imposed by an agency directly, by an agency through judicial process, or by any other person through administrative or judicial process").

called the Social Security number "perhaps the most valuable piece of information for the [identity] thief."

Next, for each of the policies that were identified—and for each individual identified in connection with each policy—the Commission then seeks a wide range of additional information about the details of the insurance, the costs for insurance, the specific details of coverage chosen by each individual, the insurance and/or credit score for each individual, the risk history for the dwelling (including a wide variety of details about the homes of each individual), additional coverage details selected by each insured, details on claims submitted under the policies and additional details about the application submitted by the insured. The Proposed Order seeks, essentially, every piece of information held by these insurers about their homeowners insurance policyholders—covering a wide array of areas and sensitive information, and creating a warehouse of personal data not otherwise available through any individual source. Indeed, it seeks much information that insurers have not acquired from their customers. The collection of this personal data is inappropriate and creates unnecessary risks of privacy and security breaches.

At their core, these information requests are inconsistent with the very standards and guidance established by the Commission itself to protect personal information from inappropriate use and unnecessary security risk. The Commission has become, over the past decade, the most visible and influential regulator of privacy and security behavior; this data request, however, puts the Commission at odds with its own guidance and requirements.

For example, the Commission has published a highly useful information security guide, which says:

> Different types of information present varying risks. Pay particular attention to how you keep personally identifying information: Social Security numbers, credit card or financial information, and other sensitive data. That's what identity thieves use most often to commit fraud or identity theft. *See* FTC, *Protecting Personal Information: A Guide for Business*, at 5.[19]

[19] This publication is available at http://www.ftc.gov/bcp/edu/pubs/business/privacy/bus69.pdf; *see also* Fed. Trade Comm'n, *Combating Identity Theft: A Strategic Plan, available at* http://www.idtheft.gov/reports/StrategicPlan.pdf.

Moreover, as one if its primary "tips," the Commission states:

> If you don't have a legitimate business need for sensitive personally identifying information, don't keep it. In fact, don't even collect it. If you have a legitimate business need for the information, keep it only as long as it's necessary. *Id.* at 6.

In addition, in its guidance, the Commission focuses additional attention on the goal of restricting collection and use of SSNs. According to the Commission, "Use Social Security numbers only for required and lawful purposes – like reporting employee taxes. Don't use Social Security numbers unnecessarily – for example, as an employee or customer identification number, or because you've always done it." *Id.*

Despite this guidance, the Proposed Order requires the insurers not only to provide sensitive information in their possession, but also to gather and disseminate the most sensitive of personal information, the Social Security number, even when the insurers do not have this information today.

The Commission's guidance also is consistent with standards that are applicable to government agencies across the federal government. In a May 22, 2007 letter from Clay Johnson III, OMB Deputy Director for Management, to the Heads of All U.S. Government Executive Departments and Agencies (available at http://www.whitehouse.gov/omb/memoranda/fy2007/m07-16.pdf), the OMB identified several ongoing challenges and requirements for agencies in connection with personal data. For example, all federal agencies (including the Commission) are directed to: "review their current holdings of all personally identifiable information and … reduce them to the minimum necessary for the proper performance of a documented agency function." *Id.* at 6. This clearly included Social Security numbers.

As a corollary to this step, OMB requires agencies, in a section called "Reduce the Use of Social Security Numbers," with a subheading "Eliminate Unnecessary Use," to "review their use of social security numbers in agency systems and programs to identify instances in which collection or use of the social security number is superfluous [and] … explore alternatives to agency use of Social Security Numbers as a personal identifier for both Federal employees and in Federal programs (e.g., surveys, data calls, etc.)." *Id.* at 7.

Beyond these concerns about the collection and storage of these data, we also have substantial concerns about the security of this information. Clearly, this request would result in the generation of an enormous personal information database, including not only Social Security numbers, but also drivers license information and other non-public personal information. We are unaware of how the Commission would control access to it, who would have access to the information, or how the Commission would protect the security of this information.

Moreover, the Commission has made no commitments about whether it would provide this sensitive information to others or otherwise creating additional risks of improper use or access resulting from the collection and dissemination of this information. Indeed, to the contrary, the Commission has indicated that it would provide this highly sensitive information to Congress or a Congressional committee, if requested. While it has said that it would otherwise protect the information consistent with the law, it has not confirmed that it reads the applicable law as requiring the Commission to protect it.

