



**OVERVIEW OF  
THE FAIR CREDIT REPORTING ACT,  
THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT,  
AND  
THE DRIVERS PRIVACY PROTECTION ACT**

**Prepared by  
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This memorandum is not intended to provide specific advice about individual legal, business or other questions. It was prepared solely for use as a guide, and is not a recommendation that a particular course of action be followed. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional, such as an attorney, should be sought.

## **I. INTRODUCTION**

This memorandum discusses three federal statutes, the Fair Credit Reporting Act (“FCRA”), the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) which amends the FCRA, and the Drivers Privacy Protection Act (“DPPA”), and their impact on the ability of insurance agents and brokers to use:

- ▶ driving records,
- ▶ consumer reports, and
- ▶ credit scores.

This memorandum does not address other aspects of the statutes nor does it address the impact of state law on the ability of insurance agents and brokers to use the type of information referenced above.

## **II. FAIR CREDIT REPORTING ACT OVERVIEW**

The FCRA was enacted in 1970 to protect the privacy and assure the accuracy of consumers’ credit information. The FCRA imposes requirements on the collection and dissemination of certain information regarding individuals. Information about entities, such as corporations and partnerships, is not regulated by the FCRA. The FCRA requirements apply to consumer

reporting agencies and those who furnish information to them, as well as users of consumer reports, such as insurance agents and brokers.

#### A. Consumer Reporting Agencies and Consumer Reports

A **consumer reporting agency** is an entity that assembles or evaluates consumer credit information. A **consumer report** includes basic personal identifying information (e.g., name, address, social security number) as well as financial information (e.g., credit card balances, mortgage information, bank accounts), employment information, requests for the consumer report (i.e., the number and identity of requesters - name, address, and phone number), public record information (e.g., bankruptcies), and certain health and other information.

Certain information cannot be included in a consumer report. For example:

- ▶ Bankruptcies that precede the report by more than 10 years.
- ▶ Civil suits and judgments, and records of arrest, that precede the report by more than seven years or until the governing statute of limitations has expired, whichever is longer.
- ▶ Paid tax liens which precede the report by more than seven years.
- ▶ Accounts placed for collection or charged as a loss which precede the report by more than seven years.
- ▶ Any other adverse item of information which precedes the report by more than seven years, other than records of convictions of crimes.

In addition, a consumer reporting agency may not provide a consumer report that contains medical information unless the medical information is relevant to process or effect the employment or credit transaction, and the consumer provides specific advance written consent to furnish the report, describing in clear and conspicuous language the intended use of the information.

The exclusions above do not apply in the case of any consumer report to be used in connection with the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of \$150,000 or more, or the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal \$75,000 or more.

A consumer reporting agency may provide a consumer report to a third party, such as an insurance agent or broker, only in the following instances:

- ▶ If the consumer reporting agency has reason to believe that the prospective recipient intends to use the information:
  - In connection with the underwriting of insurance involving the consumer (i.e., insurability based upon creditworthiness);
  - In connection with a credit transaction involving the consumer about whom the information is to be furnished and involving the extension of credit to the consumer, or review or collection of an account of the consumer;

- For employment purposes (such as evaluating an individual for employment, promotion, reassignment or retention as an employee);
  - In connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
  - In connection with a valuation or assessment of the credit or prepayment risks associated with an existing credit obligation;
- ▶ In response to the order of a court with jurisdiction, or a subpoena issued in connection with proceedings before a federal grand jury;
  - ▶ In accordance with the written instructions of the consumer to whom it relates;
  - ▶ When there is a legitimate business need for the information in connection with a business transaction that is initiated by the consumer or to review an account to determine whether the consumer continues to meet the terms of the account;
  - ▶ In response to a request by the head of a state or local child support enforcement agency if the person making the request makes the required certification; or
  - ▶ To an agency administering a state plan of the Social Security Act for use to set an initial or modified child support award.

