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VIA E-MAIL AND OVERNIGHT DELIVERY

December 4, 2000

Office of the Comptroller of the Currency
Communications Division
250 E Street, SW
Washington, DC 20219
Attention: Docket No. 00-20
regs.comments@occ.treas.gov

Board of Governors of the Federal Reserve System
20 th and C Streets, NW
Washington, DC 20551
Attention: Jennifer J. Johnson
Re: Docket No. R-1082
regs.comments@federalreserve.gov

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17 th Street, NW
Washington, DC 20429
Attention: Comments/OES
comments@fdic.goc

Office of Thrift Supervision
Manager, Dissemination Branch
Information Management and Services Division
1700 G Street, NW
Washington, DC 20552
Attention: Docket No. 2000-81
public.info@ots.treas.gov

RE: "Joint Notice of Proposed Rulemaking re: Fair Credit Reporting Act" - Comment of USA Education, Inc.

Dear Sirs and Madams:

This letter is submitted on behalf of USA Education, Inc. and its subsidiaries, including the Student Loan Marketing Association (collectively "Sallie Mae") in response to the joint notice of proposed rulemaking published by the Board of Governors of the Federal Reserve System (the "Board"), the Federal

Deposit Insurance Corporation, the Office of the Comptroller of the Currency and the Office of Thrift Supervision (collectively, the "Agencies") to implement the affiliate sharing provisions of the Fair Credit Reporting Act (the "FCRA") (the "Proposed Rule") published at 65 Fed. Reg. 63119.

Sallie Mae is the nation's largest provider of education financing and largest holder of loans under the Federal Family Education Loan Program (the "FFELP"), a federally sponsored loan program. We own or manage approximately $62.2 billion of federally insured student loans including $60.0 billion of FFELP loans. We operate principally through 2 subsidiaries: the Student Loan Marketing Association, a government sponsored enterprise, which acts as a secondary market for FFELP loans, and Sallie Mae Servicing Corporation which is the nation's largest servicer of FFELP loans with nearly 5.5 million accounts. Under the Student Loan Marketing Association Reorganization Act of 1996, the Student Loan Marketing Association will be dissolved on or before September 30, 2008.

Sallie Mae is not a depository institution regulated by any of the Agencies and as such would not be subject to the Proposed Rule. However we actively partner with many of the nation's leading lenders in helping students and families plan and pay for college. We also are a loan disbursement service provider and loan servicer for many of these same institutions. In many of these circumstances, we share information with our affiliates and our business partners. As such, we are interested in the mandates of the Final Rule. At the same time, Sallie Mae recognizes the legitimate concerns of consumers about information contained in credit reports and how that information is used and distributed. That is why Sallie Mae supports the Proposed Rule and recognizes that the Agencies have attempted to balance the legitimate privacy concerns of the public with the need for companies to operate efficiently.

We agree with many of the concepts embodied in the Proposed Rule and we urge the Agencies to adopt the Proposed Rule in final form ("Final Rule") using much of the same structure presented in the Proposed Rule. Our comments are intended to reflect our desire for a Final Rule which provides consumers with meaningful disclosure of an institution's affiliate sharing practices while accurately reflecting the provisions of the FCRA and preserving effective industry practices that have proven beneficial to consumers.

In General

Coordination with Privacy Rules

Sallie Mae applauds the Agencies for their desire to ease compliance with the Proposed Rule by making it consistent with the Agencies' and the Federal Trade Commission's rules implementing applicable portions of Title V of the Gramm-Leach-Bliley Act (the "GLBA") (the "Privacy Rules"). In our view, an appropriate level of consistency between the two rules may facilitate compliance and produce more meaningful disclosures for consumers. However, we do not believe that the Proposed Rule should mirror the Privacy Rules in every respect.

The privacy provisions of the GLBA are vastly different from the affiliate sharing provisions of the FCRA. The GLBA goes well beyond a simple notice and opt out requirement and explicitly dictates the information which must be included in the required notice. For example, section 503 of the GLBA mandates that the GLBA privacy notices must include: the categories of persons to whom information is or may be disclosed, the categories of information that are collected by the institution, and the "policies and practices" with respect to disclosing information to nonaffiliated third parties. In addition, section 502 of the GLBA sets forth certain limitations with respect to the form in which the opt out notice must be delivered.

None of these provisions were included in FCRA's statutory language. Instead, the FCRA unambiguously states that the definition of consumer report does not apply where affiliates share certain information "if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity" to opt out before the information is initially shared. The statutory language of the FCRA sets forth absolutely no additional requirements with respect to the content of the notice and imposes no limitation on the form in which the notice must be delivered. We believe that, based on the plain language of the FCRA, much of the detail required in the Proposed Rule cannot be justified. Indeed, if the simple language set forth in the FCRA were deemed to provide sufficient basis for all of the content in the Proposed Rule, then much of the language Congress included in the GLBA would have been entirely unnecessary.

