Oldaker, Biden & Belair LLP
818 Connecticut Avenue, NW, Suite 1100
Washington, DC 20006
Telephone: (202) 728-1010
Fax: (202) 728-4044

VIA COURIER AND ELECTRONIC SUBMISSION

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

I. INTRODUCTION

Oldaker, Biden & Belair[1] appreciates the opportunity to submit comments to the Federal Trade Commission (Commission) in the above captioned matter (Proposed Rule) on behalf of one of our clients, a multi-line regional property and casualty insurance company. The Proposed Rule would implement § 214 of the Fair and Accurate Credit Transactions Act of 2003 (the FACT Act), which has been codified as § 624 of the Fair Credit Reporting Act (FCRA).

Our client believes that the Proposed Rule is well drafted and generally consistent with the requirements of § 624. There are several areas, however, where it is vital that the Commission provide additional guidance and clarifications with respect to the operation of § 624 and its implementing regulations, with respect to how the rule operates in the insurance context. Clarifications are particularly important with respect to the status of insurance agents, which play a vital role as a liaison between insurers and consumers, including in the marketing of insurance services.

II. COMMENTS

A. The Commission should clarify that the role of insurance agents in the insurance process is not limited by § 624 or the Proposed Rule.

For many consumers, the insurance agent is their primary source of insurance information. Consumers often go to their agent when they have questions about new

[1] Oldaker, Biden & Belair, a law firm located in Washington DC, represents insurers, information companies, consumer reporting agencies, credit grantors, and furnishers, providing legal advice on Fair Credit Reporting Act and other privacy matters. The opinions herein represent the views of our client.

policies, when they want to make changes to existing policies, or when they want to cancel policies. In addition, consumers frequently rely on their insurance agent to help them identify gaps in their existing insurance coverage; to inform them of multi-line discounts for which they may be eligible (e.g., discounts for insuring both home and auto with the same family of insurance companies); and to provide consumers with information about other policies and programs that may be beneficial.

In order to fulfill this essential role in the insurance marketplace, it is important for the agent to be able to communicate with consumers with respect to the whole range of insurance products that the agent offers. Of course, due to the structure of the insurance industry in many states, this means that an agent must be able to inform consumers about products available from what may be multiple affiliated insurance companies, each of which may be a separate legal entity servicing a distinct portion of the larger insurance market (property versus auto and general liability; standard versus preferred, etc.).

Our client does not believe that § 624 restricts the ability of its insurance agents to market the products of the insurers with whom the agent is associated, as insurance agents are not affiliates within the meaning of § 624 or the Proposed Rule. Given however, that licensed agents are referenced in the statutory definition of "pre-existing business relationship" (discussed below), it would be helpful if the Commission clarified in the final rule that § 624 and its implementing regulations do not limit the ability of insurance agents to market products and services to consumers that are offered by insurers with whom the agent is associated.

B. The definition of "pre-existing business relationship" should be revised to include the statutory definition's reference to licensed agents.

In the Overview that accompanies the Proposed Rule, the Commission indicates that its proposed definition for the term "pre-existing business relationship" "generally tracks the statutory definition…with certain revisions for clarity."[2] While the Commission's goal to simplify the definition is laudable, one of the revisions made to the definition omits important language pertaining to "licensed agents" which could result in an inappropriately narrow reading of the definition of pre-existing business relationship.

FACT Act § 624(a)(1) provides that the "term 'pre-existing business relationship' means a relationship between a person, or a person's licensed agent, and a consumer" based on the events specified in the statute. This statutory reference to licensed agents should be included in the definition adopted in the final rule. The inclusion of agents in the statutory definition of pre-existing business relationship is important because it allows insurers, who often have only indirect contact with consumers, to market products and services directly to the consumer if they choose to do so, relying on their agent's relationship with the consumer.

[2] 69 Fed. Reg. 33327 (June 15, 2004).

C. Marketing that does not involve an exchange of consumer information among affiliates--including so-called "constructive sharing"--should not be subject to the § 624 opt-out requirement.

