Comment #: 49

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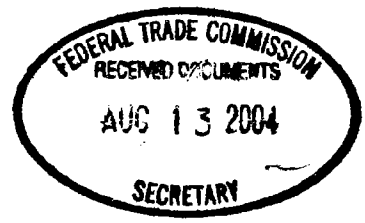

Federal Trade Commission/Office of the Secretary
Room H-159 (Annex Q)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

Dear Sir or Madam:

Please find enclosed herewith a copy of the National Independent Automobile Dealers Association's (NIADA) Comments Regarding the FACT Act Affiliate Marketing Rule, R-411006. Also, please be advised that a copy of NIADA's Comment was submitted via e-mail to comments@comments.regulations.gov.

If you have any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,

Deanna L. Stockamp

DLS/sjm

Enclosures

FACT Act Affiliate Marketing Rule, Matter No. R 411006

COMMENTS OF THE NATIONAL INDEPENDENT AUTOMOBILE DEALERS ASSOCIATION DIRECTED TO THE FEDERAL TRADE COMMISSION, WASHINGTON, D.C. 20580

SECTION A. BACKGROUND

On December 4, 2003, President Bush signed into law the Fair and Accurate Credit Transactions Act (FACT Act) in an attempt to reduce the risk of consumer fraud and related crimes, including identity theft, and to assist any victims. In general, the FACT Act amends the Fair Credit Reporting Act (FCRA) to enhance the accuracy of consumer reports and to allow consumers to exercise greater control regarding the type and amount of marketing solicitations they receive. The FCRA sets standards for the collection, communication and use of information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is collected and communicated by consumer reporting agencies.[1]

The FCRA, as amended in 1996, provides that a person may communicate to an affiliate or non-affiliated third party information solely as to transactions or experiences between the consumer and the person without becoming a consumer reporting agency.[2] Section 214 of the FACT Act adds a new Section 624 to the FCRA. This new provision gives consumers the right to restrict a person from using certain information obtained from an affiliate to make solicitations to that consumer. Section 624 generally provides that, if a person shares certain information about a consumer with an affiliate, the affiliate may not use that information to make or send solicitations to the consumer about its products or services, unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information. Section 214 of the FACT Act also requires the FTC, in consultation and coordination with other Federal Agencies, to issue regulations implementing the Section that are as consistent and comparable as possible. On June 10, 2004, the FTC released its Proposed Affiliate Marketing Rule implementing Section 624 of the FCRA and requested that comments be submitted by July 20, 2004. On July 19, 2004, it extended the deadline to respond to August 16, 2004.

The National Independent Automobile Dealers Association (NIADA) has represented independent motor vehicle dealers for over 50 years. The National Association and its State Affiliate Associations represent more than 19,000 independent motor vehicle dealers located across the United States. Many motor vehicle dealers may own two or more dealerships and/or a related finance, insurance, or service contract company or a company to administer its warranty programs. In 2003, a record 43.6 million used motor vehicles were retailed generating more than $366 billion in revenues. Because vehicles are lasting longer (the average vehicle on the road today is over 8.5 years old), projections of future used vehicle sales volumes suggest that the used vehicle market will maintain its 40-million-plus volume in the years to come.[3] Given the number of motor vehicle transactions that take place each year by motor vehicle dealers, the FACT Act Affiliate Marketing Rule will have a significant impact on the used retail

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1 15 U.S.C. 1681-1681x

2 FCRA §§ 603(d)(2)(A)(i) and (ii)

3 The 2004 Used Car Market Report, Manheim Auctions, 1400 Lake Hearn Drive, NE, Atlanta, GA 30319-1464.

motor vehicle industry, and therefore NIADA hereby submits the following comments with respect to the Rule.

SECTION B. COMMENTS ON THE PROPOSED FACT ACT AFFILIATE MARKETING RULE.

