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MasterCard International

Via Hand Delivery

December 4, 2000

Communications Division
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219
Attention: Docket No. 00-20

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th and C Streets, NW
Washington, DC 20551
Attention: Docket No. R-1082

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

Manager, Dissemination Branch
Information Management & Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: Docket No. 2000-81

Re: Fair Credit Reporting Regulations

Dear Sirs and Madams:

This comment letter is filed on behalf of MasterCard International Incorporated ("MasterCard")[1] in response to the joint notice of proposed rulemaking ("Proposal") published by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System ("Board"), the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision

[1] MasterCard is a membership organization comprised of financial institutions which are licensed to use the MasterCard service marks in connection with payment systems, including credit cards, debit cards, smart cards and stored-value cards.

(collectively, the "Agencies") to implement the affiliate sharing provisions of the Fair Credit Reporting Act ("FCRA"). MasterCard appreciates the opportunity to comment on the Proposal.

MasterCard appreciates the efforts of the Agencies to develop a coordinated approach for complying with the FCRA affiliate sharing provisions and the privacy disclosures required by the Gramm-Leach-Bliley Act ("GLB"). We believe that guidance from the Agencies on many of the issues addressed in the Proposal could be helpful to financial institutions that must integrate the FCRA and GLB notices. The Agencies, however, should not try to conform the Proposal to the Privacy Rules in every respect. In this regard, it must be recognized that the statutory requirements of the FCRA are different from, and much simpler than, those of the GLB. In particular, with respect to affiliate sharing, the FCRA simply requires that consumers be furnished a clear and conspicuous notice that information may be communicated among affiliates and be provided an opportunity to opt out. Unlike the GLB, the FCRA does not contain any additional requirements regarding the contents of the notice. In addition, a wide variety of effective industry practices have been developed in reliance on the plain language of the FCRA, and it would not be appropriate to conform the Proposal entirely to the requirements of the Privacy Rules given the effectiveness of those practices.

We respectfully request that the Agencies consider our comments as they move toward developing a final rule ("Final Rule"). These comments are intended to facilitate the development of a Final Rule which provides consumers with meaningful disclosures about affiliate sharing practices while preserving the flexibility necessary to ensure that consumers are able to realize the benefits of such practices.

Effective Date

One of the most significant issues raised by the Proposal is the question of when the Final Rule will become effective. When considering this issue, we strongly urge the Agencies to study the logistical issues raised with respect to compliance with the Final Rule, especially in light of current efforts to comply with the Privacy Rules. At the urging of the Agencies, many financial institutions have already printed their privacy notices in order to comply with the Privacy Rules prior to July 1, 2001. Those who have not printed their notices will most likely have done so before the Agencies issue a Final Rule. Virtually all of these notices are drafted in reliance on the plain language of the FCRA and will not contain the entirely new information that would be required under the Proposal. As a result, any requirement by the Agencies that the GLB privacy notices must be revised to include the new requirements set forth in the Proposal would essentially mandate that financial institutions discard millions of privacy notices that have already been printed, or will have been printed by the time a Final Rule is issued.

In order to address this issue, MasterCard requests that the Agencies make it clear that the Final Rule will not be effective until the later of July 1, 2002, or the time at which the financial institution sends its annual notice to the consumer in the year 2002. Such an effective date would allow financial institutions the opportunity to deplete their current stock of privacy notices without forcing financial institutions to discard and reprint millions of notices. Not only would the reprinting of millions of notices be an unnecessary compliance burden for financial institutions, but the enormous cost of doing so would ultimately be passed on to consumers. Such a result would be difficult to justify, particularly in view of the fact that consumers already receive adequate protection in the affiliate sharing area. Specifically, any financial institution that wishes to engage in affiliate sharing of "opt out information" already provides the affiliate sharing notice and opt out based on the existing statutory language of the FCRA. Moreover, any notices furnished to consumers under the Privacy Rules also must contain an affiliate sharing notice and opt out that

complies with the FCRA. As a result, consumers already receive the most important information regarding affiliate sharing — notice of the sharing and an opportunity to opt out.

