ORIGINAL

January 31, 2001

Donald S. Clark
Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

RE: COMMENTS ON THE FEDERAL TRADE COMMISSION'S PROPOSED INTERPRETATIONS OF THE FAIR CREDIT REPORTING ACT

Dear Mr. Clark:

We, the undersigned, are members of the Consumer Financial Services Committee of the American Bar Association's Business Law Section, and are commenting on the above-referenced proposed interpretations (hereinafter referred to as the "Commentary"). We are lawyers representing companies that may wish to share consumer information with their affiliated companies and that will be affected by the Commentary. The views expressed in this letter are solely the personal opinions of the undersigned, and do not necessarily represent the official position of the Consumer Financial Services Committee, any client or employer of the undersigned, any entity with which the undersigned are otherwise associated, or the American Bar Association or any of its subdivisions. Individual lawyers who helped prepare this comment letter also may have worked on separate comment letters for their clients, their firms, or the organizations they represent. Such separate comment letters may take different views from those expressed herein.

We appreciate the Commission's effort to provide guidance to companies who might wish to share consumer information with their affiliates without that information being considered a consumer report. We also understand that the Commission's interest in proposing new interpretations of the Fair Credit Reporting Act ("FCRA") was spurred, at least in part, by new rules that have been proposed by the banking agencies. The Commission's desire to be consistent with its Rule on Privacy of Consumer Financial Information ("Privacy Rule"), promulgated under the Gramm-Leach-Bliley Act ("GLBA"), also is laudable.

We believe, however, that the proposed Commentary needs to reflect the more limited purposes of the FCRA. Moreover, the Commission should bear in mind that consumers already are receiving FCRA notices. These notices generally have seemed to be adequate, and the proposed Commentary should not propose substantive new requirements that might interfere with financial institutions' implementation of their GLBA privacy policies and notices. To that

end, we offer several general and specific comments that we hope the Commission will consider as it makes its final determination with respect to the Commentary.

I. Interference with GLBA Notifications

In general, the FCRA requires only that a very simple opt out notice be provided to consumers. *See* FCRA § 603(d)(2)(A)(iii); *see also* OCC Advisory Letter AL 99-3 (March 29, 1999) at 5 (noting that the FCRA does not impose requirements for placement or content of an opt out notice and does not require that consumers be given a convenient means of opting out of information sharing). This is in contrast to the GLBA, which sets forth detailed requirements for the content, form, and delivery of notices and opt outs. *See* GLBA §§ 502 and 503. We believe that these two statutory schemes are very different and that any rules or interpretations promulgated under these statutes should reflect these differences. We also believe, however, that in the privacy area the goals of regulators, consumer advocates, and the financial services industry are largely the same. We all want to foster consumer understanding of these important and substantive privacy rights, and do not want to confuse consumers or otherwise limit their exercise of these rights. We believe that the proposed Commentary would create a complex new notice that might in the end confuse consumers and conflict with the important goals of the GLBA and the Commission's Privacy Rule.

Beginning this summer, many firms that have never before considered themselves to be "financial institutions" (*e.g.*, travel agents, car dealers, grocers) and have never been regulated as such will be required to comply with the GLBA and the Commission's Privacy Rule. Among other things, these firms will be required to provide their customers with initial and annual notices of their privacy policies. Those statements of privacy policies will be complex, disclosing the categories of nonpublic personal information collected, categories of nonpublic personal information disclosed to others, categories of affiliates and non-affiliated third parties to whom nonpublic personal information is disclosed, an explanation of the consumer's right to opt out of disclosure of information to non-affiliated third parties, and the policies and practices implemented with respect to the confidentiality and security of nonpublic personal information. 16 C.F.R. § 313.6(a). Compliance with this new law will be difficult and expensive, particularly for those firms unfamiliar with federal regulation. We believe that it is critical that no additional rules interfere with the implementation of the important GLBA requirements.

