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BY ELECTRONIC MAIL

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Attn: Jennifer J. Johnson, Secretary
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Robert E. Feldman, Executive Secretary
Attn: Comments
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Regulation Comments (Attn: No. 2004-31)
Chief Counsel's Office
Office of Thrift Supervision
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Becky Baker
Secretary of the Board
National Credit Union Administration
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Alexandria, VA 22314-3428
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Re: FACT ACT AFFILIATE MARKETING RULE:
***OCC Docket No. 04-16* (12 CFR Part 41)**
***Board of Governors of the Federal Reserve System Docket No. R-1203* (12 CFR Part 222)**
***FDIC RIN No. 3064-AC 73* (12 CFR Part 334)**
***OTS No. 2004-31* (12 CFR Part 571)**
***NCUA* (12 CFR Part 717)**

Ladies and Gentlemen:

The American Insurance Association ("AIA")[1] appreciates the opportunity to provide comments in response to the proposed rules published by the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Board"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA") (collectively, "Federal Agencies" or "Agencies") in the July 15, 2004 Federal Register implementing the provisions contained in Section 214 of the Fair and Accurate Credit Transactions Act of

[1] AIA is a national trade association of major property and casualty insurance companies, representing over 450 insurers that provide all lines of property and casualty insurance throughout the United States and that wrote more than $115 billion in annual premiums in 2002.

JAY S. FISHMAN Chairman | JOHN J. AMORE Chairman Elect | DOUGLAS G. ELLIOT Vice Chairman | MIKE MCGAVICK Vice Chairman | ROBERT E. VAGLEY President

2003 ("FACT Act") ("Proposed Rules"). 69 Fed. Reg. 42502-42542. Those provisions add a new Section 624 to the Fair Credit Reporting Act ("FCRA") that relates to certain procedures that regulated entities must follow when an affiliate uses certain information received from another affiliate to make marketing solicitations to consumers that do not fall within certain exceptions.

We have reviewed the Proposed Rules and believe that the provisions generally track the actual language of Section 624. This is particularly important with respect to this section of the FACT Act, as those companies that are required to comply with the affiliate marketing solicitation restrictions must be able to evaluate those restrictions with confidence that their marketing practices are aligned with the statutory language. Implementing regulations that introduce interpretations at variance with the statutory language are not only beyond the authority of the issuing agency, they lead to undue compliance burdens for regulated entities that have relied on the plain meaning of statutory language.

Thus, while we agree with the Proposed Rules as phrased, we are concerned by the Federal Agencies' "invitation to comment," in the Section-by-Section Analysis of solicitations involving eligibility information, which seems to imply that "constructive sharing" of information by one affiliate with another affiliate in order for the receiving affiliate to market the sharing affiliate's products or services to its customers does not squarely fall within the "pre-existing business relationship" exception. 69 Fed. Reg. at 42507. But an analysis of the statutory exception leads inescapably to the conclusion that this is precisely the type of solicitation that was envisioned by the exception.

Subsection 624(a)(4) of the FACT Act lists the exceptions to the general requirement that consumers be given notice and an opportunity to "opt-out" of marketing solicitations by affiliated companies. Importantly, these exceptions are separated by the disjunctive "or", and are therefore individual, not cumulative. Thus, compliance with <u>any one</u> of the exceptions will suffice. Subsection 624(a)(4)(A) specifically provides that a person (which includes any corporation[2]) need not comply with the consumer notice and opt-out opportunity where the person is "using information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship." As a result, a company may market <u>without restriction</u> to those consumers that have a "pre-existing business relationship" with that company.

The term "pre-existing business relationship" is statutorily defined in Subsection 624(d)(1) as a relationship "between a person, or a person's licensed agent,[3] and a consumer" that is

> "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 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;

[2] <u>See</u> 12 CFR § 41.3(l); 12 CFR § 222.3(l); 12 CFR § 3343.3(l); 12 CFR § 571.3(l); 12 CFR § 571.3(l); 12 CFR § 717.3(l).