### **Insurance Solicitations Not Initiated by the Consumer**

In addition to the above, the consumer reporting agency may furnish a consumer report in connection with any credit or insurance transaction not initiated by the consumer **only if**: 1) the consumer authorizes the consumer reporting agency to provide the report (See Appendix A for sample authorization letter) or 2) the transaction consists of a firm offer of insurance, the consumer has not made an election to opt out of having his/her consumer report provided in connection with any credit or insurance transaction that he/she does not initiate, and the consumer has not elected to have his/her name and address excluded from lists of names provided by the consumer reporting agency. There are limits on the information that an insurance agent or broker may receive under #2 above; specifically, the insurance agent or broker may only receive the name and address of the consumer, a consumer identifier that is not unique to the consumer, and other consumer information that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

Also, insurance agents or brokers who make solicitations not initiated by the consumer for the purchase of insurance products, based on information obtained from consumer reporting agencies, must provide to the customer with each written solicitation a "clear and conspicuous statement" in writing that:

- ▶ information contained in the customer's consumer report was used;
- ▶ the customer received the solicitation because he/she satisfied certain credit worthiness or insurability criteria;
- ▶ if applicable, the credit or insurance may not be offered if he/she does not meet the criteria used to select the customer for the offer or any applicable credit worthiness or insurability criteria; and

- ▶ the customer has the right to prohibit information contained in his/her consumer credit file from being used in connection with any insurance solicitation he/she does not initiate by notifying the appropriate consumer reporting agency.

Inquiries by an insurance agent or broker to a consumer reporting agency in connection with a credit or insurance transaction that is not initiated by the consumer should not have a negative impact on a consumer's credit rating since a consumer reporting agency cannot provide a record of such inquiries; except, however, that any such inquiries received by the consumer reporting agency during the prior year may be disclosed to the consumer upon request.

### B. Investigative Consumer Reports

Consumer reporting agencies also prepare investigative consumer reports that include information on the reputation, lifestyle, and character of the consumer gleaned from interviews with persons who are familiar with the consumer. Since investigative consumer reports contain sensitive information, a requestor must disclose to the consumer in writing (within three days after the request) that: 1) the investigative consumer report is being created; and 2) the consumer has the right to request and receive additional disclosures about the nature and scope of the investigation. A copy of the Consumer Financial Protection Bureau ("CFPB") publication, *A Summary of Your Rights Under the Fair Credit Reporting Act* (available [here](#)), must be included with these disclosures. It should be noted that the prior version of the publication was available from the Federal Trade Commission ("FTC") when it had responsibility for interpreting the FCRA, a function taken over by the CFPB as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act signed into law by President Obama on July 21, 2010.

The disclosures to consumers described above must be in writing unless the consumer authorizes that the disclosures be made either in person; by telephone (upon written request of the consumer); by electronic means; or any other reasonable means.

### C. Credit Scores

Insurance agents and brokers frequently obtain insurance application information from potential policyholders, either in person or on the telephone. During such conversations, the agent or broker may be able to determine the insurability of the customer based solely on information provided by the customer. However, that information often is supplemented by reviewing the individual's consumer report. The "credit score" included in that consumer report is sometimes used to determine whether the customer is eligible for insurance from one of the companies with which the agent or broker is appointed.

A credit score is a numerical value or "grade" of credit worthiness derived from a statistical tool or modeling system used to predict the likelihood of certain credit behaviors, including default. While there is no uniform algorithm employed to determine credit scores, factors such as the consumer's payment history, amount of debt, and extensions of credit sought typically will be

considered in determining a consumer's credit score. Consumer reporting agencies and insurers may each develop their own formula to calculate a consumer's credit score.

Consumer reporting agencies must disclose to a consumer his/her credit score for a "fair and reasonable fee." In addition, the consumer reporting agency is required to supply to the consumer a written statement indicating that the information and its credit scoring model may be different than the credit score that may be used by a lender, and a written notice that includes:

- ▶ The current credit score of the consumer, or the most recent credit score of the consumer that previously was calculated by the credit reporting agency for a purpose related to the extension of credit;
- ▶ The range of possible credit scores under the model used;
- ▶ All of the key factors that adversely affected the credit score of the consumer in the model used, the total number of which shall not exceed four;
- ▶ The date on which the credit score was created; and
- ▶ The name of the person or entity that provided the credit score or credit file upon which the credit score was created.

