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A·C·L·I AMERICAN COUNCIL OF LIFE INSURERS
FINANCIAL SECURITY FOR LIFE

August 13, 2004

Via E-Mail

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609

Re: Limitations on Affiliate Marketing (Regulation S-AM); File Number S7-29-04

Ladies and Gentlemen:

The American Council of Life Insurers ("ACLI") is submitting this comment to the Securities and Exchange 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*. 42302 (July 14, 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.

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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 § 247.20 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 247.20(c)(1) of the proposed rule provides:

> (c) Exceptions. The provisions of this part 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 *42319-42320.*

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 § 247.20(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 the Commission use throughout § 247.20(c) the statutory language of § 214 that was carefully considered and enacted by the Congress.

Similarly, § 247.20(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. 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. 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 §§ 247.21(b)(2), 247.22(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 proposed 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 system 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 proposed 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. 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 proposed rule departs in several important ways from the definition of "pre-existing business relationship" in § 214. Section 214 provides that an existing business relationship is a relationship between a person, or a person's licensed agent, and a consumer based upon certain transactions specified in the statute. Inexplicably, the Commission's proposed rule deletes the words "or a person's licensed agent." These words are critical for the insurance industry.

Variable life insurance and variable annuity contracts are quite different from most other securities transactions under the Commission's jurisdiction.[1] These insurance and annuity transactions typically involve a contract that remains in force for many years. During the life of the relationship, the insurer and licensed insurance agents may contact the consumer to provide information about the status of the policy or annuity, or to inform the consumer about added policy features, policy loans, partial withdrawals, enhancements and other policies or services that may be of interest or benefit to the consumer. The Commission's definition does not take into account the continuing and lengthy nature of the relationship that typically exists between the consumer, the insurer and the company's licensed insurance agents.

While licensed agents represent an insurer, often they are not company employees. Indeed, they often represent more than one company. By omitting the phrase "or a person's licensed agent" from the definition of "pre-existing business relationship" in the proposed rule, the Commission has jeopardized the ability of a company's licensed agents to treat consumers they represent as customers with whom they have a pre-existing business relationship. We believe that it is imperative to include the phrase "or a person's licensed agent" in the definition to avoid disruption to the insurance industry. It would be contrary to the best interests of consumers to not include the statutory language in the definition of "pre-existing business relationship." Failure to do so could jeopardize the ability of licensed insurance agents to contact persons with whom they maintain relationships to provide them important information regarding existing insurance products and services and innovative, new products and services. Accordingly, as provided in § 214, consumers' relationships with companies' licensed agents should properly be regarded to be "pre-existing business relationships" under the Commission's rule.

Contracts in Force

The proposed rule provides that a "pre-existing business relationship" includes a relationship between a person and a consumer based upon a financial contract in force "on the date on which the consumer is sent a marketing solicitation." § 247.3(p)((1). By contrast, the definition of "pre-existing business relationship" in § 214 requires only that the contract be in force. 15 U.S.C. § 1681s-3(d)(1)(A). The statute does not require that the contract must be in force on the date the solicitation is made. Section 214 provides that it does not apply to a person using information to make a marketing solicitation if the company has a pre-existing business relationship with the consumer. The literal reading of that provision, coupled with the statutory definition of "pre-existing business relationship," suggests that the contract between the company and the consumer is to be in force at the time the company uses the information rather than when the solicitation is sent. Because of inherent delays between the time information is processed and the time the solicitation may be sent, requiring a company to ensure that a contract is in force when the solicitation is sent will impose an undue burden on companies. By adding the requirement as to precisely when the contract must be in force, the Commission's proposed rule again limits the flexibility that Congress provided to companies. The Commission should maintain the flexibility Congress provided in this area.

[1] The proposal would have an impact on life insurers who issue variable life insurance and variable annuity contracts, and on broker-dealers selling these products. Broker-dealers affiliated with life insurers are different from full service broker-dealers in their structure, operation, products and services. The securities activities of these broker-dealers are a component of a larger insurance business. As a by-product of this relationship, customer services are often conducted through an insurance distribution system.

"Constructive Sharing"

The Commission requests comment regarding whether, given the policy objectives of § 214, the notice and opt-out requirements of § 247.20 of the proposed rule should apply to instances where there is "constructive sharing" of eligibility information. In the preamble, "constructive sharing" is suggested as occurring when a business sends its customers solicitations on behalf of its affiliate, the solicitations are based on criteria that include eligibility criteria specified by the affiliate, and the consumers' responses to the affiliate reveal eligibility information. ACLI strongly objects to the notion that such solicitations should be subject to the proposed rule. Section 214 clearly contemplates that targeted solicitations are permitted and are not subject to the notice and opt-out provisions.

