ACLI AMERICAN COUNCIL OF LIFE INSURERS
FINANCIAL SECURITY FOR LIFE

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December 4, 2000

Manager
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Office of Thrift Supervision
1700 G Street, N.W.
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Re: Docket No. 2000-81: Proposed Fair Credit Reporting Regulations

Ladies and Gentlemen:

The American Council of Life Insurers ("ACLI") appreciates the opportunity to respond to your request for public comment on your proposed rule implementing the provisions of the Fair Credit Reporting Act ("FCRA"), as amended by the Gramm-Leach-Bliley Act ("GLB Act") (the "Proposed Rule") 65 *Federal Register* 63120 (October 20, 2000). The Proposed Rule, issued jointly by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision (the "Agencies"), establishes how depository institutions are to comply with the affiliate information sharing provisions of the FCRA.

The ACLI is a national trade association whose 435 member companies represent approximately 73 percent of the life insurance and 87 percent of the long term care insurance in force in the United States. They also represent over 80 percent of the domestic pension business funded through life insurance companies and 71 percent of the companies that provide disability income insurance.

As insurers, ACLI member companies are not directly subject to the Proposed Rule. However, we believe that it is important for us to comment on it. To the extent that member companies affiliate with depository institutions that are subject to your agency's jurisdiction, they will be significantly affected by it.

General Overview

The Agencies' *Federal Register* notice states that in order "[t]o ease compliance and promote consistency," the Agencies are conforming the Proposed Rule with the final regulation to implement the privacy requirements of Title V of the GLB Act (the "Privacy Rule") "where appropriate." 65 *Fed. Reg.* at 63121 . We believe that certain provisions of the Proposed Rule

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do not achieve this objective. Other provisions of the Proposed Rule are of significant concern to us because they are ambiguous, do not accurately reflect the language of the FCRA, or inappropriately expand the scope of coverage of the Proposed Rule well beyond the language of the FCRA. As a result, several aspects of the Proposed Rule could lead to confusion among consumers as well as insurers and depository institutions, and could have significant adverse effects on consumers and on the operations of insurers and depository institutions. We believe these results are unintended. Accordingly, as presented below, we suggest ways in which these provisions could be clarified. We are also providing comments on questions you have raised.

Specific Comments

Section__.1 Purpose and Scope.

Section __.1(a) provides that the Proposed Rule governs the *collection,* communication and *use* by depository institutions of certain information bearing on a consumer's credit worthiness and certain other characteristics. However, the Proposed Rule is intended to implement the 1996 Amendments to the FCRA, which addressed the *communication* of information with affiliates by excluding specified types of information communicated among affiliates from the definition of "consumer report." FCRA § 603(d). Expanding the purpose of the Proposed Rule to apply to the "collection" and "use" of information would extend the Proposed Rule well beyond the scope of the FCRA. Accordingly, we recommend that you delete the words "collection" and "use" from § __.1(a).

Section __.1(b)(3) provides that nothing in the Proposed Rule affects the rules adopted by the Secretary of Health and Human Services ("HHS") under the Health Insurance Portability and Accountability Act of 1996. The *Federal Register* preamble states that the Agencies will consult with HHS to avoid duplicative or inconsistent requirements. The ACLI urges that at the same time the Agencies consult with HHS, they seek comment from the public as to how the HHS rules and the Proposed Rule can be harmonized.

Section __.2 Examples.

You have asked whether including examples in the regulation is useful or appropriate. The ACLI believes that examples provide a useful means by which financial institutions can be assured that their practices comport with legal requirements. The ACLI encourages the Agencies to present additional examples, where appropriate, that clarify the manner in which financial institutions may comply with the Proposed Rule.

Section __.3 Definitions.

(b) Affiliate and (i) Control. The Proposed Rule uses the same definition of the term "control" used by the Agencies in the Privacy Rule. 12 C.F.R. § __.3(g). Use of this definition was necessary in the Privacy Rule because the term "affiliate," was defined in § 509(6) of the GLB Act as "any company that controls, is controlled by, or is under common control with another company." However, the FCRA does not define the term "affiliate" or "control."