1. Definitions

Section 680.3 contains the definitions for the terms utilized in the FTC's Proposed Rule. Many of the proposed definitions, such as "consumer" and "person," follow the statutory definitions in Section 603 of the FCRA and, therefore, need not be addressed by NIADA. In addition, while NIADA desires to obtain clarification with respect to the application of the "pre-existing business relationship" exception, which is discussed in more detail below, it is not proposing that the FTC include other circumstances that constitute exceptions within the definition itself. NIADA has, however, elected to respond to specific inquiries of the FTC with respect to the definitions of "affiliate," "clear and conspicuous," "eligibility information," and "solicitation" as follows:

(a) Affiliate

With respect to the definition of "affiliate", as the FTC points out, the FCRA, the FACT Act, and the GLB Act take a variety of approaches to the term. The FTC has opted to define "affiliate" in Proposed Paragraph 680.3(b) to mean "any person that is related by common ownership or common corporate control with another person" and to adopt a definition of "control" that is consistent with the definition of "control" in the FTC's Privacy Rule. Given the stated purposes of Section 624 of the FCRA and of the GLB Act to restrict the use of certain information by third parties, NIADA believes the FTC has achieved its goal of harmonizing the various treatments of "affiliate" and construing them to mean the same thing.

(b) Clear and Conspicuous

Paragraph 680.3(c) defines the term "clear and conspicuous" to mean reasonably understandable and designed to call attention to the nature and significance of the information presented. The FTC has permitted companies to retain flexibility in determining how best to meet the clear and conspicuous standard, while providing examples of the methods that may be utilized to make their notices clear and conspicuous and to call attention to the nature and significance of the information provided. NIADA appreciates and supports the FTC's decision to avoid prescribing that specified typefaces, types sizes or other formats be utilized. This approach is consistent with other Federal Laws and Regulations that impose disclosure obligations upon the motor vehicle industry, including the GLB Act and the Truth in Lending and Leasing Acts.

(c) Eligibility Information

The FTC's Proposal uses the term "eligibility information" to describe the type of information that the statute allows consumers to bar affiliates from using to send marketing solicitations. It includes any information the communication of which would be a "consumer report" if the statutory exclusions from the definition of "consumer report" in section 603(d)(2)(A) of the FCRA did not apply. In other words, in addition to information from credit bureau reports or applications, eligibility information may include a person's own transaction or experience information with respect to a consumer's credit worthiness which is used or collected for the

purpose of serving as a factor in establishing eligibility for credit or insurance to be used primarily for personal, family or household purposes, employment purposes, or any other purpose authorized in Section 604 of the FCRA. NIADA agrees that the term "eligibility information," as defined and taken together with the exceptions under which the information may be shared, appropriately reflects the scope of coverage and further believes that using the more complicated language set forth in the statute is unnecessary.

(d) Solicitation

The FTC has defined Solicitation to mean marketing initiated by a person to a particular consumer that is based on eligibility information communicated to that person by its affiliate and is intended to encourage the consumer to purchase a product or service. The FTC points out that it has the statutory authority to determine by regulation that other communications do not constitute a solicitation and has solicited comment on whether it is necessary to do so. NIADA does not believe it is necessary to include additional communications that do not constitute a solicitation in the definition, but encourages the FTC to reconsider the scope of the exclusion in Subparagraph (2) and the examples of solicitations in Subparagraph (3).

Subparagraph (2) contains a specific exclusion from the definition of solicitation for marketing directed at "the general public" without regard to eligibility information, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications. NIADA maintains that any marketing made without regard to eligibility information is not deemed to be a solicitation, by definition, regardless of whether it is directed at the general public or a specific consumer or group of consumers. For example, if a Dealership maintains a list of the names and addresses of all consumers that visit the Dealership, without regard to any other information about them, marketing directed to these consumers would not fall within the definition of a solicitation because it was not based on eligibility information. With respect to Subparagraph (3), which is titled "Examples of solicitations," the provision actually clarifies that telemarketing calls, direct mail and e-mail are forms of marketing communications which, if they are based on eligibility information, would be deemed to be solicitations. NIADA suggests that the FTC consider restructuring the definition of solicitation to clarify in Subsection (1) that solicitations include telemarketing calls, direct mail, e-mail or other forms of marketing communication and that it use Subsections (2) and (3) to provide examples of the types of communications that are and/or are not deemed to be solicitations and to clarify whether, and to what extent, various tools used in Internet marketing constitute solicitations and to provide further guidance with respect to Internet marketing.

