Comment #: 43

Property Casualty Insurers Association of America

Shaping the Future of American Insurance

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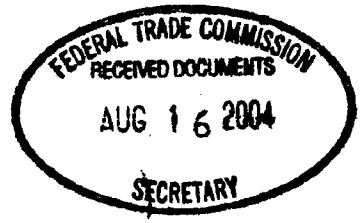

KATHLEEN N. JENSEN
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COUNSEL

August 16, 2004

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

RE: FACT Act Affiliate Marketing Rule
Matter No. R411006

Property Casualty Insurers Association of America Comments

The Property Casualty Insurers Association of America (PCI) offers the following comments to the proposed FACT Act Affiliate Marketing Rule (Matter R411006.) PCI, a leading property and casualty trade association, represents over 1,000 companies that write 38 percent of the US property/casualty insurance market. PCI member companies write all lines of coverage, including automobile, homeowners, workers' compensation, surplus lines and reinsurance, in all 50 states and the District of Columbia. The membership is comprised of every type of insurance company – stock, mutual, reciprocal and Lloyds.

On behalf of our member companies, PCI respectfully submits the following comments and asks that they be made part of the official record.

PCI believes that the FTC does not have the authority to promulgate a rule to be applied to the property/casualty insurance industry. In the Telemarketing Sales Rule adopted in 2003, the FTC acknowledged that the insurance industry is exempt from the FTC's jurisdiction. PCI believes this exemption applies as well to the FACT Act Affiliate Marketing Rule. This needs to be clarified in the FACT Act Affiliate Marketing Rule.

Even though the property/casualty industry is exempt from the FTC rule, we realize that the FACT Act and the Fair Credit Reporting Act does apply to the property/casualty insurance industry and therefore the FTC rule may be influential to those entities who regulate the industry. Therefore, there are a number of areas we believe the FTC needs to change or further clarify in their proposed rule.

On page 9 the *Commission invites comments on whether the term "eligibility information," as defined, appropriately reflects the scope of coverage, or whether the regulation should track the more complicated language of the statute regarding the communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A) of the FCRA."*

PCI believes this term does need to be clarified further, but not necessarily to reiterate what is in the FACT Act. Since the FACT Act did not change the definition of a consumer report, the rule needs to refer back to that definition. The definition states that a "consumer report" can only come from a "consumer reporting agency." Therefore, the "eligibility information" is in fact consumer report information, including transactional and experience information that comes from a consumer reporting agency. Pursuant to both the FACT Act and the FCRA, if a company does not fall into the definition of a consumer reporting agency, any transactional or experience information that it did not receive from a consumer reporting agency is not "eligibility information." PCI recommends that the FTC clarify that the eligibility information is that information from a consumer-reporting agency that is shared between affiliates and is used for solicitation purposes.

PCI requests further clarification regarding "actions taken by an agent on behalf of a person that are within the scope of the agency relationship will be treated as actions of that person" that is discussed on page 15. In the case of an "independent agent," this person may receive consumer report information from one company and then may use that information to market the products of another affiliated company to a consumer they have a "pre-existing relationship" with. Since this agent is an agent of both affiliated companies and the consumer has a "pre-existing business relationship with the agent, does the agent have a duty to supply the opt-out notice, since they are the entity that is both receiving the information and using the information?

The Commission invited comment on whether, given the policy objectives of section 214 of the FACT Act, proposed paragraph (a) should apply if affiliated companies seek to avoid providing notice and opt-out by engaging in the "constructive sharing" of eligibility information to conduct marketing. Incorporating "constructive sharing" in the rule goes beyond the scope of section 214, and was not intended when Congress passed the FACT Act. It is a slippery slope that the Commission should not go down. If "constructive sharing" is incorporated, when and how will such sharing be determined? "Constructive sharing" is too subjective of a concept. If "constructive sharing" is included, it will become the genesis of many lawsuits.

The PCI commends the FTC for consistently applying other "Federal" rules in the application of this rule, such as the "pre-existing business relationship" from the Telemarketing Sales Rule, and the opt-out notice and methodology from GLBA. This consistency allows commercial entities to utilize policies and procedures that they already have in place, and does not require the entity to expend money and time in the development of new procedures and notices.

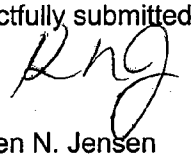
In the exceptions to initiating a solicitation without providing an opt-out there is one additional exception that should be recognized by the Commission. The additional exception needs to apply when a number of affiliates do a massive "general" advertising or solicitation campaign incorporating the financial products of many affiliates together. This exception could fall under the pre-existing relationship exception because at least one of the affiliates would have a pre-existing relationship with the consumer.

PCI recommends that the FTC does delay the compliance date beyond the effective date for 18 months to permit financial institutions that are subject to this rule to incorporate the affiliate marketing notice into their next annual GLBA notice. Due to the potential cycle a company may be on with their GLBA notice it will take them time to first identify when the notice must be sent, and

then implement the necessary systems (electronic and non-electronic) to assure compliance with this rule.

PCI appreciates the opportunity to comment on the proposed rule. If you would like to discuss any of these comments, please do not hesitate to contact me via telephone at 847-553-3718 or via e-mail at kathleen.jensen@pciaa.net.

Respectfully submitted,



Kathleen N. Jensen