Rather, the FCRA provides that the communication of certain information "among persons related by common ownership or affiliated by corporate control" may be treated differently from other communications. FCRA §§ 603(d)(2)(A)(iii), 624(b)(2). As a result, the scope of the FCRA is not coterminous with that of the GLB Act.

The financial industry has for the past five years relied upon the language of the FCRA without a problem, nor are we aware of any concerns which consumers may have with this language. Moreover, the range of companies that financial institutions treat as affiliates under the FCRA will likely differ from the range of companies treated as affiliates under the definition of affiliate contained in the GLB Act. The definitions of "affiliate" and "control" in the Proposed Rule run the risk of requiring financial institutions to limit the range of companies which they now regard as affiliates. This would jeopardize existing relationships and force some financial institutions to terminate existing information sharing arrangements.

The Agencies recognize that the GLB Act does not modify, limit or supersede the FCRA. GLB Act § 506(c). We believe adoption of the definitions of "affiliate" and "control" contained in the Proposed Rule inappropriately limits the range of entities which are affiliates under the FCRA simply in the interest of making the Proposed Rule identical to Title V of the GLBA. This runs the risk of violating § 506(c) of the GLB Act because it would limit the scope of the FCRA. Accordingly, we recommend that you delete the definitions of "control" and "affiliate" from the Proposed Rule.

(c)(2)(iii) Notice on a web page. This section of the Proposed Rule is similar, but not identical, to the Privacy Rule. It is unclear whether the use of different language in the Proposed Rule is intended to establish standards which differ from those in the Privacy Rule. For example, the Privacy Rule refers to "notices on web *sites,*" whereas the Proposed Rule makes reference to "notice on a web *page*." We believe that these differences in wording could give rise to confusion as to how extensive disclosures must be on web sites under the Proposed Rule, and how disclosures under the Proposed Rule differ from those under the Privacy Rule. Similarly, §§ __.3(c)(2)(iii)(A) and (B) of the Proposed Rule refer to a notice on a *page* that consumers access *often*, whereas the Privacy Rule refers to a notice on a *screen* that consumers *frequently* access. While the differences between the terms may not be dramatic, they raise issues regarding why the Agencies used different terminology. If the Agencies desire to make the Proposed Rule and the Privacy Rule consistent, the Agencies should use identical language where possible, unless, of course, there is a reason for using different terminology because of differences between the FCRA and the GLB Act.

(k) Opt out information. The definition of "opt out information" in the Proposed Rule is derived from the definition of "consumer report" contained in the FCRA. However, the proposed definition of opt out information omits an important element of the definition of consumer report that we believe should be included. The FCRA defines a consumer report as a communication of information *by a consumer reporting agency*. The definition of "opt out information" in the Proposed Rule does not contain this important qualification. Information is "opt out information" only if it is information communicated by a consumer reporting agency. To not include this qualification in the definition of opt out information could lead to the

inappropriate conclusion that all information (other than transaction and experience information) which is used for the specified purposes is opt out information. Accordingly, we urge that the definition of "opt out information" be amended to mean "information communicated by a *consumer reporting agency* . . ."

Section __.4 Communication of opt out information to affiliates.

This section provides that an institution's communication of opt out information to an affiliate is not a consumer report if notice is provided to the consumer and the consumer is given a *reasonable* opportunity and *means* to opt out before the information is provided to the affiliate. There is nothing in the FCRA that requires "reasonable" opportunity and "means" to opt out. We believe that the terms "reasonable" and "means" should be deleted because they are not used in the FCRA.