#### D. Adverse Action

If an action is taken that is considered to be an "adverse action" under the FCRA, then an adverse action notification must be provided to the consumer. In general terms, the FCRA defines an "adverse action" to be an action adverse to the interests of the consumer, such as: 1) a denial or cancellation of, an increase in any charge for, or a reduction or unfavorable change in the terms of coverage or amount of insurance; or 2) a denial of employment or other employment decision adverse to a job applicant/employee.

As it applies to insurance companies, the interpretation of the term "adverse action" was subject to differing views by different courts. Key open issues were resolved by a United States Supreme Court decision on June 4, 2007. The lawsuits, Safeco v. Burr and GEICO v. Edo, were argued and decided together, and resulted in the following rulings by the Court:

- 1) the FCRA adverse action notice requirement applies to new applicants for insurance as well as those renewing coverage;
- 2) the determination of whether a first-time applicant is entitled to an adverse action notice is based on whether the premium offered using the applicant's credit score is higher than if the applicant's credit score was not considered to set the rate; the determination is not based on whether a better rate would have been available if the applicant had the best possible credit score;
- 3) an increased insurance premium does not trigger an adverse action notice unless it is "based in whole or in part" on a credit report;
- 4) once an applicant receives an adverse action notice because the initial premium offered exceeds the rate that would have been offered absent a credit score, each renewal of that policy does not trigger a new adverse action notice;

- 5) willful violations of the adverse action notice obligation under the FCRA can be committed knowingly or by reckless disregard for compliance, depending on the circumstances; this is important because willful violations are subject to actual, statutory, and punitive damages, whereas negligent violations are only subject to actual damages; and
- 6) a company's violation of the FCRA is not necessarily "reckless" even if its interpretation of the FCRA is wrong as long as it is not "objectively unreasonable."

For more information on the facts of Safeco v. Burr and GEICO v. Edo and the business implications of the decision, see the Executive Summary of Safeco v. Burr and GEICO v. Edo in the Legal Advocacy section of the IIABA website under Cases.

Who is responsible for providing the notification? Absent an agreement or standardized process between an agent and the companies he/she represents, any adverse action notification burden falls on the person who actually makes the coverage eligibility determination. For example, if the agent or broker submits an application to an insurer for coverage and the application is denied, then the Company is responsible for satisfying any adverse action notification obligation required by the FCRA. However, if the agent or broker determines that the customer's application should be denied based on a credit score or information in a consumer report, the agent or broker would be required to provide the adverse action notification.

To comply with the requirements of the FCRA, an adverse action notification (which may be provided to the consumer orally, in writing, or electronically) must cover four things:

- ▶ The name, address, and telephone number (including any toll-free number) of the consumer reporting agency that provided the consumer report;
- ▶ A statement that the consumer reporting agency did not make the adverse decision and cannot explain why the decision was made;
- ▶ A statement setting forth the consumer's right to obtain a free copy of the consumer report from the consumer reporting agency if the consumer requests the report within 60 days; and
- ▶ A statement setting forth the consumer's right to dispute directly with the consumer reporting agency the accuracy or completeness of any information provided by the consumer reporting agency.

When an adverse action notification is required, written notification provides proof that the required notice was given. (See Appendix B for a sample adverse action notification.)

In addition, the adverse action notification to the consumer must be accompanied by the CFPB publication, *A Summary of Your Rights Under the Fair Credit Reporting Act* (available [here](#)).

#### E. Obligations of Furnishers and Users of Consumer Reports

Insurance agents and brokers are sometimes asked to provide copies of individual consumer reports to assist their client-insureds in evaluating potential employees and an individual's

insurability. If insurance agents and brokers provide credit or insurance-related information to consumer reporting agencies or third parties, they should review and must comply with the CFPB publication, *Notice to Furnishers of Information: Obligations of Furnishers Under the FCRA* (available [here](#)). In addition, insurance agents and brokers must provide the CFPB publication, *Notice To Users Of Consumer Reports: Obligations Of Users Under the FCRA* (available [here](#)), to any third parties to whom they provide consumer reports. The FCRA is silent as to the frequency of giving this notice; the only thing that is clear is that it must be given to users of consumer reports. Thus, discretion and prudence are left to the distributing entity to determine how frequently this notice should be given to users. Insurance agents and brokers should use their best business and legal judgment, in light of state law, in determining the frequency with which they will provide such notices to users.