A. Content of Notice

The initial, annual, and revised privacy notices given consumers under the Commission's Privacy Rule must contain, *inter alia*, "any disclosure that you make under section 603(d)(2)(A)(iii) of the Fair Credit Reporting Act . . . (that is, notices regarding the ability to opt out of disclosures of information among affiliates)." 16 C.F.R. § 313.6(a)(7). Because the disclosures required by the Privacy Rule for sharing with non-affiliates are more detailed, and, in

particular, do not require that the consumer be given a right to opt out of information-sharing with affiliates, the Commentary's proposal for a lengthy set of disclosures for the FCRA affiliate-sharing opt out serves to complicate the disclosures and confuse the consumer. Although the proposed commentary was developed to track the Privacy Rule, which requires that notices be given in a clear and conspicuous manner, requiring a detailed explanation of the FCRA opt out right is unnecessary. More disclosure and conflicting disclosure will make the GLBA notice and the FCRA notice less clear and less conspicuous and thus less effective.

A distinction must be drawn between the nonpublic personal information that is the subject of the privacy policy notice and the opt out right under the Privacy Rule, and the information that is the subject of the FCRA affiliate-sharing opt out right. It will be difficult for a consumer to understand what information is subject to the GLBA notice, and what information is subject to the FCRA notice, particularly since the FCRA opt out information is not subject to an opt out right under the Privacy Rule. This information is referred to in the FCRA as "other information," in the proposed Commentary as "opt out information," and in the sample notice in the Commentary as simply "information." FCRA § 603(d)(2)(A)(iii); 65 Fed. Reg. 80,802-09 (Dec. 22, 2000).

Among those responsible for crafting these notices, there has been discussion as to how to draw this distinction, based on the Commentary. Some have suggested that the FCRA opt out notice be set forth on its own separate page, such as the treatment afforded by the Commentary – yet that may fail to make clear in the consumer's mind what the distinction is between the two notices, and appear to give conflicting instructions. Other suggestions have centered on the appropriate reference in a combined notice to the FCRA opt out information to avoid having it incorrectly categorized as opt out information covered by the GLBA notice – "other credit information," "non-experience information," "limited consumer credit information." In truth, the technical FCRA reference would be "information that is an exception to a 'consumer report' provided the consumer does not opt out," but this has no meaning to the typical consumer and more words do not make the matter more clear.

In view of the broad and important coverage of the GLBA notices, the limited application of the FCRA opt out right, and the need to keep the information given to the consumer about the consumer's rights in focus, it is suggested that a simple, straightforward approach to disclosing the FCRA opt out right is the appropriate treatment. How this is accomplished should be left to those who have the obligation, subject to the basic tenets that the notice be clear and conspicuous. Since there appears to be no single reference that will suffice for all, the final Commentary should recognize that there is great flexibility in making this disclosure. The Commentary might provide, *e.g.,* (1) that a creditor may share consumer credit information with its affiliates, (2) that the consumer has the right to opt out of the sharing of that consumer credit information with affiliates, (3) that the consumer does not have the right to opt out to the sharing of information about transactions or experiences between the consumer and the creditor or

otherwise permitted by law, and (4) that whatever words a creditor may use to describe that right in its opt out notice, whether a stand-alone notice or a notice combined with the GLBA notice, do not matter so long as the notice is reasonably understandable and designed to call attention to the nature and significance of the consumer's right and how the consumer may exercise it. We note that under the broad language of the FCRA, a company might adopt a detailed notice such as that prescribed by the Commentary and the Commission's sample notice, or it might adopt a simpler notice, depending on the needs of its clientele. In this regard, the proposed Commentary definitions of "clear and conspicuous," "reasonably understandable," and "designed to call attention" are helpful. However, the complexity of the content of the opt out notice and the sample opt out notice are not helpful. Moreover, the lengthy disclosures proposed would limit companies' flexibility with respect to the timing and placement of the notice and opt-out. For example, it would be difficult to include an opt-out on applications and signature cards, where space is limited.