[3] We note that the Proposed Rules' pre-existing business relationship" definition omits the reference to a "person's licensed agent" in the introductory phrase. See 12 CFR § 41.3(m); 12 CFR § 222.3(m); 12 CFR § 3343.3(m); 12 CFR § 571.3(m); 12 CFR § 571.3(m); 12 CFR § 717.3(m). AIA respectfully recommends that the regulatory definition be amended to include that reference in order to align with the actual language of Subsection 624(d)(1).

(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 customer relationship defined in the regulations implementing this section." (Emphasis added.)

Like Section 624's "exception" structure, a corporate relationship with a consumer that meets any of the four definitions of "pre-existing business relationship" meets the statutory term. For property-casualty insurers, this means, among other things, that a "pre-existing business relationship" exists with their current policyholders and with other consumers with whom they have a financial contract in place (see Subsection 624(d)(1)(A)), as well as those consumers that apply for or inquire about the insurer's products or services for 3 months following the application or inquiry, even when that inquiry or application does not result in issuance of an insurance policy or other completed business transaction (see Subsection 624(d)(1)(C)).

Importantly, neither the "pre-existing business relationship" exception nor the term's definition is limited to solicitations involving an entity's own products or services. In addition, there is nothing in the exception (or the corresponding definitions) that precludes an entity from sending a solicitation to a customer involving another affiliate's products or services.

Further, none of the other exceptions to Section 624's affiliate marketing solicitation restriction limits the exception for pre-existing business relationships in any way. As we have noted, the exceptions listed in Subsection 624(a)(4) are independent of one another – each designed to permit affiliate marketing solicitations in certain situations without the need for consumer notice or an opportunity to "opt-out" of such solicitations. For example, Subsection 624(a)(4)(F) excepts an insurer from the marketing solicitation restrictions set forth in Section 624 "if compliance with [those requirements] by that [insurer] would prevent compliance by that [insurer] with any provision of State insurance laws pertaining to unfair discrimination in any State in which the person is lawfully doing business." This exception was included to account for the state insurance regulatory environment that polices property-casualty insurer business practices for unlawful discrimination, as well as regulates rates (and, in many instances, requires prior regulatory approval of those rates) according to a standard that those rates not be "excessive, inadequate, or unfairly discriminatory," and to ensure that insurer compliance with Section 624 did not put the insurer in conflict with legal standards in any jurisdiction where it lawfully does business.

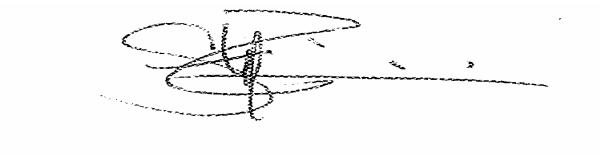
Finally, during the FACT Act legislative debate, the meaning of Section 624(a)(4)(A) was clearly understood as allowing companies to market freely to those consumers with whom they have a pre-existing business relationship, whether or not the marketing solicitation involved the company's products or services or those of an affiliate. Indeed, the plain meaning of this language provided the fulcrum for consensus support for Section 624. Thus, any implication that "constructive sharing," as the Agencies have phrased it, is questionable constitutes a departure from the statute and must give way in deference to the clear language of the pre-existing business relationship exception.

With regard to the Federal Agencies' request for comments on the effective date of the rule, 69 Fed. Reg. at 42512, AIA respectfully suggests that a six month period is not sufficient for entities to evaluate the final rule, determine its impact on current affiliate marketing practices, and implement any needed operational changes. AIA urges the Federal Agencies to extend the effective date to twelve months from final publication.

* * *

AIA welcomes the opportunity to comment on the affiliate marketing solicitation provisions of Section 624. We hope that the Proposed Rules, as finally adopted, follow both the letter and the spirit of the FACT Act and allows financial services institutions such as AIA's member companies to continue to engage in activities contemplated by that legislation.

Respectfully submitted,



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