Insurance agents and brokers must also provide a copy of the CFPB publication *A Summary of Your Rights Under the Fair Credit Reporting Act* with **every** consumer report transmitted to the client-insured. This publication is available [here](#).

#### **F. Enforcement**

The FCRA is enforced by the CFPB and the FTC. Willful violations of the FCRA's requirements can result in fines of up to \$1,000 per violation or actual damages, whichever is greater, for actions initiated by consumers, plus punitive damages, attorneys' fees, and costs of the lawsuit. Actions initiated by the CFPB or FTC can result in penalties of up to \$2,500 per violation as well as any other penalties authorized by law.

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined, imprisoned, or both.

### **III. THE FACT ACT OVERVIEW**

The FCRA was amended by the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"). The primary purpose of the FACT Act is to combat identity theft. Under the FACT Act:

- ▶ Consumer reporting agencies must disclose to a consumer his/her consumer report for a "fair and reasonable fee";
- ▶ Consumers are entitled to receive one free consumer report from each of the three major consumer reporting agencies (i.e., Equifax, Experian and TransUnion) on an annual basis;
- ▶ Consumers may post a fraud alert on their files with consumer reporting agencies, which require potential creditors to contact the consumer directly before extending credit;
- ▶ Consumers must be allowed to opt out of affiliate marketing; and
- ▶ Consumer reporting agencies may not include medical information in reports used for employment, credit or insurance transactions without the consumer's prior written consent.

## A. Protection of Consumer Information

Organizations and businesses, including associations and insurance agents and brokers, who use consumer reports are required to “take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal,” whether it is stored in paper and/or electronic form. In other words, information cannot be disposed of in a way that makes it easy for potential thieves to obtain it. For example, it is easy for someone to “dumpster dive” to get information thrown in the trash, so it is unlikely that simply throwing sensitive information in the trash will be considered a reasonable measure to prevent unauthorized access to it. Similarly, if such information is stored electronically or on computer, the computer should not be thrown out, sold or donated until the information has been deleted properly.

While the Act cites examples of how to dispose of paper by burning, pulverizing or shredding it so that the information on it cannot be reconstructed, what is “reasonable” will be determined on an individual basis, taking into account the sensitivity of the consumer information, the nature and size of the insurance agent’s or broker’s business, the costs and benefits of different disposal methods, and relevant technological changes. Depending on the circumstances, reasonable measures may include shredding paper documents, destroying CD’s with consumer reports on them, and properly deleting electronic copies. Reasonable measures also are likely to include the establishment of policies and procedures governing disposal, as well as appropriate employee training on those policies and procedures.

## B. Fraud Alerts

The FACT Act allows any consumer to request that a national consumer reporting agency include a fraud alert in his/her file for a period of 90 days after the date of the consumer’s request. If a consumer makes such a request and provides an identity theft report, the fraud alert in his/her file will be extended for an additional seven years (beyond the initial 90 days). Under the FACT Act, an identity theft report is a copy of an official, valid report filed by a consumer with a federal, state or local law enforcement agency alleging an identity theft, the filing of which subjects the person filing it to criminal penalties relating to the filing of false information.

Consumers who request a fraud alert can receive a free copy of their file with consumer reporting agencies. Consumers who place an extended fraud alert are permitted two free copies of those file in the first year of the extended fraud alert. The fraud alert must be included with any credit score generated using the consumer’s file for the time period it is required to be part of his/her file. Users of consumer reports and scores must honor fraud alerts by refusing to issue a new credit line, extension of credit, new credit card or requested higher credit limit on any existing accounts unless the consumer is called using the phone number provided by the consumer for verification, or other reasonable verification steps are taken. Any national consumer reporting agency provided with a fraud alert (either 90 day or extended) by a consumer must inform other national consumer reporting agencies that a fraud alert has been placed. Non-national consumer reporting agencies must advise consumers on how to contact national consumer reporting



agencies. Active duty military personnel may request one-year “active-duty” alerts from any consumer reporting agency.<sup>1</sup>

### C. Blocking Information Resulting From Identity Theft

A consumer reporting agency must block the reporting of any information in its file on a consumer that the consumer identifies as resulting from an alleged identity theft. This block must be in place no more than four business days after receiving:

- ▶ proof of the identity of the consumer (e.g., presentation of government issued identification);
- ▶ a copy of an identity theft report;
- ▶ the identification by the consumer of the fraudulent information; and
- ▶ a statement by the consumer that the information is not information relating to any transaction by that consumer.