Not only should the Final Rule's effective date reflect industry's compliance efforts with respect to the Privacy Rules, but the Agencies should apply the Final Rule prospectively. In this regard, the Final Rule should apply only to notices provided on or after July 1, 2002. Of particular importance is clarification that the Final Rule would not require financial institutions (i) to send a revised FCRA notice to their consumers solely because the most recent notice provided did not comply with the Final Rule or (ii) to send a revised GLB privacy notice solely because the most recent GLB notice did not include the new FCRA notice required by the Final Rule. We believe this is the intent of § ___.9 of the Proposal and § ___.8 of the Privacy Rules, but without clarification the utility of a delayed effective date may be significantly diminished. There would be significant cost burdens associated with a requirement that financial institutions must provide new FCRA notices and/or GLB privacy notices containing the new FCRA disclosure to consumers who already received a FCRA notice, either as part of a GLB privacy notice or otherwise, prior to July 1, 2002. Since those consumers already received an FCRA notice and opportunity to opt out, there would be no justification for imposing on financial institutions and consumers the compliance burdens and costs associated with providing revised privacy notices.

Purpose and Scope (§ ___.1)

Section ___.1(b)(2) lists the financial institutions covered by the Proposal. In the Board's version of the Proposal, Section ___.1(b)(2) indicates that the Proposal covers, among other things, "member banks of the Federal Reserve System" but does not refer to certain other entities within the Board's applicable jurisdiction. In particular, the Board's Proposal makes no mention of the Board's jurisdiction over bank holding companies and their affiliates. This jurisdiction was specifically assigned to the Board under section 506(a)(2) of the GLB which states that the Board's rulemaking authority under the FCRA covers "bank holding companies and affiliates (other than depository institutions and consumer reporting agencies) of such holding companies."

We urge the Board to modify its Proposal to more precisely reflect its scope. Such a clarification is important, not only to effectuate congressional intent, but also to ease compliance burdens and reduce consumer confusion. A uniform application of the Proposal to all entities within a bank holding company family (other than any consumer reporting agencies) would reduce compliance burdens by enabling those entities to adopt a single, integrated approach to implementing the Final Rule. It would also reduce the risk that consumers could receive different, or even conflicting, notices from companies within the same corporate family.

Examples (§ ___.2)

We applaud the Agencies for including examples in the Proposal, and we urge that the Agencies include examples in the Final Rule. Examples have been helpful to financial institutions developing compliance programs for the Privacy Rules and would serve the same purpose with respect to the Final Rule. It is important, however, that the Agencies also include in the Final Rule language clarifying that the examples are not exclusive.

The Proposal states that "[c]ompliance with an example or use of the sample notice, to the extent applicable, constitutes compliance with" the Proposal. This is an important clarification, and we urge that it be retained in the Final Rule. In addition, we urge that the Agencies include a clarification with respect to use of sample notices. Specifically, the Final Rule or Supplementary Information should indicate that a financial institution may comply with the Final

Rule by using applicable clauses set forth in the sample notice; a financial institution need not use the entire sample notice.

Definitions (§ .3)

"Clear and Conspicuous"

The Proposal's definition of "clear and conspicuous" is largely consistent with the definition used in the Privacy Rules. It requires notices to be "reasonably understandable" and "designed to call attention to the nature and significance of the information" they contain. The Supplementary Information to the Proposal includes a helpful clarification that the Proposal "do[es] not mandate the use of any particular technique for making a notice clear and conspicuous." We urge the Agencies to retain this clarification in the Final Rule.

The Agencies specifically request comment on whether financial institutions may have particular concerns about compliance with the Proposal's clear and conspicuous requirements when FCRA opt out notices are included with privacy notices required by the GLB. As a general matter, we are concerned about this issue as well as the various definitions of "clear and conspicuous" for other disclosures. There are at least three different definitions of clear and conspicuous in use with respect to consumer disclosures (*e.g.*, the Privacy Rules, portions of Regulation Z, and others such as Regulations B, E, and the rest of Z). This has the potential to create significant compliance questions when financial institutions attempt to make several "clear and conspicuous" disclosures on the same form.