2. Section 680.20-Use of Eligibility Information by Affiliates for Marketing

(a) Providing the Notice and Opportunity to Opt-Out

Proposed § 680.20 establishes the basic rules governing the requirement to provide the consumer with notice and a reasonable opportunity to opt out of a person's use of eligibility information that it obtains from an affiliate for the purpose of making or sending solicitations to the consumer. Section 624 of the FACT Act does not specify which affiliate must give the consumer the notice and an opportunity to opt out of the use of the information. The FTC has proposed in 680.20(a) and (b) that the person communicating information about a consumer to its affiliate should be responsible for satisfying the initial notice and opt-out requirements before

an affiliate may use eligibility information to make or send solicitations to the consumer. It based its decision, in part, upon the language in Section 624(a)(1)(A), that the disclosure must state that the information "may be communicated" among affiliates for purposes of making solicitations, and the language in Section 214 of the FACT Act, requiring the FTC to consider existing affiliate sharing notification practices and provide for coordinated and consolidated notices, which may include GLB Act privacy notices.

NIADA agrees with the FTC's interpretation and proposal. It further appreciates the flexibility of the Rule to the extent it facilitates the use of a single notice to comply with both the GLB Act and the FCRA, permits the notice to be provided either in the name of the company with which the consumer has or is doing business or in one or more common corporate names shared by members of an affiliate group of companies, and permits covered entities to provide the notice on behalf of all of its affiliates by name. In the motor vehicle industry, the dealership typically is the entity that obtains non-public personal information from its customers and the entity that provides the initial Privacy Notice required by the GLB Act and the FTC's Implementing Privacy Rule.

(b) Exceptions to the Affiliate Marketing Notice and Opt-Out Requirements

Section 680.20(c)(1)-(6) sets forth the exceptions to the affiliate marketing notice and opt-out requirements. NIADA seeks clarification as to the scope of an affiliate's ability to send marketing materials and solicitations pursuant to the exceptions in subsections (1) and (4), in part to address the FTC's request for input regarding the "constructive sharing" of eligibility information to conduct marketing.

Subsection (1) of Section 680.20(c) provides an exception for making or sending a marketing solicitation to a consumer with whom an affiliate has a pre-existing business relationship as defined in Section 680.3(i). "Pre-existing business relationship" is defined to mean a relationship between a person and a consumer based on the following: (1) a financial contract between the person and the consumer that is in force; (2) 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 a solicitation is made or sent to the consumer; or (3) 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 a covered solicitation is made or sent to the consumer. As applied to sales and leases of goods or services, and consumer inquiries about such transactions, the FTC further acknowledged that the definition of "pre-existing business relationship" is substantially similar to the definition of "established business relationship" under the amended Telemarketing Sales Rule (TSR) (16 CFR 310.2(n)), suggesting that it would be appropriate to consider the reasonable expectations of the consumer in determining the scope of this exception.

Recognizing that one of the few places credit impaired consumers who desire to purchase a motor vehicle have to turn is a motor vehicle dealership that is willing to finance the consumer's purchase itself, it has become increasingly common for dealers to offer "in-house" (also known as "buy here-pay here") financing. In some cases, dealers have also formed separate, but related, finance companies to purchase the in house retail installment contracts from their

dealerships. NIADA seeks clarification from the FTC as to whether it is correct that it would be permissible for a dealership offering in-house financing and/or its related finance company to provide marketing materials and solicitations to the consumers in the following situation:

The consumer enters Dealership A, a dealership that offers in-house financing, looking for a vehicle and completes a credit application. Although the consumer is informed that he qualifies for financing, he leaves Dealership A without purchasing a vehicle because he wishes to look some more. Would it be appropriate for Dealership A, having now established a business relationship with the customer, to send marketing materials to the consumer that include information about the Dealership, as well as any affiliated dealerships that have similar financing criteria? Similarly, if Dealership A does not offer in-house financing, but rather has specific authorization from the consumer to submit the consumer's credit information to its related finance company, would it be appropriate for the related finance company, having now established a business relationship with the customer, to send marketing materials to the consumer that include information about each of the dealerships with whom the finance company has a contractual agreement to purchase retail installment contracts?

NIADA believes the proposed solicitations would be appropriate in both situations because the entities, whether it be the buy here-pay here dealership or the related finance company, have established a business relationship with the customer pursuant to the exception in (c)(1). In the alternative, NIADA proposes that they would be permitted to make such solicitations pursuant to (c)(4) because use of the eligibility information would be responsive to a communication initiated by the consumer requesting information about the purchase of a motor vehicle for which financing is available.

3. The Opt-Out Notice

Proposed Sections 680.21, 680.22, 680.23 and 680.24 address the contents of the opt-out notice, what constitutes a reasonable opportunity to opt-out, reasonable and simple methods of opting out and delivery of the opt-out notice, respectively. These requirements generally track those of the GLB Act and FTC Privacy Rule. While use of a model form in Appendix A of the Rule would comply with the notice requirements, the FTC has specified that it is not required and that the notice may be combined with other disclosures required or authorized by federal or state law.

