

The Fair Credit Reporting Act and the FTC's Proposed Regulations

On December 22, 2000, the Federal Trade Commission ("FTC") issued proposed interpretations of the Fair Credit Reporting Act ("FCRA")¹ that permit institutions to communicate information about consumers² to affiliates³ of the institutions (affiliate information sharing) without incurring the obligations of consumer reporting agencies.⁴ The proposed regulations authorize institutions to communicate among their affiliates two categories of consumer information:

- (1) "Transaction or Experience Information," which may be communicated to affiliates *without restrictions*; and
- (2) "Opt-Out Information," which may be communicated to affiliates *provided that certain conditions are met*.⁵

Although the proposed regulations do not define transaction or experience information, they clarify the difference between such information and "opt-out information" by giving examples of categories of information that qualify as opt-out information. The general approach is consistent with requiring that the customer be provided with an opt-out before insurance information submitted in conjunction with credit applications may be shared with affiliates; however, that express example is not included in the regulations.

The significant provisions of the proposed regulations are discussed below.

1 Unless otherwise noted, all citations are to 65 Fed. Reg. 80,806- 80,809, where the FTC's proposed "Commentary on the Amended Fair Credit Reporting Act (Affiliate Information Sharing)" is set forth (to be codified as Appendix B to 16 C.F.R. Part 600)

2 "Consumer" is defined simply as "an individual."

3 "Affiliate" is defined as any company that is "related or affiliated by common ownership, or affiliated by corporate control or common corporate control, with another company." This means controlling, controlled by, or under common control with, another company.

4 The four federal banking agencies issued their proposed FCRA regulations on October 20, 2000. See 65 Fed. Reg. 63,120. We issued comments on your behalf to the banking agencies on December 4, 2000. The proposed FCRA rules by the federal banking agencies are substantially the same as the regulations proposed by the FTC, but the FTC's regulations are the ones that will apply to insurance agents.

5 The proposed regulations explain that both types of information are covered by the FCRA, but there are restrictions imposed on the sharing of opt-out information with affiliates that are not imposed on the sharing of transaction or experience information with affiliates.

Consumer Report

The touchstone of the FCRA affiliate information-sharing restrictions is its definition of “consumer report.” In general, the term means any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for credit, insurance or employment purposes.

Specifically *excluded* from the definition of “consumer report” are, *inter alia*, the following categories of information:

- (1) Any report containing information *solely* as to transactions or experiences between the consumer and the person making the report;
- (2) Any communication of that information among affiliates;
- (3) Any communication among affiliates of opt-out information as long as certain conditions are satisfied.

Transaction or Experience Information

The proposed rule tracks the statutory language of the FCRA referring to “transaction or experience information” but, like the statute, does not specifically define that term.

Opt-Out Information

The proposed FCRA rules use the term “opt-out information” to refer to information that is protected by the FCRA but that is not transaction or experience information. The proposed rule defines opt-out information as information that:

- (1) Bears upon a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living;
- (2) Is used or expected to be used or collected to serve as a factor in establishing the consumer’s eligibility for credit or for another of the permissible purposes listed in the FCRA (*e.g.*, credit transactions, insurance underwriting, employment purposes); and
- (3) Is not a report containing information solely as to transactions or experiences between the consumer and the person reporting or communicating the information.

Additional guidance is provided in the proposed regulation that governs the contents of an opt-out notice (discussed below), where categories of information that qualify as opt-out information are provided.

Communication of Opt-Out Information to Affiliates

The proposed regulations provide that an institution's communication to its affiliates of opt-out information about a consumer is not a "consumer report" if the following conditions are met:

- (1) The institution has provided the consumer with an opt-out notice;
- (2) The institution has given the consumer a reasonable opportunity and means, before it communicates the information to its affiliates, to opt out; and
- (3) The consumer has not opted out.

Contents of Opt-Out Notice

In general, an opt out-notice must be clear and conspicuous and must explain the categories of opt-out information about an institution's consumers that the institution communicates to its affiliates, the categories of affiliates to which is communicates such information, the consumer's right to opt out, and a reasonable means for opting-out.

An institution satisfies the requirement to categorize the opt-out information that it communicates if it lists, for example, the following categories of information (as applicable) along with examples to illustrate the type of information in each category. Those categories include:

- (1) Information from a consumer's application;
- (2) Information from a consumer's credit report;
- (3) Information obtained by verifying representations made by a consumer; or
- (4) Information provided by another person regarding its employment, credit or other relationship with a consumer.

Examples of information within one of these categories would include, *e.g.*, a consumer's:

- (1) Income
- (2) Credit score or credit history with others;

- (3) Open lines of credit with others;
- (4) Employment history with others;
- (5) Marital status; and
- (6) Medical history.⁶

Coordination with Privacy Regulations

If a financial institution is required to provide FCRA disclosures and an opt-out notice under the FCRA, those notices must be included in the initial and annual privacy notice mandated by the GLBA. The cover memorandum and sample privacy form included as Appendix 1 demonstrate how to provide the requisite FCRA disclosures.

Clear and conspicuous. Like the GLBA rules, the proposed FCRA rule requires that notices be “clear and conspicuous,” which is defined to mean reasonably understandable and designed to call attention to the nature and significance of the information it contains. Although the proposed regulations do not mandate the use of any particular technique for making a notice clear and conspicuous, they offer a detailed list of examples of what constitutes “reasonably understandable” (e.g., uses bullet lists and every day words, and avoids multiple negatives) and what constitutes “designed to call attention” (e.g., uses easy-to-read typeface, and boldface or italics for key words). This list is the same as the one used in the GLBA regulations.

Reasonable opportunity to opt-out. The proposed rule provides that, in general, an institution provides a reasonable opportunity to opt out if it provides a reasonable period of time following the delivery of the opt-out notice for the consumer to opt-out. Examples of a reasonable period of time in which to opt out are:

- (1) 30 days from the date of delivery in person of an opt-out notice;
- (2) 30 days from the date of mailing an opt-out notice
- (3) 30 days from the date a consumer acknowledges receipt of an electronic notice.

⁶ With respect to health information, the proposed rule explains that an institution that communicates or reserves the right to communicate individually identifiable health information satisfactorily describes this type of information only if it provides specific, illustrative examples of such information. See also the preamble to the federal banking regulations, 65 Fed. Reg. at 63,129 (to be codified at 12 C.F.R. §41.5(d)(4)). As we have noted, the new federal health privacy regulations issued by the Department of Health and Human Services also will impact your treatment of personal health information.

You should refer to the cover memorandum to this Guide and the sample privacy form and notice clauses for a demonstration of how to implement the FCRA regulations and how to coordinate your obligations under the FCRA with your obligations under the GLBA.