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November 8, 2005

Honorable Spencer Bachus
Chairman
Honorable Bernard Sanders
Ranking Minority Member
Subcommittee on Financial Institutions and Consumer Credit
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

SUBJECT: Financial Data Protection Act of 2005 – HR 3997

Dear Chairman Bachus and Ranking Member Sanders:

On behalf of state insurance regulators, the National Association of Insurance Commissioners (NAIC) would like to offer the following comments for consideration by the Subcommittee on Financial Institutions and Consumer Credit regarding HR 3997, the "Financial Data Protection Act of 2005".

HR 3997 would amend the Fair Credit Reporting Act (FCRA) by adding a new Section 630, entitled "Data Security Safeguards", establishing specific federal data security requirements for most entities in the United States, including insurance companies and producers already regulated by the states under the McCarran-Ferguson Act and the Gramm-Leach-Bliley Act (GLBA). The true strength of the state regulatory system in protecting consumers at the local level in the communities where they live was recognized by Congress in these primary federal laws dealing with proper supervision of the business of insurance. Under the McCarran-Ferguson Act and GLBA, states are permitted to establish higher consumer protection standards than those mandated by federal law, and many states have chosen to do so. HR 3997 seeks an opposite result by imposing a federal ceiling on the authority of states to protect their consumers on privacy and data security matters.

State insurance regulators and the NAIC enthusiastically support strong laws and regulations protecting the privacy of individual consumer information. Every state has adopted comprehensive privacy laws to protect the extensive personal information collected by insurers to underwrite and administer insurance policies. The primacy and importance of these state privacy laws were specifically recognized and embraced by Congress in Title V of GLBA. Insurance regulators also support efforts by our state and federal legislators to mandate fair treatment and notification to consumers when their private information is improperly disclosed to third parties, especially where such unauthorized disclosures might result in identity theft.

HR 3997 provides that "any person" operating in interstate commerce who is engaged in assembling or evaluating "information on consumers" must implement and maintain reasonable policies and procedures to protect the security and confidentiality of "sensitive financial personal information". Under FCRA (which HR 3997 would amend), "person" is defined to mean any individual, business, government, or other entity. Consequently, the "persons" subject to the mandates of HR 3997 would encompass almost every business, government, or individual entity in the United States that collects health, financial, or other information on consumers. Such persons would be required to investigate possible breaches of data security and provide notices and certain remedies to affected consumers.

While state regulators applaud the goal of safeguarding sensitive personal financial data, we are deeply concerned that several sweeping provisions in HR 3997 go far beyond that goal and would seriously weaken privacy protections for consumers. HR 3997 seeks to preempt all state privacy laws protecting consumer health, lifestyle, and financial data collected by insurers to underwrite and administer insurance policies, even though such information is not used in commercial transactions that lead to identify theft. <u>If state laws are preempted, consumers will not receive the privacy safeguards promised to them in GLBA regarding personal financial and health information collected by insurance companies.</u>

H.R. 3997 has several troubling provisions that would undermine or negate the efforts of state insurance regulators to enforce fair market conduct and protect the security and confidentiality of consumer information that is collected, maintained, transferred, and used by insurance companies. State insurance departments also offer cost-free assistance to consumers to intercede with insurers and help negotiate fair solutions when problems occur. These could also be undermined.

- First, the blanket federal preemption of state laws in HR 3997 far exceeds the purpose and scope of the bill itself, which is to prevent and mitigate identity theft. Although HR 3997 is aimed at protecting sensitive personal information used in financial transactions, the vast scope of its federal preemption provision would effectively prohibit a state from protecting ANY type of consumer information, including health and medical information, lifestyle and income information, claims history information, and employment information, to name a few.

- Second, HR 3997 would change the existing operation of FCRA by expanding its reach to encompass far more than consumer reporting agencies and persons that use consumer reports for credit and employment purposes. At present, FCRA is a law with a narrow purpose of promoting national credit markets, and its federal preemption provision is limited solely to state laws that conflict with its narrow purpose. HR 3997 adds new and different definitions and provisions to FCRA that greatly expand its scope to cover data security requirements in all industries. These additional terms and changes to the mission of FCRA involve numerous subjective judgments that could confuse and complicate decision-making by business and government entities that use FCRA.

- Third, HR 3997 appears to rewrite the powers and responsibilities of states as regulators already set forth in GLBA by taking away their authority to develop and implement privacy and data security regulations. Title V of GLBA expressly recognizes exclusive state authority to establish privacy and data security requirements that exceed federal minimum requirements. Similarly, HR 3997 appears to conflict with other federal laws that depend on states to accomplish federal goals, such as the Health Insurance Portability and Accountability Act.

- Fourth, HR 3997 does not provide the same high level of consumer protection that is found in many state privacy and data security laws. Several states have laws that provide "opt-in" privacy rights and immediate notification of data security breaches with no restrictions on the right of consumers or a state attorney general to seek damages from companies that abuse personal information. Insurance markets will not work if consumers believe that their highly personal information submitted to insurers is inadequately protected by state laws and enforcement actions.

- Fifth, HR 3997 undercuts the authority of individual states to protect their own residents when a data security breach happens. The bill assigns enforcement of its federal data security requirements to an insurer's state of domicile, which may be far removed from the location of consumers who are harmed by a breach of data security or weak safeguards. The strength of state consumer protection efforts is to ensure that local officials have authority to monitor an insurer's conduct and take enforcement actions to prevent harm to local residents.

In short, HR 3997 would take away existing state consumer privacy laws, market conduct enforcement authority, and data security safeguards for the purpose of establishing a federal system that limits consumer protection to being notified under certain circumstances when a breach of data security occurs. The NAIC believes that restricting the scope of the bill to personally-identifiable financial information and implementing safeguards through state authority under GLBA would achieve the benefits sought by Congressional sponsors, while avoiding unnecessary harm to the consumer protection

authority of state insurance regulators regarding privacy and other important insurance matters.

Thank you for considering the views of NAIC. We look forward to assisting the House Financial Services Committee and other Members of Congress as you develop data security legislation that would effectively protect consumers without surrendering their other essential rights under state and federal law.

Sincerely,

Diane Koken
Commissioner of Insurance, Pennsylvania
President, NAIC