As the Commission is well aware, virtually every federal government agency has had information security problems, whether those identified by the GAO in a series of highly critical reports or through security breaches. Even the Commission has not been immune from security breaches. See FTC, *Commission Notifies Individuals of Theft*, June 22, 2006, available at http://www.ftc.gov/opa/2006/06/fyi0640.shtm (announcing the Commission's notification of individuals concerning data contained on an Commission employee's laptop that was stolen). We have a great concern about how this information can be appropriately protected, particularly given the magnitude and sensitivity of this information. We are certain that our members' customers share this concern. Because of these security risks—the magnitude of which is increased due to sensitivity of the personal data involved—the Commission can and should take a different approach on collecting data in connection with this study.

VI.
THE PROPOSED ORDER IS OVERLY BROAD, BURDENSOME AND COSTLY.

(a) The Proposed Order is Unreasonably Broad and Burdensome in Many Respects.

In addition to being beyond the authority of the Commission, as discussed above, these requests are unreasonably broad and burdensome. Although Section 6(b) of the FTC Act grants the Commission the power to request special reports or answers in writing to specific questions, "there are limits to what, in the name of reports, the [Federal Trade] Commission may demand." *United States v. Morton Salt Co.*, 338 U.S. 632, 653 (1950). Namely, the Commission may only obtain information if "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *FTC v. Turner*, 609 F.2d 743, 744 (11th Cir. 1980). "[I]t is also clearly recognized that disclosure may be restricted where it would impose an unreasonable or undue burden on the party from whom production is sought." *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1267 (7th Cir. 1982). Beyond these well established limits on the Commission's authority, the PRA also obligates the Commission to demonstrate that the proposed collection of information "[i]s the least burdensome necessary, " "[i]s not duplicative of information otherwise accessible to the agency," and "[h]as practical utility." 5 C.F.R. § 1320.5(d)(1). As the Proposed Order is currently drafted, Commission cannot make these showings.

1. The Proposed Order Seeks Irrelevant Information and Contains Overly Broad Specifications.

The Commission's proposed requests are unreasonably broad, containing numerous requests that bear little or no relation to the stated objective of the Commission. Courts will not enforce a subpoena that is "too indefinite or broad" or if the requested information is not "relevant and material to the investigation." *Peters v. United States*, 853 F.2d 692, 699 (9th Cir. 1988).[20] An administrative subpoena thus

[20] *See also Adams v. FTC*, 296 F.2d 861, 867-870 (8th Cir. 1961)(affirming district court's limitations on temporal scope of requests and enforcing only those requests that are relevant to the investigation); *Resolution Trust Corp. v. Feffer*, 793 F.Supp. 11, 14 (D.D.C. 1992) (refusing to enforce subpoena request that was "irrelevant to the [agency's] stated inquiry").

may not be so broad so as to be in the nature of a 'fishing expedition.'" *Peters*, 853 F.2d at 700.

The Commission's stated objective here is "[t]o assist policymakers in evaluating" whether credit scores "assist in predicting risk of loss more accurately," or whether the use of credit scores "results in members of certain racial and ethnic minority groups paying higher insurance premiums than other consumers." *Prepared Statement of the FTC on "The Impact of Credit-Based Insurance Scores on the Availability and Affordability of Insurance"* before the Subcommittee on Oversight and Investigations House Committee on Financial Services" (May 21, 2008), at 2. In fact, "Congress specifically directed that federal agencies focus their empirical analysis on the effects of scores on members of racial and ethnic minority groups." *Id.* at 2-3.

Yet the Commission plans to request a variety of information that is not reasonably relevant to these evaluations, and which will often be expensive, time consuming and difficult, if not impossible, information for insurers to obtain.[21] Much of this information is among the most personally sensitive or competitively critical information insurers possess. For example, the Commission proposes to request:

- extensive application and quote data for all quotes issued, regardless of purpose, such as to update coverages for an existing policyholder, when insurance customers typically obtain multiple quotes and then make decisions that are only partially related to cost, thus demanding irrelevant application information; *see* Proposed Order at Specification 10;
- wholly irrelevant and competitively sensitive information on insurance agents, including a statistical breakdown of the source of written policies between "each business channel (e.g., direct, captive agents, and independent agents);" *see id.* at Specification 14(a); *see also id.* at Specification 3(j) (requesting the business channel through which each policy In Place or In Force during the Relevant Time Period was originally written);
- wholly irrelevant and competitively sensitive information on "compensation plans with respect to all insurance agents, brokers, salespeople, underwriters, and/or Company employees involved in selling and/or issuing the Company's Policies;" *see id.* at Specification 14(b);

[21] See the comments submitted by Michael J. Miller, FCAS, MAAA, on behalf of the National Association of Mutual Insurance Companies for a detailed analysis of the issues raised by the Proposed Order.