In addition, the FCRA requires provision of notice and opportunity to opt out "before the time the information is *initially communicated*" rather than "before the information is *provided* to the affiliate." We believe § __.4 should be amended to add the following after "if": "prior to your initial communication to your affiliates . . ." If the term "initial communication" is not used in the Proposed Rule, financial institutions may believe that they are required to provide FCRA notices every time they plan to share information with affiliates, which would be a result not called for in the FCRA. Accordingly, we urge the Agencies to make this change, and use the precise language of the FCRA wherever possible so as not to require financial institutions to change the standards they have long used in fulfilling their FCRA responsibilities.

Section __.5 Contents of opt out notice.

The ACLI strongly objects to the requirement in the Proposed Rule that the FCRA notice contain the extensive information required in § __.5. There is no similar requirement in the FCRA. By contrast, the FCRA provides financial institutions with a great deal of flexibility with regard to what the notices should say and the type of information they should contain. The Privacy Rule adopted by the Agencies requires privacy notices to contain extensive information because § 503(b) of the GLB Act requires it. There is no reason to require financial institutions to repeat the same information in their FCRA disclosures. Such a duplicative requirement merely increases the burden imposed on financial institutions without any measurable benefit to consumers, who have already been advised of the same information in the notices they receive under the Privacy Rule . Accordingly, we urge you not to adopt the rigid standard contained in § __.5 of the Proposed Rule. If the Agencies determine to retain this requirement, in order to reduce the burden on financial institutions, we recommend that you amend it by stating that compliance with § __.6 of the Privacy Rule would constitute compliance with § __.5 of the Proposed Rule.

The ACLI also strongly objects to the use of "information from a consumer's application" as an example in § __.5(d)(2)(i). This example suggests that all information on an application form is opt out information. This most certainly is not the case. For example, since a consumer's name and address appearing on an application are not used as a basis for eligibility

for credit, insurance or employment, they should not be regarded as opt out information. Only information from an application that is used to determine eligibility for credit, insurance, or employment is opt out information. Furthermore, use of information from an application as an example of opt out information may confuse consumers, which could lead to unfortunate consequences. Accordingly, we recommend that you eliminate "application information" from the examples presented and from the proposed sample notice in Appendix A.

In the preamble you also ask whether the notice should disclose (a) how long a consumer has to respond to the opt out notice before information will be disclosed to affiliates, and (b) the fact that consumers may opt out at any time. The Privacy Rule does not contain such requirements. In the interest of maintaining consistency between the Privacy Rule and the Proposed Rule, we believe that this additional burden should not be imposed under the Proposed Rule.

The preamble to the Proposed Rule states that a financial institution is required to provide examples of "medical data" which it intends to disclose to affiliates. 65 *Federal Register* at 63123. However, § __.5(d)(3)(vi) uses the term "medical history" as an example of information within a category of opt out information. As a result, it is unclear whether a financial institution is required to provide specific examples of medical data which it intends to share with affiliates or whether the term "medical information" or "medical history" would be sufficient, as suggested in § __.5(d)(3)(vi) of the Proposed Rule.

If a financial institution involved in the sale of insurance is required to list the types of medical data it intends to share, the requirement will prove extremely burdensome. This is because different types of insurance policies may require that different types of medical information be disclosed to affiliated insurance companies for underwriting purposes. Requiring financial institutions to specify examples of health information they may disclose is not provided for in the FCRA. Further, such a requirement would needlessly confuse consumers and impose significant costs upon financial institutions which would have to make different disclosures based upon a variety of factors, including the type of policies which are being applied for. Requiring financial institutions to categorize and identify the types of medical data that may be required for different types of insurance policies will present difficult compliance problems. Accordingly, we strongly urge you to clarify that the term "medical history" used in § __.5(d)(3)(vi) satisfies the disclosure requirement for types of information to be disclosed under § __.5(a)(1).

Section __.6 Reasonable opportunity to opt out.

The Proposed Rule does not permit a consumer to waive the opt out period immediately after receiving the FCRA notice. The inability to waive the opt out period could frustrate consumers who wish to receive timely information from affiliated financial institutions. We believe that consumers should be given an opportunity to waive the opt out period. This would enable a financial institution to provide information to an affiliate which, in turn, could provide the consumer with timely information concerning the affiliate's products and services.