B. Effective Date Should be Delayed

The Commission should consider delaying the effective date of the proposed Commentary until companies are required to deliver their 2002 annual privacy notices. Companies are well on their way to developing and completing the privacy notices that must be issued on or before July 1, 2001. If the Commentary is not delayed, then companies may be in a position where they have completed, or nearly completed, their privacy notices and then must revise those same notices to reflect the final Commentary before the notices are sent to consumers. Companies that have scheduled delivery of their privacy notices prior to July 1, 2001 would then have to deliver revised notices if the final FCRA Commentary requires changes. Revising notices at a late date and the possibility of having to deliver to consumers an additional, revised notice to reflect the final Commentary will create a significant cost burden for companies. In addition, consumers will be confused if they receive multiple notices.

Moreover, some companies may delay the development and delivery of their privacy notices until after they review and incorporate the requirements of the final Commentary, potentially interfering with GLBA compliance by leaving companies with insufficient time to develop and deliver adequate notices prior to July 1.

Delaying the effective date also will give the Commission and companies an opportunity to evaluate the distribution of the initial privacy notices in 2001. Companies will then have an opportunity to improve their future compliance efforts and the Commission will have an opportunity to provide any necessary clarification before the Commentary becomes effective.

Should the Commission determine to delay the effective date of the Commentary until the time that companies are required to deliver their 2002 annual privacy notices, consumers will

not be disadvantaged – they will continue to receive the opt out notices to which they already are entitled under the FCRA.

II. Method of Notice and Opt Out

The FCRA provides for only a very simple notice, but the Commentary prescribes a written notice with required waiting periods and specific revocation provisions that are not in consumers' best interests.

A. Writing Requirement

The Commentary states that opt out notices to consumers "must . . . be in writing" and that "[a] company may not provide an opt out notice solely through an oral explanation." Commentary §§ 8(a) and 8(c). The FCRA does not require that the opt out notice be in writing, and the proposed Commentary should maintain this flexibility. Consumers who apply for products or services over the telephone should be able to receive notice immediately. Similarly, the proposed Commentary should include a mechanism whereby consumers might consent to information sharing. *See* ¶ II.B., "Reasonable Period of Time" Requirement, *infra*. The telephone customer thus would be able to apply for multiple products, but only would need to complete one application, and the company only would need to pull one credit report, resulting in a cost savings for the consumer.

The proposed Commentary also should explicitly allow the opt out notice to be given on applications and signature cards, and where the consumer fails to opt out on the application or signature card, the information should be able to be shared immediately. In fact, earlier guidance on this issue from bank regulators highlighted the provision of a check-off box on a credit application as a best practice. *See* OCC Advisory Letter AL 99-3 (March 29, 1999) at 7.

B. "Reasonable Period of Time" Requirement

The proposed Commentary provides that a company may share a consumer's "opt out information" with its affiliates if the company has given the consumer an opt out notice and "a reasonable opportunity and means to opt out," and the consumer has not opted out. Commentary § 4. The Commentary then states that a company provides a reasonable opportunity to opt out if it provides a "reasonable period of time following the delivery of the opt out notice for the consumer to opt out." Commentary § 6(a). Section 603(d)(ii)(a)(iii) of the FCRA contains no "reasonable period of time" requirement. It merely states that the opt out right be clearly and conspicuously disclosed to the consumer, and that the consumer be given the opportunity to opt out before the information is shared.

The Commentary states that 30 days is a reasonable amount of time to allow a consumer to respond to an opt out notice. Commentary § 6(b). This proposed 30-day standard is imposed without regard to the type of transactional method involved. That is, the same 30-day standard

applies regardless of whether the consumer is (1) face-to-face with a financial services representative who is providing a requested service and who may present the policy and respond to the consumer's questions, (2) engaged in electronic commerce through use of the internet or over a telephone, or (3) the recipient of traditional mail notice.