- a description of the extent to which those "who market and/or sell the Company's policies have discretion in setting prices/premiums for an applicant;" and the Company's by-laws, rules, and procedures that relate to these and other irrelevant requests; *see id.* at Specification 14(c);
- all rating manuals for a multi-year period from each jurisdiction, without any limitation to specific relevant portions bearing upon use of credit information, thus demanding competitively sensitive, but wholly irrelevant information that would also be difficult to reconstruct; *see id.* at Specifications 11-12.
- information on whether the policy is paid on an installment basis, which is not reasonably relevant to a study of credit scores; *see id.* at Specification 4(c);
- information concerning whether the policy covers a secondary or vacation residence, properties that would appear to lie beyond the study's core interests; *see id.* at Specification 5(b);
- information regarding whether the policy is written in a residual market or an involuntary market, the rates for which typically are set by the states or state established entities and do not reflect credit score information; *see id.* at Specification 5(c);
- underwriting information with respect to policies for which credit scores were *not* considered and therefore are immaterial to the proposed analysis; *see id.* at Specification 6(a);
- subjective data regarding property condition that will vary over time and that insurers may very well not have or only have on a small subset of dwellings; *see id.* at Specification 7(m);
- information pertaining to non-continuous policies issued to the same policyholder, where different policy numbers will greatly complicate the insurers' ability to link all records for the same policyholder; *see id.* at Specification 7(r);
- information concerning the existence of mortgages or other encumbrances on the insured property such as home equity lines that insurers may not track, or may be out-of-date; *see id.* at Specification 7(z);
- additional unspecified information incorporated into the underwriting of policies that will vary widely across companies, be collected and coded differently and have extremely attenuated relevance, if any, to the purpose of the proposed study; *see id.* at Specifications 7(aa)-(bb);
- detailed information on all endorsements for each policy every time the policy was changed, when many, if not most, of these endorsements (*e.g*. Jewelry or boat endorsements) are not reasonably relevant to a study of the impact of credit scores; *see id.* at Specification 8(d), 8(e), 8(g); and
- information on whether the policyholder has flood insurance (with any insurer), when flood insurance is a federal program and information about it is not reasonably relevant to a study of the impact of credit scores; *see id.* at Specification 8(f).

These are only examples of irrelevant information demanded in the Proposed Order and are by no means a comprehensive listing.[22]

Moreover, much of this information is not maintained by insurers, or is not uniformly maintained. In addition to most of the irrelevant information described above, some examples of information that is not uniformly maintained by insurers are:

- detailed personal information for each policyholder, such as social security number, drivers license number, date of birth, and all prior addresses, which insurers are not likely to maintain for many, if not most, of their customers and which the Commission discourages them from collecting; *see* Proposed Order at Specification 2;
- quantification of rate impact of credit-based information that will vary based on jurisdiction and over time and likely necessitate an extensive, costly effort to develop solely for purposes of this study; *see id.* at Specification 6(e);
- the market value of the dwelling, which insurers are unlikely to know consistently, if at all, except perhaps for a subset of their customers; see *id*. at Specification 5(i));
- the market value of the property, which insurers are unlikely to know consistently, except, perhaps for a subset of their customers, see *id*. at Specification 5(j)); and
- many elements of so-called "risk data" sought under Specification 7, such as tier placement or rating group code or class, territory or zone code or class, whether a policy covers a townhouse or row-house, the length of time that the named insured has lived at the insured property, individual or household characteristics (*e.g.,* family size, marital status, education, or employment history), or the insureds' income; *see id.* at Specification 7(a), (b), (n), (q), (t), and (u); and
- insurers do not possess and, therefore, must create the majority of the data documentation information in the Proposed Order at Specification 11;