Conversely, had Congress intended FCRA notices to be as detailed as those required under the GLBA, they would have further amended the FCRA in Title V of the GLBA. Instead, Congress expressly limited its comments to the plain language that the GLBA was not intended "to modify, limit, or supersede the operation of the Fair Credit Reporting Act." Since Congress chose not to "modify, limit, or supersede the operation" of the FCRA, it is our hope that the Agencies will refrain from doing so as well.

It also should be noted that the grant of FCRA rulemaking authority provided to the Agencies under the FCRA provides further instruction with respect to Congress' intent. Specifically, section 506(a)(2) of the GLBA authorizes the Agencies to "prescribe such regulations as *necessary* to carry out the purposes" of the FCRA. (emphasis added.) As noted above, based on the language of the FCRA, it appears that a concise and simple notice to consumers would satisfy Congress's intent in mandating the FCRA affiliate sharing notice. The many provisions of the Proposed Rule which go beyond this simple provision do not appear to be "necessary" to carry out the purposes of the FCRA affiliate sharing provisions.

Preserving Consumer Benefits

It is widely accepted that consumers benefit when affiliated entities are permitted to share among themselves information that can be used to improve the services, offerings, pricing options and other choices made available to those consumers. Indeed, it was these types of consumer benefits that, to a large extent, provided the justification for the financial modernization enacted as part of the GLBA. At the same time, it is widely recognized that consumers' privacy interests are implicated when affiliates share information about them.

The affiliate sharing provisions of the FCRA are designed to balance between these potentially competing interests. We believe the plain language of the FCRA affiliate-sharing provisions strikes an appropriate balance. We are concerned, however, that the Proposed Rule may substantially upset this balance by departing from the plain language of the FCRA and may inadvertently restrict consumer choice as a result. For example, the Proposed Rule appears to suggest that when a consumer applies for one financial product but is interested in obtaining information about other products offered by affiliates, the consumer would be forced to wait a period of time (maybe even 30 days) before the information could be shared with those affiliates for use in responding to the consumer's desire for additional information. In our view, such a result would not benefit consumers and was not intended when the affiliate sharing provisions were enacted in 1996.

We believe that this issue can be adequately addressed through three clarifications.

- The Final Rule should clarify that the affiliate sharing notice and opportunity to opt out may be disclosed on or with documents such as applications or signature cards. If the consumer submits the application or completes the signature card and chooses not to opt out at that time, the affiliates must be permitted to share the information unless and until the consumer subsequently opts out.

- The Final Rule should clarify that affiliates may share among themselves information on a consumer who has received the affiliate sharing notice and has consented to the sharing. In this regard, a consumer who has consented to the sharing has unambiguously indicated an intent not to opt out at that time and the sharing must be permitted unless and until the consumer revokes the consent *(e.g.* by opting out). We believe that this approach is entirely consistent with the language and intent of the FCRA affiliate sharing provisions..

- The Final Rule should clarify that it does not in any way impact other interpretations of the FCRA which for many years have permitted affiliates (and unaffiliated third parties) to share information that might otherwise be deemed to be a consumer report. For example, it should be clarified that the affiliate sharing rules do not apply when a bank shares information with an affiliate who performs services for the bank. Similarly, it is important to make it clear that the affiliate sharing rules do not apply where affiliates or agents share information pursuant to the so-called "joint user" exception articulated by the FTC in its Commentary on the FCRA (See 16 CFR Part 600).

Other Comments.

Examples (§ ___.2)

We applaud the Agencies for including several helpful examples in the Proposed Rule and we urge the Agencies to include examples in the Final Rule. The use of examples has proven helpful to institutions in developing compliance programs for the Privacy Rules. We believe examples will serve the same purpose for institutions attempting to comply with the Final Rule. We also urge the Agencies to retain in the Final Rule the clarification that the examples are not exclusive and that compliance with an example or use of a sample notice, constitutes compliance with the Final Rule itself. These are important clarifications which should be included in the Final Rule.

Contents of the Opt Out Notice (§ ___.5)

The Proposed Rule would mandate that the FCRA opt out notices must disclose: (i) the categories of opt out information about the consumer that institution communicates; (ii) the categories of affiliates to which the institution communicates the information; (iii) the consumer's ability to opt out; and (iv) the means to do so. As noted above, the plain language of the FCRA simply does not require this level of detail. Accordingly, we urge the Agencies to revise the Proposed Rule to more closely adhere to the plain language of the FCRA.

The Proposed Rule also specifically permits institutions to reserve the right either to communicate new categories of information, or to communicate to new categories of affiliates, in the future. If, notwithstanding the plain language of the FCRA, the Agencies decide to require that the affiliate sharing notice include information about categories of information and/or categories of affiliates, this provision should be retained in the Final Rule. This clarification would be particularly important in view of the frequency with which corporate affiliations can change in the existing marketplace. The Agencies also should retain in the Final Rule the clarification that institutions may craft the opt out notice to allow consumers to selectively opt out of different information programs.