The consumer reporting agency may decline to block, or rescind any block of information, if it determines that: 1) the information was blocked in error; 2) the block was based on a material misrepresentation; or 3) the consumer obtained goods, services or money as a result of the blocked transaction. The consumer must be notified promptly (within five days) in writing if the block is declined or rescinded.

### D. Consumer’s Access to His/Her Credit File

Pursuant to the FACT Act, consumers are entitled to a free annual credit report from each of the three major national consumer reporting agencies. Thereafter, the consumer reporting agency may charge the consumer a fee for a copy of his/her report. (State law controls with regard to the cost of consumer reports if the cost set by the state does not exceed the cost set by the federal government.) Consumers also have the right to a free copy of their credit report if an entity takes an adverse action against them, based in whole or in part, on the report. A free copy of the consumer report also is available to a consumer once during any 12 month period for a consumer 1) who is on welfare; 2) whose report is inaccurate due to fraud; and/or 3) who is unemployed and looking for work. With the exception of information concerning credit scores or any other risk scores or predictors relating to the consumer, a consumer is entitled to obtain a copy of all information in his/her file. In addition, consumers are also entitled to a list (name, address and phone number) of everyone who requested information from their file during the past year, and during the past two years if the information was sought for employment purposes.

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<sup>1</sup> Active duty military consumers or their legal representatives may make a direct request to a national consumer reporting agency to: 1) include, for up to 12 months, an active duty alert in the file of that active duty military consumer so that the alert must be provided with any credit score generated using the active duty military consumer’s file; 2) exclude the active duty military consumer from any list of consumers prepared by the national consumer reporting agency and provided to any third party; and 3) refer the information regarding the active duty alert to each of the other national consumer reporting agencies.

## E. Truncation of Credit Card and Debit Card Numbers

Under the FACT Act, businesses and others accepting credit or debit cards for payment may not print more than the last five digits of the card number nor may they print the expiration date upon any receipt provided to the cardholder at the point of sale. This applies only to receipts that are electronically printed. It does not apply to handwritten receipts or receipts displaying an imprint or copy of the card.

## F. Affiliate Marketing

Any person (i.e., individual, partnership, corporation, trust, estate, cooperative, association, government or other entity) that receives from another person related to it by common ownership or affiliated by common corporate control, a communication of information from a consumer report, may not use that information to make a solicitation for marketing purposes to a consumer unless: 1) it is clearly and conspicuously disclosed to the consumer that the information may be communicated to affiliated entities; and 2) the consumer is provided an opportunity and a simple method to opt out of receiving such solicitations. The consumer opt out may include different elections to prohibit the solicitations, including the types of entities and information covered, and which methods of delivering solicitations to prohibit. Consumers may opt out of a company's use of an affiliate company's information about the consumer for marketing purposes for a period of five years. Upon the expiration of the five year period, the consumer must receive notice and an opportunity to opt out for another five years.

## G. Red Flags Rule

The Red Flags Rule ("Rule"), which is directed at fighting identity theft, was adopted January 1, 2008, with FTC enforcement beginning December 18, 2010, when the Red Flag Program Clarification Act of 2010 ("Clarification Act") was signed into law. Between those two dates, there were numerous enforcement delays based on confusion over application of the Rule, litigation over the scope of the Rule, and a request by Congress.

In short, the Rule requires "financial institutions" and "creditors" that hold "covered accounts" to implement a written program ("Program") that specifies how warning signs, or "red flags", of identity theft will be prevented, detected and mitigated. The Clarification Act limits the application of the Rule by defining the term "creditor" more narrowly than in the rest of the FACT Act. As a result, those who are creditors under the FACT Act will not necessarily be deemed creditors under the Rule.