The Commission's proposed Order is also extraordinary in the length of time that it covers. When all the dates and demands are properly factored, the total time period swept up into the scope of the requests includes all of a four year period, and for some purposes even the better part of five years. Just as one illustration of the sheer size of the request, the policy and premium data requested by Specifications 3-7 encompasses data from approximately 40,000,000 policies per year and their policy contract periods which began during calendar year 2003 and extend through calendar year 2007. Homeowners policies rarely correspond to a calendar year. The specifications request

[22] *See FTC Response to Hang-Ups Art Enterprises, Inc.'s Petition to Limit or Quash the Civil Investigative Demand*, No. 872-3209, 115 FTC 1308, 1320-21, 1992 WL 12011087 (Mar. 31, 1992) (request for certain types of media without regard to whether it was in any way relevant was overly broad).

a separate record (a line of data) for each permutation of policy term (as well as midterm change) and coverage. The number of (annual) policy terms included by this request is therefore approximately 160,000,000, so the number of records (or lines of data) requested for this section alone is in the hundreds of millions. Thus, the number of policies encompassed by the Commission's Proposed Order is not the already extraordinary number of 40,000,0000 written on an annual basis, but up to 160,000,000. And this number refers only to the estimated number of policies. The number of transactions for which information would have to be provided under the Proposed Order is much higher. Given the magnitude of the volume of data potentially involved, we believe that basing the study on a sampling of data is necessary and appropriate.

In sum, the Commission's Proposed Order unnecessarily expands its demands beyond the substantive and temporal scope of the automobile insurance study and then makes unreasonably broad demands, often lacking even minimally sufficient specificity or relevance. We believe the Commission should, therefore, start by creating a reasonable study protocol and then seek only the information that is reasonably necessary to carry out that study. As we state elsewhere in this letter and have advised the Commission on other occasions, we stand ready to work with the Commission on these issues.

2. The Proposed Order is Unduly Burdensome on Recipients.

Even if the Proposed Order were within the authority of the Commission and relevant—which it is not—compliance with its specifications would be unduly burdensome for recipients in light of the sheer number of policies covered by the requests, the detailed information requested, and the range of databases, systems, and paper documents in which the information is stored.[23]

With this Proposed Order, the Commission plans to request information from the nine largest private providers of homeowners insurance in the United States, which have roughly a 60% share of the market. Although nominally limited to a three-year

[23] An administrative subpoena or compulsory order "can be denied where the burden of compliance is too great." *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1268 (7th Cir. 1982). "[T]he degree of burden is an aspect of reasonableness." *Id.* at 1269 (refusing to enforce an administrative subpoena where the burden of compliance exceeded the probative value of the information requested).

period, the Order actually applies to every policy "In Place" or "In Force"—in other words, in effect—during that period without any limitation on the subject policies' origination date, duration, or value. *See* Proposed Order at Definition 5. Collectively, as we have noted elsewhere, these requests will cover more than 40,000,000 homeowners insurance policies for each of the years for which the Order demands information, with no attempt to limit the responses to a representative sample. Furthermore, the depth of the requests is overwhelming: there are 14 separate topics with over 100 subparts, filling ten pages of single-space type and requesting an array of data, manuals, and narrative responses on each of the tens of millions of subject homeowners policies.

It is clear that compliance with the Commission's proposed requests threatens to disrupt and unduly hinder the normal operations of the recipients' businesses, and that these requests are, therefore, unduly burdensome.

(b) The Commission Should Remove the Unnecessary Demands and Refine the Burdensome Demands.

For the reasons stated above, we submit that the Commission should properly abandon consideration of compulsory process and proceed to gather information as it and other agencies have done in earlier FACT Act studies. Should the Commission nonetheless persist in propounding an Order to File a Special Report, we urge that it, at a minimum, substantially modify the Specifications, deleting requests that are unnecessary for the study's objective and narrowing requests that are unduly burdensome.[24] The examples we have provided in this letter would be an appropriate starting point, and the insurance industry remains committed to cooperating with the Commission in fashioning a reasonable set of data elements necessary for the Commission to complete a proper homeowners study.