In Proposed Paragraph 680.22(a), which requires an affiliate to provide the consumer with a reasonable opportunity to opt out following delivery of the opt-out notice before it uses eligibility information to make or send solicitations to the consumer, the FTC has likewise adopted a flexible standard. Instead of mandating that affiliates wait a specified number of days before using the information, the FTC proposes to leave it up to the affiliates to determine the appropriate point in time at which the information may be used, recognizing that it may vary depending upon the circumstances. At the same time, the FTC included examples for what constitutes a reasonable opportunity to opt-out and a safe harbor where opt-out periods of at least 30 days are provided in certain situations. Similarly, in Section 680.23, it included examples of both reasonable opt-out means, as well as methods of opting-out that are not deemed to be reasonable and simple.

NIADA supports the adoption of a Proposed Regulation that includes examples of notices that may be used to comply with the notice requirements and of what the FTC believes constitutes

reasonable opt-out opportunities. This approach is consistent with the GLB Act and the FTC's Privacy Rule. For example, the Privacy Rule does not mandate that specific form notices be utilized or require the use of any particular technique for making the notices clear and conspicuous, but rather provides guidance on how the mandated disclosures should be presented and the types of words that customers have found readily understandable. Furthermore, the examples of reasonable opportunities to opt out and for delivering the required notices parallel the examples used in the GLB Act and Privacy Rules, making it easier for entities covered by both Rules to understand their compliance obligations and helping to reduce the overall costs and burdens that they may incur in complying with the Rule.

While NIADA believes that the use of the model notices provided in Appendix A should be discretionary, those entities that elect to use them (or a substantially similar notice) should have the benefit of a safe harbor from administrative enforcement actions and consumer and regulatory challenges regarding the notice, similar to if entities provide the 30 day opt-out periods. Encouraging the use of the format and language of a model notice would benefit both consumers and financial institutions. The development of uniform notices would enhance the ability of customers to readily compare privacy notices and protect consumers from unknowingly granting permission to use eligibility information. At the same time, covered entities would have appropriate direction as to the format and language that is most easily understood by their customers.

4. Delivery of Opt-out Notices

With respect to the Delivery of the opt-out notice, the FTC has specifically requested comment regarding the Rules in Paragraph 680.24(d)(1) that apply when two or more consumers jointly obtain a product or service, such as a loan. Similar to the FTC's Privacy Rule, a lender may provide a single opt-out notice to two joint debtors if it indicates whether an opt-out by one joint debtor will apply to both or whether each debtor may opt-out separately, and provided the lender does not require them both to opt-out before honoring an election by one not to have eligibility information shared with its affiliates. The distinction between the FCRA, which deals with use of eligibility information for marketing by affiliates, and the GLB Act, which governs the sharing of non-public personal information among affiliates, does not warrant depriving a joint consumer who has not opted-out and has an interest in receiving additional marketing materials and solicitations from having information about a joint account shared.

5. Duration and Effect of Opt-Out

Section 680.25 addresses the duration and effect of the consumer's opt-out election. In accordance with Section 624 of the FACT Act, it provides that a consumer's election to prohibit marketing based on shared information shall be effective for at least 5 years, unless the consumer revokes the election in writing, or if the consumer agrees, electronically, before the opt-out period has expired. The FTC's Proposal further permits covered entities to treat a consumer's opt-out election as effective for a longer period of time, including indefinitely, unless revoked by the consumer, to avoid the cost and burden of tracking consumer opt-outs over 5 year periods with varying start and end dates and sending out extension notices every 5 years.

Given the additional burdens that covered entities would face in tracking the 5 year opt-out periods, NIADA suspects that many of them will elect to allow the opt-out to continue to apply indefinitely unless revoked by the consumer, in part because most GLB Act notices already

state that the consumer does not need to opt-out again if the consumer previously opted-out, but primarily because the alternative is nothing short of an administrative nightmare. Regardless of when or how often the consumer opts-out, the opt-out must be effective for a period of at least 5 years. Furthermore, if an extension notice is not provided or a consumer's relationship with a company terminates for any reason when a consumer's opt-out election is in force, the opt-out will continue to apply indefinitely anyway.