Some key definitions under the Rule, in general terms, include:

- "creditor" – a person, business or entity that regularly arranges, extends or renews credit, **and** also regularly and in the ordinary course of business: (i) obtains or uses consumer reports, directly or indirectly, in connection with a credit transaction; (ii)

furnishes information to consumer reporting agencies in connection with a credit transaction; **or** (iii) advances funds to or on behalf of a person, based on an obligation of the person to repay the funds or repayable from specific property pledged by or on behalf of the person. The definition does **not** include a creditor who advances funds on behalf of a person for expenses incidental to a service provided by the creditor to that person.

- “financial institutions” – state/national banks, state/federal savings and loan associations, mutual savings banks, state/federal credit unions, or any other entity with an account from which the owner makes payments/transfers.
- “credit” – the right granted by a creditor to a debtor to defer payment of a debt or to purchase property/services and defer payment for them.
- “covered account” – (i) an account used for a personal, family or household purpose involving multiple payments (e.g., credit card accounts, checking accounts, car/home loans), **or** (ii) any other account for which there is a reasonably foreseeable risk of identity theft to customers or to the safety and soundness of the creditor or financial institution from identity theft.

For insurance agencies and brokerage firms, it is important to note that it is not their status as agencies that determine any obligation to comply with the Rule. Rather, it is the activities the agencies undertake as businesses that control whether or not the agencies must comply with the Rule. Since insurance agencies each operate differently, there is not one standard answer to whether an agency must comply with the Rule, and if so, the nature of the compliance Program needed. Each agency needs to assess the definitions under the Rule carefully in light of their own unique operations and activities to determine if it must comply with the Rule. In addition, each bank-owned insurance agency also should determine whether it must comply with the Rule based on its affiliation with a “financial institution.”

An insurance agency only needs to comply with the Rule if it acts as a creditor or financial institution **and** has covered accounts. For example, if the agency regularly arranges premium financing for personal lines customers, or obtains/uses consumer reports in connection with premium financing for personal lines customers, then the agency will be acting as a creditor with covered accounts, and needs to comply with the Rule. In addition, an agency that regularly advances funds on behalf of insureds for personal lines customers who have an obligation to repay the funds will likely be deemed a creditor by the FTC. In addition, the FTC’s description of “covered accounts” includes accounts with a reasonable foreseeable risk of identity theft, such as may be the case for commercial lines policies for small businesses. So agencies that regularly arrange premium financing for such small business accounts, or obtain/use consumer reports in connection with premium financing for them, will be treated by the FTC as subject to the Rule.

On the other hand, if all business of an agency is billed directly by carriers, then the agency would not be a creditor or have covered accounts, and thus it would not be subject to the Rule. The acceptance of credit card payments by an agency does not alone make it a creditor under the Rule. And an agency that simply provides information about premium financing without

obtaining/using a consumer report or collecting/reporting credit information also is not a creditor under the Rule.

Insurance agencies with questions about if the Rule applies to their specific business activities can seek guidance from local counsel. In addition, some agencies in this position, out of an abundance of caution, may choose to comply with the Rule, rather than spend time or money seeking a definitive answer to a question that may be unduly complex by virtue of the way the Rule is written. For insurance agencies that decide to adopt an identity theft program even if not required to do so, the Program requirements under the Rule may be a good starting point for deciding what to include in the Program.

There is no standard compliance Program businesses subject to the Rule can adopt because each Program has to be customized to the size, complexity, organizational structure, and operations/activities of each individual business.

A Program must enable the business covered by the Rule to:

1. identify red flags (described below) relevant to the entity's experience, industry, and likely risks;
2. detect the red flags identified;
3. respond appropriately to red flags that are detected in an effort to prevent and mitigate identity theft; and
4. update the Program periodically to reflect changes in risk.

Red flags or warning signs of identity theft may come from things such as past incidents of identity theft, reports in industry publications, and information published by regulators like the FTC. Examples of red flags can include things such as warnings/alerts from credit bureaus, presentation of suspicious documents (such as those with suspicious personal identifying information or a suspicious address change), and notice from a person who believes he/she has been a victim of identity theft.