In addition, we believe the Commission should consider global changes that will minimize the burden on recipients, such as restricting the requests for data to a

[24] *See*, *e.g.*, *FTC Response to Petition of Hoechst Marion Roussel, Inc. to Quash Subpoena Duces Tecum*, No., 971-0055, 124 FTC 649, 656, 1997 WL 33483335 at (Oct. 17, 1997) (narrowing scope of subpoena that was overly broad in scope and time period, to avoid search of hundreds of entities, including affiliates and subsidiaries, and to avoid search for unnecessary documents).

representative sampling of policies, policies that were originated during the relevant time period (as opposed to in effect during that period), or policies above or below certain amounts. Proceeding in this way will also make the study more manageable for the Commission.

Finally, in fairness to the recipients, the Commission should create a waiver process if the insurer attempts in good faith to comply with a particular specification but either does not possess the requested data or cannot in good faith provide the requested data without incurring unreasonable costs. A mere extension of time may not be sufficient to overcome the potential time and cost of developing new systems that are necessary to comply with the Commission's Order.

VII.
CONCLUSION

We submit this letter to the Commission in order to assist it in successfully undertaking a proper homeowners insurance credit scoring study, pursuant to section 215 of the FACT Act. As representatives of approximately 70% of the homeowners insurance market, we would be pleased to discuss these comments with the Commission for the purpose of assisting the Commission in reaching an agreement with insurers on the study.

Respectfully submitted,

David F. Snyder
Vice President and
Assistant General Counsel
American Insurance Association

Neil Alldredge
Vice President - State & Regulatory Affairs
National Association of
Mutual Insurance Companies

Attachment: Exhibit A

EXHIBIT A

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April 8, 2008

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Thomas B. Pahl
Assistant Director
Bureau of Consumer Protection
Federal Trade Commission
601 New Jersey Avenue N.W.
Washington, D.C. 20580

Re: Proposal for Conducting the Homeowners' Insurance Credit Scoring Study Under Section 215 of the Fair and Accurate Credit Transactions Act of 2003

Dear Mr. Pahl:

I am enclosing for the Commission's consideration a proposal from my insurance trade association clients for the conduct of the Commission's homeowners' insurance credit scoring study under section 215 of the Fair and Accurate Credit Transactions Act of 2003 (FACTA). The trade associations are the American Insurance Association, the National Association of Mutual Insurance Companies, and the Property Casualty Insurers Association of America.

The purpose of the proposal is to suggest a framework for the Commission to obtain information from insurers that would meet the Commission's need for quality information and, at the same time, eliminate potential litigation over any attempt by the Commission to use compulsory process against insurers to obtain that information.

We look forward to discussing the proposal with you, with the goal of assisting the Commission to quickly initiate the study. Please feel free to call me with your suggestions on how best to proceed.

Sincerely,

Craig A. Berrington

Enclosure

cc: William Blumenthal
Mark Eichorn

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

SUBJECT: FTC Homeowners' Insurance Credit Scoring Study Under Section 215 of the Fair and Accurate Credit Transactions Act of 2003: Proposal For Conducting the Homeowners' Insurance Credit Scoring Study

FROM: Interested Insurance Trade Associations

DATE: April 8, 2008

The insurance trade associations listed below[1] are submitting this Proposal to the Federal Trade Commission (Commission) for the conduct of the Commission's homeowners' credit scoring study under section 215 of the Fair and Accurate Credit Transactions Act of 2003 (FACTA).[2]

The purpose of the Proposal is to suggest a framework for the Commission to obtain information from insurers that would meet the Commission's need for quality information and, at the same time, eliminate potential litigation over any attempt by the Commission to use compulsory process against insurers to obtain that information.

I
Background Discussion

[1] This Proposal is made on behalf of three trade associations: the American Insurance Association, the National Association of Mutual Insurance Companies, and the Property Casualty Insurers Association of America. The trade associations include leading homeowners insurers among their members, but the ultimate decision with regard to each member agreeing to this proposal is with each such member. The Proposal is submitted to the Commission solely for the purpose of discussions with the Commission about a potential voluntary agreement with regard to insurer participation in the Commission's homeowners insurance study, and may not be used for any other purpose.

[2] Referenced throughout this document as "the homeowners' study".

