America's Health Insurance Plans

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Comment #: 16

August 12, 2004

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

Re: FACT Act Affiliate Marketing Rule
Matter No. R411006

Dear Sir/Madam:

I am writing on behalf of America's Health Insurance Plans (AHIP) to offer comments regarding the "Fair and Accurate Credit Transactions Act (FACT Act) Affiliate Marketing Rule" published in the *Federal Register* on June 15, 2004. The FACT Act amended the Fair Credit Reporting Act (FCRA) which regulates the use and disclosure of consumer credit information.

America's Health Insurance Plans is the national trade association representing the private sector in health care. AHIP's nearly 1,300 member companies provide health, long-term care, dental, vision, disability, and supplemental coverage to more than 200 million Americans.

State and Federal Privacy Laws

Health insurance plans are subject to extensive state and federal laws protecting the confidentiality of personally identifiable health information including the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Gramm-Leach-Bliley Act (GLBA).[1] While the FACT Act provisions may apply to the activities of some of our members who use "consumer credit reports," these requirements add another layer to an already complex state and federal legal framework to protect health information privacy. We believe consumers are best served by uniform federal confidentiality standards. **We recommend that the Federal Trade Commission work with Congress and with other stakeholders to clarify and streamline federal laws and regulations applicable to the use and disclosure of individually identifiable information by health insurance plans.**

"Definition of Pre-Existing Business Relationships"

[1] Both the HIPAA privacy rule and state laws implemented in response to GLBA, including the National Association of Insurance Commissioners (NAIC) Model Privacy Rule, govern the sharing of individually identifiable health information by a health insurance plan. In addition, the HIPAA privacy rule includes specific provisions on the use of health information for purposes of marketing.

The FACT Act defines a "pre-existing business relationship" as a relationship between a person, or a person's licensed agent, and a consumer, based on:

> (A) a financial contract between a person and a consumer which is in force;
> (B) the purchase, rental, or lease by the consumer of that person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and that person during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section;
> (C) an inquiry or application by the consumer regarding a product or service offered by that person, during the 3-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section; or
> (D) any other pre-existing consumer relationship defined in the regulations implementing this section.

(15 U.S.C. §1681s-3(d)(1)). The proposed regulatory definition of a "pre-existing business relationship" (16 CFR §680.3, 69 Fed. Reg. 33337), however, does not include the phrase "or a person's licensed agent." We believe the definitions in the rule should mirror those contained in the FACT Act. **AHIP recommends that the regulatory definition of a "pre-existing business relationship" be revised to follow the statutory definition in the FACT Act.**

Additionally, the FACT Act clearly gives the FTC the authority to define any other customer relationship that would qualify as a "pre-existing business relationship." The rule is unclear as to whether an individual's purchase of a health insurance product would qualify as a pre-existing business relationship. The rule also does not appear to anticipate situations where an insurance product is purchased by a third party for the benefit of a consumer (for example, where an individual purchases a long-term care insurance policy providing coverage for a parent). **We encourage the FTC to clarify that a "pre-existing business relationship" exists between a person and a consumer when a health insurance product is purchased by or for the benefit of a consumer.**

"Constructive Sharing"

The preamble to the proposed regulations requests public comment on whether a person must provide a consumer notice and an opportunity to opt-out when a person asks an affiliate to make solicitations on its behalf based on criteria selected by the person such as credit worthiness (referred to as "constructive sharing") (69 Fed. Reg. 33328). For example, Company "A" sells disability income protection (DI) insurance to individuals. Company "B" sells long-term care (LTC) insurance to individuals. Company A expands its insurance operations and acquires Company B. Company B then operates as an affiliate of Company A. Company A wants to mail

information on Company B's LTC insurance products to its DI customers. Company B provides Company A with criteria that, based on LTC industry research and Company B's own experience, are the type of customer most likely to consider purchasing LTC coverage. In this situation, eligibility information is not used to make the solicitations and is only shared with the affiliate if a consumer affirmatively responds to the solicitation. The FACT Act intended for the notice and opt-out requirements to apply to solicitations when a person communicates a consumer's eligibility information to an affiliate and the affiliate uses the consumer information for solicitations. The FACT Act did not specifically prohibit constructive sharing situations. **Therefore, we believe that constructive sharing of consumer information does not require consumer notice and an opportunity to opt-out.**

Effective Compliance Date for the Regulation

The FACT Act provides that consumer information will be subject to the regulations only if that information is received after the compliance date stated in the final rule. (15 U.S.C. §1681s-3(a)(5)) The proposed regulations, however, appear to contradict the statute by exempting consumer information from the rule's requirements only if it was received by an affiliate prior to the regulatory compliance date (16 CFR §680.20(e), 69 Fed. Reg. 33338). **AHIP recommends that the rule be revised to coincide with the statutory requirement to exempt eligibility information that was received by either the person or the affiliate prior to the regulatory compliance date.**

We appreciate the opportunity to comment on these important proposals. Please feel free to contact me at (202) 778-3259 or ddennett@ahip.org should you have any questions.

Sincerely,

Diana C. Dennett
Executive Vice President