An entity required to have a Program must have the initial Program approved by its board of directors or an appropriate committee of its board of directors. In addition, the board of directors, an appropriate committee of the board, or someone from senior management must be involved in the oversight, development, implementation, and administration of the Program, and the entity's staff must be trained to implement the Program.

The FTC can seek monetary civil penalties and injunctive relief for failure to meet the requirements of the Rule, but there is no private right of action available to consumers for violations of the Rule.

Under the Clarification Act, the FTC has authority to make other types of creditors subject to the Rule in the future if the FTC determines that such creditors offer or maintain accounts that are subject to a reasonably foreseeable risk of identity theft. Such other creditors will not become

subject to the Rule, however, until the FTC promulgates regulations identifying those creditors as being subject to the Rule. The rulemaking process requires that the FTC provide notice and an opportunity to comment on the proposed regulation.

Agencies seeking additional information about the Rule can visit the FTC's website at <http://ftc.gov/redflagsrule>.

#### **IV. DRIVERS PRIVACY PROTECTION ACT OVERVIEW**

The DPPA was enacted in 1994 to regulate the use of personal information (typically defined as information that identifies an individual, including an individual's photograph, social security number<sup>2</sup>, driver identification number, name, address, telephone number, and medical or disability information) provided by an individual as a part of his/her registration for a motor vehicle license with a state department of motor vehicles ("DMV"). The DPPA does not regulate the disclosure of information relative to a person's vehicle accidents, driving violations, and driver status. At first glance, the DPPA appears to apply only to DMVs, but it actually limits the use by all persons of personal information obtained from a DMV.

Generally, DMVs are prohibited from disclosing personal information except in circumstances in which the DPPA specifically permits disclosure. Recipients of personal information obtained from a DMV are required to use that information only for purposes permitted by the DPPA. A document acknowledging and permitting the disclosure of personal information, signed by the person whose information is sought, meets the requirements of DPPA. (See Appendix C for sample consent form)

Under the DPPA, personal information on others can be obtained from a DMV for the purposes listed below. While some of these may not be relevant to insurance agents and brokers, the entire list is set forth.

“(b)(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private persons or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only –

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

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<sup>2</sup> There are other federal laws that regulate the use of social security numbers, including the Privacy Act of 1974 and the Social Security Act of 1935, and a discussion of those laws is beyond the scope of this memorandum.

if such information as so submitted is not correct or is no longer correct, to obtain (B) the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against the individual.

- (4) For use in connection with any civil, criminal, administration, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.
- (5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.
- (6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, anti-fraud activities, rating or underwriting.
- (7) For use in providing notice to owners of towed or impounded vehicles.
- (8) For use by any licensed private investigative agency or licensed security service for any purpose permitted [...].
- (9) For use by an employer or its agents or insurer to obtain or verify information relating to a holder of a commercial driver's license [...].
- (10) For use in connection with the operation of private toll transportation facilities.
- (11) For any other use in response to requests for individual motor vehicle records if the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.
- (12) For bulk distribution of surveys, marketing, and solicitations if the motor vehicle department has implemented methods and procedures to ensure that –
  - (A) individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and
  - (B) the information will be used, rented, or sold solely for bulk distribution for surveys, marketing, and solicitations, and that surveys, marketing, and solicitations will not be directed at those individuals who requested in a timely fashion that they not be directed at them.
- (13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains. [See Appendix C for sample consent form.]
- (14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.”

Any authorized recipient of information that resells or discloses personal information covered by the DPPA must keep records for five years identifying each person or entity that it provided such information to and the permitted purpose for which the information was provided, and must make such records available to the DMV upon request.

Those who violate the DPPA are subject to civil actions by anyone whose information was used improperly, and can result in awards of actual damages or liquidated damages (i.e., based on an agreement in advance of what the amount of the damages will be) of not less than \$2,500, as well as punitive damages, attorneys' fees, and other equitable relief, such as injunctions. In addition, violations may be subject to criminal penalties including imprisonment and fines.