Section 215 of the Fair and Accurate Credit Transaction Act (FACTA) directs, inter alia, the Commission to conduct a study on the use of credit in personal automobile and homeowners' insurance, and also establishes the procedures for doing so. The Commission released its study of automobile insurance and submitted its report to the Congress on July 27, 2007. The Commission is now preparing to initiate its study of homeowners' insurance.

The Commission's automobile insurance study confirmed that insurers do not use risk models that include information about race, ethnicity or income.[3] The report concluded that credit scores were an accurate predictor of insurance risk among all groups. Moreover, in undertaking its analysis, the Commission was unable to develop any alternative scoring model that was more predictive of claims and costs than the models that the insurers were using, while at the same time reducing the differences among groups.

Among the Commission's findings and conclusions, as set forth in the Executive Summary, were the following:[4]

- Credit-based insurance scores are effective predictors of risk under automobile policies. They are predictive of the number of claims consumers file and the total cost of those claims. The use of scores is therefore likely to make the price of insurance better match the risk of loss posed by the consumer. Thus, on average, higher-risk consumers will pay higher premiums and lower-risk consumers will pay lower premiums.
- Use of credit-based scores may result in benefits for consumers. For example, scores permit insurance companies to evaluate risk with greater accuracy, which may make them more willing to offer insurance to higher-risk consumers for whom they would otherwise not be able to determine an appropriate premium. Scores also may make the process of granting and pricing insurance quicker and cheaper, cost savings that may be passed on to consumers in the form of lower premiums. However, little hard data was submitted or available to quantify the magnitude of these benefits to consumers.

[3] Report, p. 61.

[4] The Executive Summary is on pages 1 through 4 of the report.

- Credit-based insurance scores appear to have little effect as a 'proxy' for membership in racial and ethnic groups in decisions related to insurance.
- Tests also showed that scores predict insurance risk within racial and ethnic minority groups (e.g. Hispanics with lower scores have a higher estimated risk than Hispanics with higher scores).
- After trying a variety of approaches, the FTC was not able to develop an alternative credit-based insurance scoring model that would continue to predict risk effectively, yet decrease the differences in scores among racial and ethnic groups. This does not mean that a model could not be constructed that meets both of these objectives. It does strongly suggest, however, that there is no readily available scoring model that would do so.

Commissioner Pamela Jones Harbour dissented from the Commission report on a variety of grounds, including the Commission's methodology and its decision not to issue compulsory process orders under section 6(b) of the Federal Trade Commission Act. Commissioner Harbour also asserted that the insurers "never provided the Commission with written verification of the accuracy, authenticity or representativeness of the data."[5]

Subsequent to the issuance of the report, the arguments made in Commissioner Harbour's dissent were further explored in communication between members of the House Financial Services Committee and the Commission, as well as in a later hearing held by the Committee on the report and the upcoming homeowners' insurance study.[6] The exchange of communication between the Committee and the Commission had been initiated by a letter from Representative Mel Watt, joined by Representatives Barney Frank and Luis Gutierrez, raising the same types of issues as were raised in Commissioner Harbour's dissent.[7] In their letter, they "urge(d) the FTC to use its full authority under section 6(b), as well as any other appropriate authority

[5] Dissent of Commissioner Pamela Jones Harbor: Federal Trade Commission, Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance (July 2007).

[6] October 2, 2007

[7] Hereinafter referenced as the "Watt letter", August 28, 2007.

available to the FTC, to obtain comprehensive policy data by a large number of insurers to complete the ... Section 215 report on homeowners insurance."

On behalf of the Commission, Chairman Deborah Platt Majoras responded to the Watt letter, on September 17, 2007. In her response, the Chairman discussed how the Commission intended to conduct its study and stated that the Commission would want the following data elements about homeowners' insurance policies:

- Name;
- Address;
- Social Security Number;
- Relevant insurance policy coverage information; and
- Relevant insurance policy claims information.

The Chairman's letter then set out the Commission's approach to conducting the study, as follows:

- The Commission staff would "evaluate and prepare for analysis the information it receives from multiple insurance companies;"
- The Commission would acquire and apply its own demographic information that it will add to the company database; and
- The Commission would then apply insurance scores and credit history information to a sample of the consumers.