This inflexible 30-day standard is not in consumers' best interests. The point in time at which a new customer relationship begins is often the point at which the customer is most interested in learning about other products and services available from the institution. Mandating a 30 day "stand still" that prohibits a company from using information to better analyze the needs of its customers makes such a process much more difficult. Such a standstill would have a stifling effect on competition. A consumer seeking financial services is not likely to wait 30 days for a needed service. Moreover, this timing fails to recognize the possibility that a consumer may consent to the information sharing where the sharing will facilitate efficient delivery of services when he or she is presented with a choice in connection with an application or similar initiation document.

The timing should be flexible enough to take into account variations available through the method of service delivery selected, and further should acknowledge that consumers may decide to authorize sharing at the time a service is requested. The timing should provide for immediate sharing where the selection is made in person or through an internet transaction where the consumer is presented with the form or an "on application" selection with the opportunity to elect as part of the delivery of services the right to make the decision on the spot.

For example, a creditor using an online credit application could design a pop-up screen that provides a clear and conspicuous notice of the opt out right (including the means by which the consumer may opt out at some future time) and require the applicant consumer to opt out (or not opt out) before he or she can return to the application page and submit his or her completed application. The consumer has received notice in accordance with the FCRA, and has had the opportunity to opt out, also in accordance with the FCRA. Imposing a 30-day waiting period in this instance serves little or no purpose.

Information sharing among related companies is different than sharing with nonaffiliated third parties. This difference is recognized in both the GLBA and the FCRA. The difference should be recognized by the Commission and reflected in the Commentary. Moreover, companies should retain the flexibility to provide notice in any form to meet the manner and method consumers select to do business, and the Commentary should recognize and support this flexibility.

C. Continuing Opt Out Right

The Commentary provides that "[a] consumer may opt out at any time." Commentary § 6(c). While the FCRA does not provide that a consumer's right to prevent sharing of

information is an ongoing right exercisable at any time, we see no reason why consumers cannot opt out of the sharing of "opt out information" among affiliates at any point during their relationship with a company. However, this opt out can be prospective only, and the proposed Commentary should reflect that fact.

The FCRA provides that "opt out information" may be shared among affiliates if the consumer is given the opportunity "before the time that the information is *initially* communicated [to an affiliate]" to direct that such information not be shared. FCRA § 603(d)(2)(A)(iii) (emphasis added). Our reading of the statute tells us that once an item of "opt out information" is communicated by a company to an affiliate, the consumer no longer has a right to opt out of the sharing of that item of information. Although the consumer may opt out of the sharing of other items of information, his right with respect to already-shared information has been lost. Consequently, we do not believe that the Commentary can confer an opt out right on a consumer under these circumstances, and the proposed Commentary's language to the effect that a consumer can opt out "at any time" should be clarified. Such clarification is necessary to assure companies that they are not required to review and cleanse their systems of any "opt out information" that may have been shared prior to receipt of an opt out request.

D. Retention and Accessibility

The Commentary requires that companies provide opt out notices to consumers "so that they can be retained or obtained at a later time" by the consumer in writing (or electronically, if the consumer agrees). Commentary § 8(d). Not only is a "retention and accessibility" requirement not included in the FCRA, it makes little sense for opt out notices to be retained or accessible. The important consideration here is that consumers know of their right to opt out of information sharing and that companies honor that request – whether the actual notice and opt out election is retained and accessible is not relevant to consumer protection and poses significant compliance costs on the companies required to give these notices. A possible middle ground that might accommodate companies' information storage constraints and consumers' interest in their opt out rights, would be to allow a company to inform a consumer, upon his or her request, of its current policy with respect to the sharing of information with its affiliates. Alternatively, the Commentary could adopt the practice mandated by the Telephone Consumer Protection Act and require companies to provide written copies of their current policies, upon consumer request.

