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Via E-Mail

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex Q)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: FACT Act Affiliate Marketing Rule, Matter No. R411006

Ladies and Gentlemen:

The American Council of Life Insurers (“ACLI”) is submitting this comment to the Federal Trade Commission (the “Commission”) in connection with its request for public comment on its proposed rule implementing § 214 of the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) (“§ 214”). 69 *Fed. Reg.* 33324 (June 15, 2004).

ACLI is the principal trade association of life insurance companies whose 383 member companies account for 73 percent of the assets of legal reserve life insurance companies, 70 percent of life insurance premiums and 77 percent of annuity considerations in the U.S. ACLI members are also major participants in the pension, long-term care insurance, disability income insurance and reinsurance markets. ACLI member companies actively engage in marketing activities with existing and prospective policyholders, insureds and annuitants. Accordingly, ACLI and its member companies have a significant interest in the Commission’s proposal.

Summary

ACLI is concerned that in several instances the Commission’s proposed rule does not follow the language of § 214 of FACT Act and resulting new Fair Credit Reporting Act (“FCRA”) § 624. In some instances the departures from the statute represent material differences that will have adverse effects on the insurance industry and its ability to serve its customers. For example, as explained in more detail below, the definition of “pre-existing business relationship” in the proposed rule deviates from the definition in § 214 in a number of ways. Most significantly, the definition in the proposed rule fails to include the statutory reference to the relationship between “a person’s licensed agent” and a consumer. ACLI is also concerned that some of the proposed rule’s departures from the statutory language broaden the scope of the requirements of § 214 and narrow the flexibility provided by Congress. ACLI believes that Congress intended to provide companies with flexibility to enable them to implement § 214 in the manner that they determine best meets the needs of their customers and prospects. We have indicated below several provisions of the proposed rule that we believe should be conformed to the statutory language of § 214.

ACLI believes that it is important that the Commission's rule use the precise language of the statute. We request that the Commission use the statutory language of § 214 when it adopts the final rule and not eliminate or add to the words Congress carefully considered and enacted. Similarly, we urge the Commission to eliminate any restrictions or requirements in the proposed rule that are not expressly set forth in § 214.

In response to the Commission's request for comment as to whether the notice and opt-out requirements of § 680.20 of the proposed rule should apply to instances where there is so-called "constructive sharing" of eligibility information, ACLI strongly objects to subjecting such solicitations to the proposed rule. Section 214 clearly contemplates that such targeted solicitations are permitted and are not subject to notice and opt-out provisions.

In response to the Commission's request for comment on whether there is any need to delay the compliance date beyond the effective date to permit financial institutions to incorporate the affiliate marketing notice into their next annual Gramm-Leach-Bliley Act ("GLB Act") notice, ACLI believes there is such a need both because financial institutions often stagger the mailing of their GLB notices throughout the year and because they need adequate lead time to implement all the systems and operational changes necessitated by § 214. ACLI urges that the compliance date be 18 months after the effective date.

Also, to avoid any confusion as to the applicability of state laws, ACLI urges amendment to the proposed rule to expressly provide that new FCRA § 624 provides a uniform national standard for the exchange and use of information to make solicitations for marketing purposes and that no state may impose requirements or establish prohibitions relating to the exchange and use of information to make a solicitation for marketing purposes, as provided in FCRA § 625(b).

Discussion

Scope and Exceptions to the Notice and Opportunity to Opt-Out Requirements

Section 680.20(c)(1) of the proposed rule provides:

(c) Exceptions. The provisions of this subpart do not apply if you use eligibility information you receive from an affiliate:

- (1) To make or send a marketing solicitation to a consumer with whom you have a pre-existing business relationship ... 69 *Fed. Reg.* at 33338.

The corresponding provision of FACT Act § 214 provides:

- (4) Scope. This section shall not apply to a person—
 - (A) using information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship; 15 U.S.C. § 1681s-3(a)(4)(A).

FACT Act § 214 excludes from the scope of new FCRA § 624 *any* person performing the functions specified in the exceptions, reflecting Congressional intent that the exceptions be applicable to *either* the affiliate disclosing eligibility information or the affiliate receiving and using eligibility information. However, the language of § 680.20(c) of the proposed rule appears to make the exceptions

applicable only to affiliates that receive and use eligibility information. This apparent narrowing of the reach of exceptions gives rise to concern that the proposed rule may be interpreted in a manner that generally alters the scope of new FCRA § 624. Given the express language of § 214, reflecting clear Congressional intent, and the potential for unintended adverse consequences, we request that throughout § 680.20(c) the Commission use the statutory language of § 214 that was carefully considered and enacted by Congress.