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## Appendix A

### **Sample Letter Authorizing Consumer Reports and/or Driving Records to be Obtained – Signed by Insurance/Employment Applicant**

(Name of Insurance/Employment Applicant)  
(Street Address)  
(City, State, Zip Code)

(Date)

(Name of Insurance Agency/Employer)  
(Street Address)  
(City, State, Zip Code)

Dear (Name of Insurance Agency/Employer):

I, (Name of Insurance/Employment Applicant), authorize (Name of Insurance Agency/Employer) (“Company”) to obtain consumer reports covered by the federal Fair Credit Reporting Act and any comparable state laws that are applicable, as well as my driving record, covered by the federal Drivers Privacy Protection Act and any comparable state laws that are applicable, to assess my insurability and/or employability and for any other legally permissible purposes. By signing this authorization, I hereby provide my consent to the Company to procure such consumer reports and driving records about me from time to time, as it deems appropriate, to evaluate my insurability and/or employability and for any other legally permissible purposes.

Sincerely,

(Signature of Insurance/Employment Applicant)  
(Typed Name of Insurance/Employment Applicant)  
Driver’s license number/Social Security number of Insurance/Employment Applicant, if needed

**(Note: The Fair Credit Reporting Act provides that the agent or broker should retain copies of consent authorizations and FCRA notices sent to the client-insured for at least two years after the date of the request. In addition, any authorized recipient that resells or rediscloses personal information covered by the Drivers Privacy Protection Act must keep records identifying each person or entity that receives information and the permitted purpose for which the information will be used for a period of 5 years and must make such records available to the motor vehicle department upon request.)**



## **Appendix B**

### **Sample Adverse Action Notification Letter from Insurance Agent**

(For use by the insurance agency if the insurance agent makes the adverse coverage eligibility decision or fails to hire an applicant for a position with the agency based on a negative consumer report. If an employer (other than the agency) decides not to hire an applicant for a position with its business based on a negative consumer report about the applicant, the employer should give the adverse action notification, not the agent.

*(Letterhead of Insurance Agency/Employer)*

*(Date)*

*(Name of Employment/Insurance Applicant)*

*(Street Address)*

*(City, State, Zip Code)*

Dear *(Name of Employment/Insurance Applicant)*:

We have carefully considered your application for *(employment/insurance)*. We regret to inform you that we are not able to offer you *(employment/insurance)* due to certain adverse information contained in your consumer credit report.

We obtained this information from *(Name of Consumer Reporting Agency), (Street Address of Consumer Reporting Agency), (City, State, Zip Code), (Telephone Number/Must Include Toll-Free Telephone Number if Available)*. *(Name of Consumer Reporting Agency)* was not responsible for the decision to deny your application for *(employment/insurance)* and is unable to provide you with the specific reasons as to why this adverse decision was made.

You have the right to obtain a free copy of your consumer report from *(Name of Consumer Reporting Agency)* within 60 days after this notice. You also have the right to dispute with the consumer reporting agency the accuracy or completeness of any information in your consumer report.

Sincerely,

*(Signature of Insurance Agency Representative/Employer Representative)*

*(Typed Name of Insurance Agency/Employer)*

Enclosure: *A Summary of Your Rights Under the Fair Credit Reporting Act*

## Appendix C

### Drivers Privacy Protection Act Consent Form

(Name of Employment/Insurance Applicant)  
(Street Address)  
(City, State, Zip Code)

(Date)

To whom it may concern:

I, (Employment/Insurance Applicant), authorize (Company Name) to obtain personal information contained in my records with the (state motor vehicle agency). I understand that my personal information may be used for the purpose of evaluating my (employment/insurance application). The information may be procured by (Company Name), and may include, for example, my photograph, name, address, telephone number, social security number, driver identification number, medical or disability information, and driving record. By signing this disclosure, I hereby authorize (Company Name) to procure such reports and additional reports about me from time to time, as it deems appropriate, to evaluate my insurability, employability, and for other permissible purposes.

Sincerely,

(Signature of Insurance/Employment Applicant)  
(Typed Name of Insurance/Employment Applicant)  
(Driver's License Number/Social Security Number, if needed)

**(Note: Any authorized recipient that resells or rediscloses personal information covered by the Drivers Privacy Protection Act must keep records identifying each person or entity that receives information and the permitted purpose for which the information will be used for a period of 5 years and must make such records available to the motor vehicle department upon request.)**