In fact, Congressional intent in connection with this subject is reflected in the clear language of § 214, which expressly provides that its notice and opt-out requirements shall not apply to a person "using information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship" or a person "using information in response to a communication initiated by the consumer." 15 U.S.C. § 1681s-3(a)(4). Congress intentionally placed no limitations on a company's ability to solicit its existing customers for marketing purposes in recognition of the many consumer benefits that devolve from such contacts. Moreover, it is clear that a consumer who requests information about a company's products and services is initiating a communication to the company. As a result of the consumer's request, the company may use information from its affiliate without regard to § 214.

Congress plainly intended to allow precisely the activity that the preamble suggests is an effort by affiliated companies to "seek to avoid providing notice and opt-out by engaging in 'constructive sharing' of eligibility information to conduct marketing." 69 *Fed. Reg*. at 42307. The concept of constructive sharing is not relevant to targeted marketing. As illustrated above, such solicitations are contemplated and permitted by § 214. The underlying public policy rationale of the Congress in this regard is clear. Using customer information a business already knows allows it to focus its solicitations on its customers who are most likely to be interested in the product or service offered. The result is less mail for consumers (particularly, mail about products or services in which they are not interested) and more efficient and cost-effective marketing for businesses, resulting in reduced costs that may be passed along to consumers in product or service pricing.

It is worth noting that the only information the affiliate receives as a result of such marketing is information that it needs to provide the product or service; and the affiliate only receives this information about those consumers who express an interest in the product or service. The express language of the FACT Act reflects recognition by the Congress that allowing businesses with relationships to consumers to send them solicitations on behalf of affiliates is a win win: consumers receive communications from businesses they already know, about products in which they may reasonably be thought to be interested, and the marketplace is efficient. Indeed, consumers are often disturbed if they are required to provide information that they assume the company already has. There is simply no reason, public policy or otherwise, and no basis in the FACT Act, for the Commission to apply the requirements of proposed rule § 247.20 to this activity.

Solicitation

The proposed rule frequently uses the term "marketing solicitation," whereas § 214 frequently uses the term "solicitation for marketing purposes." ACLI believes that the different phrasing of § 214 has a particular meaning and that the statutory language should be included in the final rule.

Also, § 247.3(n) of the proposed rule defines "marketing solicitation" as marketing initiated by a person to a particular consumer based upon eligibility information and intended to encourage the consumer to purchase such product or service. The statute, however, defines "solicitation" as the marketing "of a product or service based upon an exchange of information and" intended to encourage the purchase of a product or service. ACLI believes that the failure to include the phrase "product or service" after the word "marketing" in the proposed rule raises the possibility that the term "marketing solicitation" in the proposed rule could be interpreted to include marketing for items that are not products or services. In addition, ACLI believes that the failure to include the phrase "based upon an exchange of information" raises the possibility that the definition of "marketing solicitation" in the proposed rule may be construed to include marketing not based on an exchange of eligibility information and, consequently, beyond the scope of the rule. In view of the clear language of the statute, ACLI urges that the final rule mirror the statutory definition of the term "solicitation."

The proposed rule provides that a company may not use eligibility information to make or send solicitations to a consumer unless the affiliate that provided the information has complied with the notice and opt-out requirement. Sections 247.20(a)(1), (b). However, the statute provides that the company may not use the information to market its products and services until the required notice has been provided. 15 U.S.C. § 1681s-3(a)(1). By not including the phrase "its products and services," the proposed rule raises concerns about whether the company could send information about the affiliate's products and services. ACLI believes that the Commission should use the language Congress enacted.

ACLI is also concerned that the preamble misstates when solicitations may be sent on behalf of a company. The preamble states that if a consumer has opted out, a company that has received information from an affiliate may not instruct its affiliate with the pre-existing customer relationship to make or send solicitations to the consumer on behalf of the company. 69 *Fed. Reg.* at 42308-42309. ACLI believes that the statement is incorrect. We see nothing in the statute that prevents a company from asking its affiliate that has a customer relationship with a customer to send information to the customer so long as the company is not using the information it received from the affiliate in connection with the solicitation.

Provision of Oral Notice

The Commission requests comment on whether (1) there are circumstances in which it is necessary and appropriate to allow an oral notice, and (2) there exists any practical method for meeting the "clear and conspicuous" standard in oral notices. ACLI believes that oral affiliate marketing notices are necessary and appropriate when a requirement that notice be provided in writing would substantially delay a customer's transaction, such as when a financial institution and an individual agree over the telephone to enter into a relationship that involves prompt delivery of the insurance product or service. Permitting financial institutions to provide oral notices would appropriately enhance their flexibility in serving their customers. If the Commission is concerned with ensuring that oral notices meet the "clear and conspicuous" standard and the other requirements for affiliate marketing notices, the proposed rule could be amended to simply require that oral notices be recorded.