In order to address these issues, we urge that the Agencies incorporate into the Final Rule clarifications that the affiliate sharing notice may be included on a document containing other notices and that a particular notice will be deemed to be clear and conspicuous based on the specific meaning given to that term in the statute and/or regulation that apply to that notice. For example, where the affiliate sharing notice is included with notices provided under Regulation Z, the affiliate sharing notice must comply with the "clear and conspicuous" standard set forth in the Final Rule, while the Regulation Z notice must comply with the separate "clear and conspicuous" standard set forth in the applicable portion of Regulation Z.

"Communication"

The Proposal defines "communication" to include "electronic communication to a consumer only if the consumer agrees to receive the communication electronically." This definition appears to be intended to incorporate the concept addressed elsewhere in the Proposal that notices may not be furnished to a consumer electronically unless the consumer agrees. The Proposal itself, however, does not use the term "communication" to describe the flow of information between a financial institution and a consumer. Instead, the term "communication" is used in the Proposal exclusively to describe the transmission of information between affiliated entities. As a result, the term has no meaning with respect to interactions with a consumer. In order to address this issue, the following language should be deleted from the definition: "provided that the term includes electronic communication to a consumer only if the consumer agrees to receive the communication electronically."

"Opt Out Information"

The Proposal sets forth a definition of the term "opt out information" which incorporates certain components of the definition of "consumer report." Under the Proposal, "opt

out information" is defined as information that bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used, expected to be used, or collected in whole or in part to serve as a factor in establishing a consumer's eligibility for credit or other defined purposes. The definition also properly excludes information solely as to transactions or experiences between the consumer and the person reporting the information.

The definition apparently is intended to clarify that the affiliate sharing notice and opt out provisions only apply to information that would otherwise meet the definition of "consumer report." Because the definition of "opt out information" only incorporates certain components of the definition of "consumer report," however, this important clarification is not fully realized by the Proposal. In order to address this issue, we recommend that the definition of opt out information, or the accompanying Supplementary Information, clarify that the definition does not include any information: (i) that is not covered under the definition of "consumer report" set forth in section 603(d)(1) of the FCRA; or (ii) any information excluded from the definition of consumer report under section 603(d)(2)(A)(i), (ii), or section 603(d)(2)(B), (C), or (D).

Contents of the Opt Out Notice (§ .5)

Under the Proposal, the affiliate sharing opt out notice must include: (i) the categories of opt out information about the consumer that the financial institution communicates; (ii) the categories of affiliates to which the financial institution communicates the information; (iii) the consumer's ability to opt out; and (iv) the means to do so. It must be noted that the plain language of the FCRA itself does not actually require the disclosure of the categories of opt out information that the financial institution communicates or the categories of affiliates to which the information is communicated. Instead, the FCRA simply requires notice that information may be shared among affiliates and that consumers be provided an opportunity to opt out of that sharing.

This is in stark contrast to the plain language of the GLB which mandates disclosure of certain categories of information collected, and categories of those who will receive the information. This distinction is an important one, and we urge the Agencies to honor it in the Final Rule. In particular, we urge that the Final Rule make it clear that a financial institution may comply with the FCRA's affiliate sharing notice without disclosing the categories of opt out information or categories of affiliates to which the information is communicated. We believe that such a clarification is necessary in order to accurately implement the language and intent of the FCRA affiliate sharing provisions.

If the Agencies nevertheless choose to impose notice requirements that go beyond the language of the FCRA, we urge the Agencies to ensure that the notice may be conveyed to consumers clearly and concisely. In order to accomplish this, it would be important that the Final Rule not add any other notice requirements that go beyond the plain language of the FCRA. In this context, the Agencies specifically request 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 financial institution may begin disclosing information about that consumer to its affiliates; or (ii) the fact that a consumer can opt out at any time. We would urge that the Agencies not include these requirements in the Final Rule. Such additional information provides little benefit to consumers and increases the likelihood that the essential components of the FCRA affiliate sharing notice (notice that the sharing will take place and how the consumer can opt out) will be obscured.