NIADA is also concerned about the procedures for providing an extension notice as prescribed in Proposed Section 680.26. Paragraph (a) provides that a receiving affiliate may not make or send solicitations to the consumer after the expiration of the opt-out period based on eligibility information it receives or has received from an affiliate, unless the person responsible for providing the initial opt-out notice, or its successor, has given the consumer an extension notice and a reasonable opportunity to extend the opt-out, and the consumer does not extend the opt-out. For many members of the motor vehicle industry, this would impose a substantial burden and hardship.

The GLB Act and Privacy Rule requires a financial institution to provide an initial notice of its privacy policies at the time of establishing a customer relationship or, for consumers who are not customers, prior to disclosing nonpublic personal information about the consumer to a nonaffiliated third party. As a practical matter, motor vehicle dealerships provide the initial privacy notice to the customer at the dealership when the dealership accepts a customer's credit application. Financial institutions must also provide copies of their privacy notices at least annually to customers during the continuation of a customer relationship. The FTC has recognized, however, that it is appropriate to consider a loan transaction as giving rise to only one customer relationship and that this customer relationship may be transferred with a sale of part or all of a loan. A financial institution that makes a loan, retains it in its portfolio and provides servicing for the loan (i.e. a dealership engaging in buy here-pay here financing) clearly would have a customer relationship and an obligation to provide annual notices. But, if the dealership never extended a loan to the customer, but provided financial services such as assisting an individual to obtain financing for a purchase or lease, or sells the loan to a third party, then the customer relationship ends, as does the dealership's obligation to provide an annual notice to the consumer.

In other words, motor vehicle dealerships across the Country would be required not only to implement policies for tracking the expiration of the opt-out period, but for creating and sending extension notices that could more efficiently be monitored and sent by entities that already send annual privacy notices. For those companies that wish to limit the opt-out election to 5-year periods, NIADA recommends that the FTC amend the Proposed Regulation to permit extension notices to be sent by either the company responsible for providing the initial opt-out notice or the affiliate desiring to send solicitations based on eligibility information it receives.

6. Consolidated and Equivalent Notices

Proposed Section 680.27 implements Section 624(b) of the Act, and provides that a notice may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the FCRA and the notice required by Title V of the GLB Act. NIADA anticipates that the affiliate marketing and opt-out notices will be consolidated with the GLB Act privacy notice or the affiliate sharing opt-out notice under of the FCRA by its Members and other

members of the motor vehicle industry. Consolidating these notices with the GLB Privacy notice will reduce costs and burdens of compliance with the Proposed Rule. Consolidated notices will also be less confusing to consumers. In the average motor vehicle transaction, a motor vehicle dealership uses ten separate documents and spends approximately two hours with the consumer to complete a sales transaction. Reducing the amount of paperwork provided to the consumer, if disclosures can be made clearly and conspicuously and in a manner easily understandable, therefore benefits both the dealership and its customers. The sample notices provided in Appendix A, together with the guidance the FTC has provided regarding making "clear and conspicuous" disclosures should be sufficient to achieve this goal.

7. Effective Date

Consistent with the requirements of Section 624 of the FACT Act, the Proposed Regulations will become effective 6 months after the date on which they are issued in final form, but the FTC has requested 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 GLB Act notice. NIADA does not believe that making the Affiliate Marketing Rule effective 6 months after the publication of the Final Rule is an adequate amount of time to advise covered entities of their new obligations, to modify existing Privacy Notices and/or create new Notices, and implement appropriate policies and procedures to process and maintain the opt-out elections. Many entities that will be covered under the Proposed Regulation may not be subject to the GLB Act and Privacy Rules. Even those entities that are covered under both Rules will need sufficient time to modify their existing notices; implement appropriate policies and procedures to process and maintain the opt-out notices; to conduct appropriate employee training; and to take such other measures as they deem appropriate to ensure that affiliates only have access to and use the eligibility information as permitted by the Affiliate Marketing Rule. NIADA proposes that a mandatory effective date 1 year from the date on which a Final Rule is issued is adequate time for covered entities to comply.

SECTION C. CONCLUSION

NIADA would like to thank the FTC for the opportunity to comment with respect to the Proposed FACT Act Affiliate Marketing Rule. Any questions the FTC has regarding NIADA's comments and the position taken herein may be directed to NIADA's Legal Counsel, Keith E. Whann or Deanna L. Stockamp, of the Law Firm Whann & Associates located at 6300 Frantz Road, Dublin, Ohio 43017.