In the Overview accompanying the Proposed Rule, the Commission correctly indicated that the Proposed Rule's opt-out requirements would "not apply if, for example, a finance company asks its affiliated retailer to include finance company marketing material in periodic statements sent to consumers by the retailer without regard to eligibility information."[3] These communications, often popularly referred to as "statement stuffers," are familiar to virtually every consumer and represent no privacy threat to the consumer, as the person that has the relationship with the consumer retains control over consumer's information at all times. At most, the consumer simply receives another piece of paper accompanying the periodic statement.

The Commission requested public comment as to whether the opt-out requirement should apply in cases where—rather than sending the solicitation to all customers—the affiliate with the customer relationship, instead, used its own eligibility information to target the message promoting a product of its affiliate to only customers meeting certain criteria; a situation the Commission termed "constructive sharing."[4]

In our client's view, § 624 does not apply to the situation about which the Commission sought public comment. By its terms, § 624 only applies in instances where 1) an entity receives information from an affiliated entity; 2) the information received is what the Commission refers to as "eligibility information"; and 3) that eligibility information is used by the recipient to make a solicitation for marketing purposes. Unless these three prerequisites are met, the § 624 opt-out is inapplicable. In the scenario presented by the Commission, there is no exchange of eligibility information (or any other information for that matter) between affiliates. Therefore, § 624 does not apply and referring to the fact pattern as "constructive sharing" does not change this analysis.

Had Congress intended to prohibit statement stuffers—of either the blanket or targeted variety—it could have readily done so. It did not. Rather than attempting to regulate all marketing by affiliated companies, the Congress focused specifically on the use of information exchanged between affiliated companies. Congress elected to supplement the existing opt-out in FCRA § 603(d) for the sharing of certain information between affiliates with § 624 which requires a special, marketing-specific opt-out opportunity. As such, § 624 operates to allow consumers to permit the exchange of consumer report information between affiliates for other purposes, while still being able to limit the subsequent use of that information by the affiliate for marketing. Section 624 does not regulate marketing where there is no exchange of information between affiliates; absent such an exchange, a business that has a relationship with a consumer is not restricted in its ability to market its own products or services or those of its affiliates to consumers.

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[3] 69 Fed. Reg. 33328.
[4] 69 Fed. Reg. 33328.

D. The limitation on the ability of service providers to take advantage of the § 624(a)(4)(C) exception to the opt-out requirement should not be interpreted so as to restrict marketing where no information has been exchanged.

As discussed above, the general rule is that § 624 applies in instances where: 1) an entity receives information from an affiliated entity; 2) the information received is what the Commission refers to as "eligibility information"; and 3) that eligibility information is used by the recipient to make a solicitation for marketing purposes. If these criteria are met, the opt-out requirement is applicable unless one of the exceptions specified by Congress in § 624(a)(4) applies.

The exception in § 624(a)(4)(C) provides that § 624 does not apply to a person: "using information to perform services on behalf of another person related by common ownership or affiliated by corporate control, except that this subparagraph shall not be construed as permitting a person to send solicitations on behalf of another person, if such person would not be permitted to send the solicitation on its own behalf as a result of the election of the consumer to prohibit solicitations [pursuant to the opt-out]."

The language in § 624(a)(4)(C) only limits the applicability of the exception to the opt-out requirement for service providers. For the service provider exception to even be relevant in the first instance, § 624 would have to otherwise be applicable. As discussed above, § 624(a)(1) does not apply if there is no exchange of information between affiliates. Had Congress intended to prohibit the affiliate that has the relationship with the consumer from itself promoting the products of its affiliated companies, Congress could have said so. Instead, Congress elected only to limit the availability of the service provider exception.

In discussing this exception in the Overview that accompanies the Proposed Rule, the Commission states that "an affiliate subject to the consumer's opt-out election that has *received eligibility information* from a person that has a relationship with the consumer may not circumvent the opt-out by instructing the person with the consumer relationship or another affiliate to make or send solicitations to the consumer on its behalf."[5] Our client believes that the Commission's statement is correct to the extent the Commission's view turns on the fact that eligibility information was communicated between affiliates and used by the recipient affiliate to identify consumers. Our client suggests, however, that the Commission clarify that § 624(a)(4)(C) does not restrict the activities of the entity that has the relationship with the consumer when no information is exchanged between affiliates.

Sincerely,

Kevin Coy, Partner
Oldaker, Biden & Belair

[5] 69 Fed. Reg. 33329 (emphasis added).