Also, in the event the Final Rule goes beyond the language of the FCRA and requires disclosure of categories of information or affiliates, it would be important to enable affiliates to craft the disclosure in anticipation of future activities. In this regard, it would be

important to retain the language set forth in the Proposal which specifically permits financial institutions to reserve the right either to communicate new categories of information, or to communicate to new categories of affiliates, in the future.

In addition, we agree with the statement in the Proposal clarifying that financial institutions may allow consumers to selectively opt out of certain information sharing programs while continuing to permit others. This flexibility is important to financial institutions and consumers, consistent with the corresponding provisions in the Privacy Rules, and should be retained in the Final Rule.

Reasonable Opportunity to Opt Out (§ .6)

The Proposal appears to establish a general rule that, once an affiliate provides the affiliate sharing notice to a consumer, the affiliate must wait 30 days before sharing information about the consumer with other affiliates. We are concerned that this general rule is inconsistent with the language and intent of the affiliate sharing provisions and, in many instances, will be detrimental, rather than helpful, to consumers. We are concerned, for example, that this general rule may inadvertently restrict consumer choice by forcing an affiliate to wait 30 days before sharing information even where the consumer wishes to have the information shared more quickly. 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 that the consumer may qualify for, the consumer would be forced to wait at least 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.

The 30-day waiting period produces inappropriate results in other contexts as well. For example, under the 30-day rule, financial institutions would be required to delay sharing information on a credit application which is intended to be used by affiliates for fraud detection purposes. In addition, financial institutions would not even be permitted to share with their affiliates information which is intended to be used for suspicious activity reports.

Accordingly, it is important that this issue be addressed when the Final Rule is adopted. This issue can be adequately addressed through the following clarifications. First, 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. If the consumer submits the application 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.

Second, the Final Rule must 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 clearly 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. Moreover, such a clarification would be important to avoid any suggestion that affiliates must ignore a consumer's choice to authorize sharing immediately.

Third, 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 agent who performs services for the bank. Similarly, it is important to make it clear that the affiliate sharing rules do not apply where affiliates share information pursuant to the so-called "joint user" exception articulated by the FTC in its Commentary on the FCRA.

In addition, with respect to notices delivered electronically, the Agencies suggest that a financial institution must wait 30 days from the date a consumer "acknowledges" receipt of the electronic notice. We urge the Agencies to eliminate this approach. There simply is no reason to require acknowledgement of a notice delivered electronically. At this point in time, it appears beyond question that electronic delivery methods are at least as effective as paper delivery methods in communicating with consumers. We are not aware of any basis that would justify requiring special "acknowledgement" procedures for electronic delivery when no such procedures are required for paper-based delivery methods.

It also is important to note that consumers already would be adequately protected in this area under the Proposal. As discussed below, the Proposal already requires that a financial institution must deliver the affiliate sharing notice so that each consumer "can reasonably be expected to receive actual notice." As a result, the burden is on the financial institution to select a delivery method which complies with this delivery standard regardless of whether the notice is delivered electronically or in writing. We believe that this standard adequately protects consumers and ensures that financial institutions must use appropriate delivery mechanisms. Just as consumer acknowledgement of receipt is not required by various disclosures mandated under the Truth in Lending Act, Equal Credit Opportunity Act ("ECOA"), Electronic Fund Transfer Act, and other portions of the FCRA, acknowledgement should not be required for any component of the notice required under the Proposal.

As the Agencies consider this issue, we request that they also keep in mind the substantial burdens that would be placed on financial institutions if they were required to monitor whether consumers had acknowledged receipt of electronic notice. For example, financial institutions would be required to individually track each consumer to determine whether that consumer had acknowledged receipt before any affiliate sharing could begin with respect to that consumer. Of course, not all consumers will acknowledge receipt, even if a reply is requested, which effectively negates the effect of the notice. This also defeats the purpose of providing more efficient, less expensive electronic notices, resulting in higher costs to the consumer.