The Agencies specifically requested comment on whether financial institutions should be required to disclose: (i) how long a consumer has to respond to the opt out notice before the institution may begin disclosing information about that consumer to its affiliates; and (ii) the fact that a consumer can opt out at any time. We urge the Agencies to refrain from including any such requirement in the Final Rule. As noted above, the FCRA affiliate sharing notice is intended to provide a clear and conspicuous, but concise and simple, disclosure about affiliate sharing. Based on the plain language of the FCRA, the most essential components of that notice are the fact that affiliates will share information about the consumer and how the consumer may opt out of that sharing. These two key components should be conveyed as clearly as possible and additional language such as timeframes for opting out should be avoided.

Reasonable Opportunity to Opt Out (§ ___.6)

As noted above, the Proposed Rule suggests a blanket example of 30 days as appropriate in order to provide consumers a "reasonable opportunity to opt out." For the reasons discussed above, we urge the Agencies to delete this example and instead clarify that: (i) a financial institution may share information among affiliates if the opt out notice is provided on an application or signature card submitted by the consumer and the consumer did not opt out; (ii) affiliates may share information among themselves if the consumer has consented to such sharing; and (iii) the Final Rule does not affect other interpretations of the FCRA that do not involve the affiliate sharing provisions.

Delivery of Opt Out Notices (§ ___.8)

The Proposed Rule requires that the opt out notice must be delivered so that each consumer can reasonably be expected to receive actual notice in writing or, if the consumer agrees, electronically. We agree with the general standard requiring delivery so that each consumer *reasonably be expected* (emphasis added) to receive actual notice. We note, however, that unlike the GLBA, the FCRA does not explicitly require that the affiliate sharing notice be furnished in writing. This is an important distinction which we believe was intended to provide sufficient flexibility to allow the affiliate sharing notice to be furnished in any type of communication, including orally during telephone communications. In this regard, the only restrictions imposed on the affiliate sharing notice are that it must be furnished "clearly and conspicuously...before the time the information is initially communicated" among affiliates.

It is important that the flexibility established by the plain language of the FCRA be preserved in the Final Rule. Accordingly, we urge the Agencies to modify the Proposed Rule to permit oral disclosures of the FCRA opt out notice. This will preserve the flexibility necessary to provide many types of products requiring or enhanced by affiliate information sharing even when such products are requested over the phone. This flexibility is important to ensure that financial institutions can implement the wishes of consumers who may apply for financial products over the phone, such as when a consumer initiates an application for a federally insured student loan by telephone and at the same time requests information about whether the consumer may qualify for a home equity line of credit offered by an affiliate.

Revised Opt Out Notice (§ ___.9)

The Proposed Rule states that an institution must provide a revised opt out notice to a consumer if it plans to communicate opt out information to its affiliates about the consumer other than as described in a previous notice. It appears that the Agencies intend this approach to be consistent with the Privacy Rules. The Proposed Rule, however, does not include any of the clarifications set forth in ___.8 of the Privacy Rules. For example, unlike the Privacy Rules, the Proposed Rule does not clarify that the revised notice is not required where information is shared with a new entity so long as that entity was adequately described in the earlier notice. In order to avoid any inference that the revised opt out notice requirement under the Proposed Rule is different than that of the Privacy Rules, we urge that the same clarifications set forth in the Privacy Rules be included in the Final Rule.

Time by Which Opt Out Must Be Honored (§ ___.10)

The Proposed Rule notes that an institution must comply with a consumer's opt out "as soon as reasonably practicable" after it is received by the institution. In this respect, the Agencies have solicited comment as to whether they should establish a time period, such as 30 days, that would be deemed a "reasonably practicable" period of time to comply with a consumer's opt out. We believe that the Agencies should refrain from providing examples of what would be deemed to be "reasonably practicable." There may be instances when the opt out could be processed in a period of time less than 30 days. On the other hand, in many instances, it may require more than 30 days to effectuate an opt out completely and a 30-day example would create inappropriate potential for litigation and liability in those circumstances. Therefore, we urge the Agencies to refrain from defining "reasonably practicable."

Duration of Opt Out (§ ___.11)

The Agencies propose that an opt out is effective until a consumer revokes it in writing. We agree that an opt out should be effective until revoked by the consumer. However, we urge the Agencies to delete the requirement that revocation must be in writing. There certainly will be instances when a consumer is requesting an additional product by telephone or via the internet that would require the institution to share opt out information with, or obtain opt out information from, an affiliate. If the consumer has previously opted out, that consumer may have to wait several days for the product he or she requested in order to provide a revocation of the opt out in writing. This would result in needless delay for the consumer. We do not believe that such a result can be justified and we urge the Agencies to delete the requirement that opt out revocations must be in writing.

We appreciate this opportunity to comment on the Proposed Rule. If you have any questions concerning this letter or if you would like additional information, please do not hesitate to contact me at 703-810-5016.

Respectfully,

S/MARK L. HELEEN
Mark L. Heleen
Assistant General Counsel