E. Electronic Notice Requirements

The proposed Commentary provides that for electronic notice to be considered to have been delivered, its receipt must be acknowledged by the consumer as a necessary step to obtaining a particular product or service. Commentary § 8(b)(iii). (The GLBA Privacy Rule has a similar requirement. *See* 16 C.F.R. § 313.9(b)(iii).) To the extent an FCRA opt out notice is

delivered to the consumer by electronic means, the Commentary provides that a consumer must acknowledge receipt of the electronic notice. Commentary § 6(a)(3). However, there is no similar requirement where a written notice is either hand-delivered or mailed. We do not believe that acknowledgment of electronic notices should be required if the same is not required of mailed notices – a notice should be deemed to be delivered if it is sent to the consumer's last known address, whether by e-mail or regular mail. Moreover, establishing different standards for e-mail and regular mail fails to acknowledge the explosive growth of e-mail and the rapid penetration of computers and e-mail into American homes. Regular mail is rapidly being superseded due to the speed and convenience of e-mail.

In any event, the Commentary's "acknowledgment of receipt" requirement is inconsistent with the recently enacted Electronic Signatures in Global and National Commerce Act ("ESIGN"). ESIGN provides that statutes, regulations or other rules of law that require written delivery of a notice are satisfied by the use of an electronic record if the entity delivering the notice complies with the consumer consent requirements in ESIGN. ESIGN §101(c)(1). By limiting delivery of the opt out notice to two options, *i.e.*, in writing or electronically, the Commentary is within the purview of ESIGN.[1] Therefore, once the company delivering the opt out notice has obtained a consumer's consent to receive electronic notices in accordance with ESIGN, the Commission may not impose additional requirements, *e.g.*, an acknowledgment of receipt.

The proposed Commentary provides that a company may not reasonably expect that a consumer to whom it sends notices via e-mail has received the notice, where the consumer does not obtain a product or service from the company electronically. Commentary § 8(b)(2)(ii). This too is inconsistent with ESIGN in that it would prohibit a company from honoring the request of a consumer who obtains a product or service non-electronically then later exercises consent to receive electronic notices in accordance with ESIGN. Under the Commentary, all consumers will be required to receive FCRA opt out notices in writing unless they have engaged in an electronic transaction. The writing requirement triggers the applicability of ESIGN, which the Commentary attempts to undo by impermissibly limiting electronic FCRA opt out notices to those consumers who receive electronic products and services.

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1 As noted, ESIGN applies only to laws or rules that require written delivery of a notice, and the FCRA does not require that an opt out notice be in writing. FCRA § 603(d)(ii)(a)(iii). Nonetheless, we believe that the proposed language of the Commentary effectively imposes a writing requirement. Moreover, the recent banking agency rules, to the extent they contain the same acknowledgment requirement, also are inconsistent with ESIGN. It is counterintuitive that the banking rules should be subject to challenge under ESIGN, but the identical Commission interpretation should be insulated from challenge because it does not have the force of law.

While there may be good reason to avoid permitting companies to force consumers to receive opt out notices via electronic means, there is little practical value to limiting consumer choice. Many surveys and news reports have recognized the exponential growth of e-mail as a preferred communication option, and it is likely that this growth will continue as computer hardware and software and internet access become more affordable and more accessible. Moreover, many companies now request e-mail addresses as part of their account opening documentation and ask customers if they may communicate with them by that means. If a consumer is willing to indicate his or her preference to receive communications via e-mail and provide consent consistent with ESIGN, there is little reason not to honor it simply because the product or service is not obtained electronically.

F. Revocation Should Not be Required to be Written

The proposed Commentary requires consumers to submit a written or electronic revocation of their opt out in order for the revocation to be effective. Commentary § 11. Such a requirement is not called for within the FCRA and is, in fact, inconsistent with the structure of the Commentary. It also places an unnecessary burden on the consumer. Instead, a company should be permitted to accept a consumer's oral revocation, so that the revocation can take effect immediately.