Reasonable Means of Opting Out (§ .7)

The Proposal requires a financial institution to provide consumers with a "reasonable means of opting out" and states that this standard can be satisfied if the opt out method is "reasonably convenient." In this context, the Proposal clarifies that a financial institution may require a consumer to opt out through a specific means as long as that means is reasonable for that consumer. We urge the Agencies to incorporate this clarification into the Final Rule with one important modification. As currently drafted, the Proposal could be read to require that a financial institution must make a specific determination that the means of opting out is reasonable for that particular consumer. We do not believe that the Agencies intended to establish such a subjective, individualized standard, and we urge that any ambiguity on this point be eliminated by making it clear that an opt out method is acceptable provided that it satisfies the general rule mandating "a reasonably convenient method of opting out."

Delivery of Opt Out Notices (§ .8)

As noted above, 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 to receive actual notice. Moreover, we acknowledge that it may be appropriate to obtain a consumer's consent or agreement before delivering notices electronically. We note, however, that unlike the GLB, the FCRA does not require that the affiliate sharing notice be furnished in writing. This is an important distinction which 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 a home equity loan by telephone and at the same time requests information about whether the consumer may qualify for a credit card 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 Proposal notes that a financial institution must comply with a consumer's opt out "as soon as reasonably practicable" after it is received by the financial institution. This requirement should be adopted in the Final Rule.

The Agencies have solicited comment as to whether they should establish a fixed number of days that would be deemed a "reasonably practicable" period of time to comply with a consumer's opt out. The example listed is 30 days. We believe that the Agencies should refrain from establishing a definition of "reasonably practicable." There may be instances when the opt out could be processed in a period of time less than 30 days. In other circumstances, it may require more than 30 days to effectuate an opt out completely. Therefore, we urge the Agencies to refrain from defining the term "reasonably practicable."

Duration of Opt Out (§ ___.11)

The Agencies propose that an opt out will remain in effect until the 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 the opt out must be revoked in writing. There may be instances when a consumer is requesting an additional product over the phone that would require the financial institution to share opt out information with, or obtain opt out information from, an affiliate. If the consumer had 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 harms the consumer unnecessarily since an equally valid revocation is available orally. Therefore, we urge the Agencies to delete the requirement that an opt out revocation must be in writing.

Prohibition Against Discrimination (§ .12)

The Proposed Rule includes a provision which "prohibits [a financial institution] from discriminating against [a consumer credit applicant] if the consumer opts out of the [financial institution's] communication of opt out information to [its] affiliates." In proposing this provision, the Agencies appear to be interpreting provisions of the ECOA and Regulation B under the auspices of their authority to interpret the FCRA. We note, however, that the Agencies' authority to interpret the FCRA is limited to promulgating regulations "necessary" to carry out the purposes of the FCRA. Interpreting provisions of the ECOA would not appear to fall within that authority. Accordingly, we respectfully urge the Agencies to eliminate this provision from the Final Rule. Any consideration of this issue should be addressed in its proper context -- the rulemaking authority granted to the Board under the ECOA. Moreover, we note that any attempt to address this issue must be carefully crafted in order to avoid inadvertently harming consumers. In particular, it would be important to ensure that efforts to address this issue not eliminate cost savings and other benefits that are demanded by consumers who choose to participate in affiliate sharing programs.

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Once again, MasterCard greatly appreciates the opportunity to comment on the Proposal. If you have any questions concerning this comment letter, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, Joshua Peirez at (914) 249-5903, or Michael McEneney at Sidley & Austin at (202) 736-8368, our counsel in connection with this matter.

Sincerely,

Noah J. Hanft

cc: Joshua L. Peirez (MasterCard International)
Michael F. McEneney (Sidley & Austin)