Similarly, § 680.20(c)(5) of the proposed rule provides that the rule does not apply if a company uses information in response to an “affirmative” authorization or request by the consumer. The preamble states that the term “affirmative” means “a knowing action by the consumer to receive marketing solicitations.” 69 *Fed. Reg.* at 33331. Nothing in the statute requires that the consumer’s request be “affirmative.” 15 U.S.C. § 1681s-3(a)(4)(E). By using the term “affirmative,” the Commission has created uncertainty as to what may constitute an authorization or request by the consumer because it requires companies to determine whether the consumer’s action was “knowing.” This is another example of how the proposed rule’s departure from the express language of § 214 will make it more difficult for companies and consumers to conduct business. ACLI again urges the Commission to follow the language of the statute.

Preemption

As noted above, ACLI believes that the proposed rule should be amended to expressly provide that new FCRA § 624 provides a uniform national standard for the exchange and use of information to make solicitations for marketing purposes and that no state may impose requirements or establish prohibitions relating to the exchange and use of information to make a solicitation for marketing purposes, as provided in FCRA § 625(b).

Compliance Date

As also noted above, ACLI believes there is a need to delay the compliance date beyond the effective date so that financial institutions may incorporate the affiliate marketing notice into their next annual GLB Act notices as permitted under FACT Act § 214 and §§ 680.21(b)(2), 680.22(b)(4) of the proposed rule and implement all the requirements imposed under § 214. Financial institutions often stagger the mailing of their GLB notices throughout the year. As a result, the date on which they would ordinarily provide their next annual GLB notice very well may be after the required effective date of the proposed rule. Since the initial deadline for provision of the GLB notices was in July, a number of financial institutions are likely to mail their annual notices in June. If the final rule were to be effective and require compliance by March 4, 2005, it would require financial institutions that generally send their annual GLB notices later in the year either to send a separate affiliate marketing notice or to move up their annual GLB notices. Both of these scenarios would necessitate unnecessary additional systems modifications and administrative costs and burdens to come into compliance with the rule.

We estimate that it may take some companies in excess of a year to review their information sharing and affiliate marketing policies and practices to determine whether notice and opt-out would be necessary, implement necessary operational and systems changes, design and provide notices and opt-out forms and record opt-outs that are received. Accordingly, in order to give financial institutions adequate time to implement the changes called for in § 214 and to coordinate their affiliate marketing and GLB notices, ACLI urges that the compliance date for the final rule be 18 months after the effective date.

Responsibility for Providing Notice and Opportunity to Opt Out

Section 214 provides that a company that receives from an affiliate information that would otherwise be a consumer report may not use the information to make a solicitation for marketing purposes to a consumer unless the consumer is informed that the information may be disclosed to such persons and the consumer is provided an opportunity to prohibit the making of such solicitation. Section 680.20 of the Commission's proposed rule, however, requires the affiliate which communicated information about its consumer to provide the notice required by § 214 because that person would likely provide the opt-out notice under § 603(d) of the FCRA and other disclosures required by law. The Commission also suggests that consumers may not expect to receive opt-out notices from companies that have received information from affiliates. However, the Commission cites no empirical evidence in support of this conclusion.

ACLI believes that the proposed rule does not accurately reflect the language of the statute and the intent of Congress. Section 214 requires only that notice be sent and does not specify who must send the notice. This provision was drafted to permit companies to structure the manner in which they wish to send required notices to meet their unique situations and needs. It often is more appropriate and convenient from an operational standpoint for companies that receive information from affiliates to send required notices directly to consumers rather than to rely upon their affiliates to send the notices. To require a company's affiliates to send the § 214 notice will be operationally cumbersome for many companies and will impose an undue burden on such entities.

The Commission's proposal imposes a responsibility on companies neither provided nor intended by Congress. Section 214 limits the ability of a company that receives personal information from an affiliate to use such information to make a marketing solicitation to consumers. Section 214 imposes no limitation or obligation whatsoever on the affiliate disclosing the eligibility information. Nevertheless, the Commission's proposal imposes a responsibility on the affiliate despite the fact that Congress imposed no such obligation.

The intended flexibility of § 214 is quite evident when one compares its language with that of the privacy provisions of the GLB Act. Section 502(b)(1) of the GLB Act expressly imposes a notice requirement on the financial institution that intends to disclose nonpublic personal information to a nonaffiliated third party. 15 U.S.C. § 6802(b)(1). By contrast, § 214 of the FACT Act makes no mention of which affiliate is to provide the notice. ACLI believes that this was a deliberate effort by Congress to permit companies to fashion programs that serve the best interests of consumers and the companies. Permitting the company making the marketing solicitation to provide the notice often provides consumers with better information as to which company will make the solicitation and how the consumer's information may be used. The decision as to who will provide the notice to consumers should be left to the discretion of companies themselves, just as § 214 provides. ACLI sees no reason why the Commission should ignore the plain language of the statute. Accordingly, we urge that the Commission's final rule restore the flexibility intended by Congress.

Pre-Existing Business Relationship

Licensed Agents

ACLI believes that the definition of "pre-existing business relationship" in the proposed rule departs in several important ways from the definition of "pre-existing business relationship" in § 214. The definition in § 214 provides that an existing business relationship is a relationship between a person,