The Chairman's letter then addressed the question of compulsory process under Section 6 of the FTC Act. Responding to both Commissioner Harbour's dissent and to the Watt letter, Chairman Majoras described a process under which she could go to the Commission to obtain authority to use compulsory process to get information from insurers for the study. The letter then noted that

any attempt by the Commission to use section 6(b) authority to obtain information from 10 or more insurance companies would be subject to the requirements of the Paperwork Reduction Act, which would require review and clearance by OMB before the issuance of any Commission order. [8] Finally, the letter observed that insurers might challenge any attempt by the Commission to issue compulsory orders. At the very least, Chairman Majoras pointed out, that type of challenge would delay the Commission's study and might well result in the information not ultimately being made available to it.

It is in the context of this background that we are submitting our Proposal. Our goal is to avoid the type of delay and litigation that Chairman Majoras' letter correctly notes as a real possibility if the Commission attempts compulsory process and if insurers resist that attempt both at OMB and, if necessary, in the courts. We want to avoid this confrontation, if possible, and work with the Commission to be responsive to the procedural concerns that were raised about the automobile insurance credit report study. In doing so, we have carefully reviewed both FACTA and the Federal Trade Commission Act and believe that if a challenge were mounted to compulsory process, that challenge would succeed. We have reached this conclusion for two principal reasons:

- Under FACTA's clear, unambiguous language, Congress has not authorized the Commission to use compulsory process against any party, including insurers, for the conduct of the section 215 study.

- Under a distinctive, insurance-only provision of section 6 of the Federal Trade Commission Act, the Commission is prohibited from using compulsory process against insurers.

[8] The FTC's Operating Manual, referencing the Paperwork Reduction Act, actually uses the term "person" and defines that term as "an individual, partnership, association, corporation, business trust, or legal representative, an organized group of individuals, a state or local government, including branches thereof, and political subdivisions." Under this definition, we believe that each separately incorporated insurer would be a separate "person."

In our effort to avoid the potentiality of litigation, we initially discussed our concerns with Chairman Majoras. Subsequent to that meeting, we have had the opportunity to further discuss the issues with Commissioner Jonathan Leibowitz and Commission staff, including General Counsel William Blumenthal. In all of these discussions, we have tried to emphasize (i) our commitment to providing all the information necessary for the Commission to effectively conduct its study and (ii) our strong opposition to any attempt by the Commission to use compulsory process that we do not believe the Commission has the legal authority to enforce against insurers under either section 215 of FACTA or section 6 of the Federal Trade Commission Act.

In short, we want to provide the information we understand the Commission is seeking, but to do so within the Commission's proper legal authority and in a way that absolutely protects the privacy of individual insurer and customer information. Thus, in our Proposal, we believe we have met all of the Commission's information requirements within the law, while properly protecting the information provided.

II

Proposal

Our Proposal is designed to meet the Commission's needs while addressing the privacy concerns of the submitting insurers and their customers. In doing so, we hope that it will provide a positive basis for reaching an agreement. [9] Specifically, the Proposal provides for the following:

(1) FTC Designation of Insurers and Issuance of Letters to Individual Insurers for the Voluntary Submission of Information. We propose that the

[9] Of course, none of these individual items should be considered in isolation from a total agreement with the Commission on the process for conducting the homeowners' study.

Commission issue letters to individual insurers requesting they provide listed information voluntarily. These letters, often called "access letters," would be consistent with the approach we are told by Commission staff that the Commission has used from time-to-time in other circumstances. Under this approach, the Commission would solely designate the homeowners' insurance companies to receive the letters. The Commission might further make public the names of the insurers receiving the letters.

This approach would differ from the auto study, where only the insurers that participated in the EPIC credit study and further volunteered to provide data for the Commission study were included.[10] Thus, under the Proposal, the Commission would have the ability to: (i) gain information on a larger share of the market than it did for the auto study; (ii) know exactly the marketplace share that is included in the study; (iii) assure itself that separately incorporated insurance companies insuring differential levels of risk were included in the study; and (iv) protect the study's results from subsequent criticism that industry interests improperly influenced the designations of the specific insurers.

(2) Reporting Data Elements as Described by Chairman Majoras. The Proposal contemplates providing all the data elements that were described in the Chairman's response to the Watt letter. Although some of those data elements are not precise ("relevant" information on coverage and claims), we would work with the Commission to develop a common, mutual understanding on providing the data elements on policies written, recognizing that some individual companies may not possess all the information that is being requested, such as Social Security numbers.