Content of Notice – Menu of Opt-Out Choices

Section 247.21(c) provides that a company may allow a consumer to choose from a menu of alternatives when opting out of affiliate use of eligibility information for marketing so long as the company offers "… as one of the alternatives the opportunity to opt out with respect to all affiliates,

all eligibility information, and all methods of delivery." Section 214 of the FACT Act provides that the required notice shall allow a consumer the opportunity to prohibit all solicitations referred to in new FCRA § 624(a)(1), and may allow the consumer the opportunity to choose from different options when electing to prohibit the sending of such solicitations. 15 U.S.C. § 1681s-3(a)(2). New FCRA § 624(a)(1) governs marketing solicitations based on an exchange of eligibility information among affiliates. There is no requirement in § 214 that if a company provides a menu of opt-out choices, that the menu must provide the consumer the opportunity to opt out with respect to "all affiliates, all eligibility information, and all methods of delivery." Accordingly, ACLI urges that § 247.21(c) of the proposed rule be adjusted to eliminate this requirement and to mirror the language of FACT Act § 214.

Response Time

The Commission requests comment on whether companies should be required to disclose in their opt-out notices how long a consumer has to respond to the opt-out notice. 69 *Fed Reg* at 42310. ACLI believes that there should be no such requirement. The GLB Act rules do not require such a disclosure, and there have not been any problems associated with those notices. We believe that such a disclosure would confuse consumers into believing that they have only a limited period of time in which to opt out. The amount of additional disclosure that would be required to explain the consumer's options would be cumbersome and excessive. Accordingly, ACLI urges that no such disclosure be required.

Duration of the Opt-Out

Section 247.25(d) of the proposed rule provides that a former customer's opt-out continues in effect indefinitely unless revoked by the consumer. FACT Act § 214 requires that a consumer's opt-out election remain effective for at least five years and upon expiration of the opt-out period, that the company provide consumers notice and the opportunity to opt out before using the information received from an affiliate to make marketing solicitations. 15 U.S.C. § 1681s-3(a)(3). Section 214 does not require that former customers' elections to opt out remain effective indefinitely. Accordingly, ACLI urges that § 247.25(d) of the proposed rule be adjusted to reflect the language of the statute.

Consumer's Revocation of the Opt-Out

Section 247.25(a) of the proposed rule provides that a consumer may revoke his or her opt-out in writing or electronically. ACLI sees no reason why a consumer should not be permitted to revoke an opt-out orally. Section 214 expressly provides that consumers may request that their opt-outs be revoked. 15 U.S.C. § 1681s-3(a)(3)(A). The requirement that an opt-out be in writing or in electronic form runs counter to the notion that consumers should be permitted flexibility to determine whether to permit companies to use personal information to make marketing solicitations to them. We believe that a requirement that a revocation of an opt-out be in writing or electronic form could disadvantage consumers who, in response to a telephone solicitation, may wish to revoke their opt-outs in order to obtain additional information about the company's products and services. If the Commission is concerned about ensuring that oral revocation is effective, additional safeguards for documenting the consumer's revocation, such as required recording of the revocation, can be provided by the rule.

Prospective Application Information Received Prior to Date of Compliance of the Regulation

Section 247.20(e) of the proposed rule provides that the restrictions do not apply to eligibility information received by a company from an affiliate before the compliance date for the regulation. The FACT Act, however, provides that § 214's restrictions do not apply to information received before the

compliance date. It does not require that the information must have been received by the company from its affiliate prior to the effective date. The language of the statute evidences the clear intent of Congress to permit affiliates to continue to share information without regard to § 214 so long as the information was lodged at any affiliate prior to the compliance date. This provision was adopted in recognition that it may be impossible to trace the origin of information obtained prior to the compliance date and which is maintained in a central database. To ensure that companies would have unfettered access to such information (subject to the requirements of FCRA § 603(d)), Congress grandfathered all such information in FACT Act § 214. By contrast, § 247.20(e) of the proposed rule will effectively require massive data exchanges among affiliates prior to the compliance date to ensure that operations are not hampered by the Commission's arbitrary action. Imposing such a burden and expense on companies would be contrary to Congressional intent evidenced by the clear language of the statute.

Self-Addressed Envelopes

Section 247.23(a)(2) of the proposed rule suggests that a company provides a reasonable and simple method of opting out if it includes a reply form and self-addressed envelope together with the required opt-out notice. ACLI urges that the term "self-addressed envelope" be deleted from the proposal. While we recognize that this is an example of reasonable and simple methods of opting out rather than a requirement, we are concerned that the language will be regarded as a requirement. Our experience with including self-addressed envelopes with notices has been quite negative. Self-addressed envelopes are normally directed to the appropriate office of the company that deals with processing opt-out requests. Unfortunately, it is human nature for consumers to use the envelopes to send other information to the company, such as premium payments or change of address notices. The misdirection of such information can have disastrous consequences for consumers, including unavoidable delays and perhaps even lapsed policies. In view of the dangers, we recommend that the Commission delete reference to including self-addressed envelopes in the final rule.

ACLI appreciates the opportunity to provide its comments to the Commission. We would be pleased to answer any questions you may have regarding these comments.

Sincerely,

Roberta B. Meyer