The GLB Act and the Privacy Rule permit financial institutions to share information with nonaffiliated third parties with the consumer's consent. GLB Act § 502(e)(2) and Privacy Rule § __.15(a)(1). We believe that if a consumer is permitted to consent to a financial institution's sharing of information with a nonaffiliated party, the consumer should have the ability to consent to a financial institution's communication of information with an affiliate. This would enable consumers to benefit from information that can be made available to them immediately, rather than having to wait for a period of time to pass before information may be shared with affiliates. Accordingly, we recommend that you provide consumers with the opportunity to waive the requirement that a financial institution provide a reasonable opportunity to the consumer to opt out before information is shared with affiliates.

Section __.8 Delivery of opt out notices.

This section states that providing oral notice over the telephone or in person to a consumer of the opportunity to opt out is not sufficient. The ACLI believes that financial institutions should have the flexibility to provide such notices orally, particularly when a transaction takes place by telephone. There is nothing in the FCRA that requires that notices be in writing. If the opt out notice were provided orally, a financial institution could maintain a record of the conversation and whether or not the consumer chose to opt out. We believe that the decision to provide written or oral notices under the FCRA is one that should be left up to each financial institution. In this regard, § __.4(e)(2)(ii) of the Privacy Rule permits a financial institution to provide the initial notice required under that rule within a reasonable time after the establishment of a customer relationship if providing notice would substantially delay the delivery of the product or service. A similar type of exception is appropriate for the disclosures required by the Proposed Rule.

Section __.10 Time by which opt out must be honored.

You have asked whether the Agencies should establish a fixed number of days by which a financial institution must comply with a consumer's opt out direction. The ACLI believes that no fixed period should be specified. The determination as to the period by which an institution should comply with a consumer's opt out is highly dependent upon when the opt out is given (*e.g.*, at the time the relationship is established or substantially after the consumer has become a customer). It may be easier to comply with a consumer's direction earlier in the relationship before any information has been shared with affiliates. If the consumer chooses to opt out long after information has been shared, it may take longer for a financial institution to comply with the opt out direction because it must unwind the routine disclosures that had been put in place prior to the consumer's direction.

Section __.12 Prohibition against discrimination.

This section of the Proposed Rule "reminds" financial institutions that the Equal Credit Opportunity Act ("ECOA") bars discrimination against a consumer who exercises a right under the FCRA. We see no reason why such a "reminder" should be placed in the Proposed Rule. The ECOA is a completely different act from the FCRA. Financial institutions do not need to be reminded in the Proposed Rule of the requirements of the ECOA. Accordingly, we recommend that this section be deleted.

Effective Date

There is no indication in the Proposed Rule as to its effective date. We recognize that financial institutions are required to comply with the Privacy Rule by July 1, 2001. Financial institutions are well along in implementing the Privacy Rule. Indeed, many institutions have already developed their privacy notices and made arrangements for printing and distribution. Certainly, by the time the Agencies adopt the Proposed Rule, most institutions will have made these arrangements. To require them to go back and revise their notices and make new printing and distribution arrangements will result in undue burden and unnecessary costs.

Because of the arrangements financial institutions are making to comply with the Privacy Rule, it is our recommendation that the Proposed Rule should become effective no earlier than July 1, 2002. That date represents the date by which financial institutions must send customers their first annual notice under the Privacy Rule. A July 1, 2002 effective date, of course, will have no adverse effect on consumers because the notices financial institutions send to consumers by July 1, 2001 under the Privacy Rule will contain FCRA disclosures under existing standards, as required by the GLB Act. Establishing an effective date of July 1, 2002 for the Proposed Rule will provide financial institutions with an orderly phase-in period and will not disrupt existing arrangements.

We appreciate the Agencies' consideration of our concerns in relation to the Proposed Rule and would be pleased to answer any questions you may have relating to our comments.

Sincerely,

Roberta B. Meyer