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[10] EPIC is the short-hand reference to the study by Michael J. Miller and Richard A. Smith, entitled, "The Relationship of Credit-Based Insurance Scores to Private Passenger Automobile Insurance Loss Propensity", EPIC Actuaries LLC (June 2003).

(3) Commission Aggregation and Analysis of Individual Insurer Data. We have always believed that the most efficient way to collect and aggregate the data, consistent with important privacy considerations, was through a capable, third party consultant, who would perform the aggregation requested by the Commission, with the knowledge of the individual insurers. This would standardize data elements and ensure that individual policyholder and insurer data were not identifiable. This is the approach that was successfully used in the automobile study, and that we have strongly suggested in our conversations with the Commission for the homeowners' insurance study, as well.

We understand, however, from these conversations that the Commission may wish to use a different approach in the homeowners' study than was used in the auto study. As we understand this new approach, the Commission would not want a third party aggregator. Rather, the Commission would have access to the raw data from the individual insurers and would do all the aggregation work, itself, as well as all the additional analysis.

While we have concerns about this approach, we want to be responsive to the Commission's desires. Therefore, we propose to both provide direct access by Commission staff to individual insurer data and eliminate third party aggregation of those data. Under our proposal, the Commission's staff would do all the aggregating of individual insurer data.

Under our proposal, insurers would submit their own certified individual company information responsive to the Commission's data request to a mutually acceptable depository facility with a secure computing environment. The depository would not be a government entity or agent, and would have confidentiality agreements with the insurers. Using the depository's computers, Commission staff would process individual company data into an aggregate

industry database and append credit and other demographic data to it.[11] Once the Commission had completed this process, it would remove from the depository facility a fully aggregated industry database that included all the demographic and credit information, less individual company and personally identifiable information. Once the aggregated database was completed, the depository would return the original individual insurer and policyholder data, without any of the data appended by the Commission, to each of the insurers or destroy it, as set forth in the confidentiality agreements.

In summary description, therefore, the Proposal would work as follows. Each insurer would send its data to a mutually acceptable non-governmental depository, as directed by the Commission. The depository would then create a database comprised of every individual insurer's information exactly as that information was provided to the depository database. Commission staff would have total access to that database and to the individual data of every insurer. The Commission's staff would use its total access to the database to aggregate the data, so that individual identifying information about policyholders and insurers was deleted. The Commission would then use the aggregated data to perform whatever analyses it thought necessary for purposes of the study. After the aggregated database was complete, the depository would return to each insurer the information it had obtained from it.

We believe this Proposal responds to the criticism of the Commission that it should have seen individual insurer data in the automobile study and then aggregated that information, itself, rather than never seeing the individual insurer information and "letting the industry" aggregate it. While we reject any implication in this criticism that there was any improper behavior by either the insurers or by the third party aggregator – the highly respected Tillinghast

[11] If the Commission decided to use a vendor to append the credit and demographic information to the database, the depository facility would send to the vendor an industry aggregate that included personally identifiable information on policyholders, without individual company identifying information.

actuarial firm – we understand the Commission's concern about eliminating any reasonable basis for such criticism in this new study. At the same time, it is critical to us that the privacy of individual company and customer data be fully protected, as misuse of those data could expose responding insurers to substantial liability, cause them serious reputational damage and expose them to extraordinary damage in the marketplace if this information is made known to competitors. We believe the only absolutely certain way to assure the necessary privacy protection, while meeting the prior criticism, is by the approach we are proposing here.

(4) Procedure for Reaching Final Agreement with the Commission. Based on the Proposal we have described, plus last year's discussions with the Bureau of Economics on the data elements needed for the homeowners' study, we are prepared to work intensively with the Commission on the necessary specifics, including the language of the letter that the Commission would send to individual insurers and any assistance that the Commission might see as useful in meeting the requirements of the Paperwork Reduction Act. Our goal is to reach a final agreement that would allow the Commission to proceed quickly and efficiently with its study.

III
Conclusion

We are submitting this Proposal to the Commission in an effort to resolve the differences that we believe exist between the insurance industry and the Commission on the conduct of the homeowners' insurance credit scoring study under section 215 of FACTA. We would be most pleased to discuss the Proposal further with you and answer your questions, with the goal of reaching a full and final agreement quickly.