The Commentary is inconsistent in that it allows a consumer to opt out orally but does not permit that same consumer to withdraw that opt out election in the same manner. *Compare* Commentary §§ 7(b)(4) and 11. There is no reason for this distinction. If the Commission is concerned with accurately registering and tracking a consumer's revocation, that concern exists with regard to the consumer's initial opt out election as well as the revocation. This can be dealt with by requiring an institution to keep an accurate record of the consumer's elections. This would be the case whether an initial opt out choice or a subsequent revocation.

Consumers who apply for products or services over the phone might not wish to wait for a written revocation to be received and processed. For instance, a consumer who has previously opted out of information sharing and applies for a home equity loan over the telephone might also ask in the same transaction whether he qualifies for a credit card. However, the consumer's credit report could not be shared with the credit card affiliate without the consumer first sending a written revocation to the home equity lender.

III. Clarification is Needed in the Proposed Commentary

A. Non-Retroactivity

The Commentary should clearly indicate that it is prospective in nature and does not require re-notification to be given to consumers who previously received notice of affiliate sharing and opt out. Such statements are useful to assure covered institutions that they may rely

on earlier notices for affiliate sharing of current customer information and that such previous notices will not be invalidated or subject to retroactive challenge based on the new standards suggested by the Commentary.

B. Specific Means of Opting Out

The Commentary provides that "[a] company may require each consumer to opt out through a specific means, as long as that means is reasonable for that consumer." Commentary § 7(d). To avoid a possible argument that the opt out method must be specifically tailored for individual customers, we suggest that the Commission include with the final Commentary language that tracks the Supplementary Information to its GLBA Privacy Rule, which provides,

> Assuming a financial institution offers one or more of the opt out means provided in the examples in the final rule or a means of opting out that is comparably convenient for a consumer, the institution may require consumers to opt out in accordance with those means and choose not to honor opt out elections communicated to the institution through alternative means.

65 Fed. Reg. 33,646, 33664 (May 24, 2000).

C. Revised Notices

An addition should be made to Section 9 of the Commentary to clarify when a revised notice is required. We suggest language similar to that in Section 313.8(b)(2) of the Commission's Privacy Rule, *i.e.,* "[a] revised notice is not required if you disclose opt out information to a new affiliated party that you adequately described in your prior notice." The Supplementary Information should indicate that so long as the categories of opt out information and categories of affiliates given in a prior notice adequately describe any proposed sharing of new information or sharing with a new affiliate, no revised notice is necessary.

D. Termination of Customer Relationship

There is a conflict between the terms of the proposed Commentary and the Supplementary Information. Section 11 of the Commentary reads that a new notice and opportunity to opt out *must* be provided where a consumer establishes a new relationship with the company. However, the Supplementary Information states that a company may treat the prior opt out as continuing in effect *or* may provide the consumer with a new notice and opportunity to opt out. 65 Fed. Reg. 80,802, 80,806 (¶(J)). The final interpretations should clarify that a company need not send a new notice, but can honor a consumer's original election, if the company wishes. This would maintain needed flexibility – not all companies have the same data processing capabilities.

E. Definition of "Opt Out Information."

It seems clear to us that the term "opt out information," as used by the Commission in the Proposed Commentary, only encompasses information that otherwise would be considered to be a "consumer report," as that term is defined in FCRA § 603(d) and prior Commission guidance on the issue. However, some clarification might be needed in light of the Commission's proffered example of marital status as "opt out information" in § 5(d)(3)(v) of the Proposed Commentary. Marital status, in the context of a credit transaction, is not "opt out information," except under very limited circumstances – it generally cannot be considered in determining credit eligibility and therefore is not a consumer report.

Thus, in addition to clarifying what *is* "opt out information," it also would be helpful to know what *is not* "opt out information." For instance, under the so-called "joint user exception," the Commission has long maintained that a person who shares a consumer report with another person jointly involved with a credit, insurance, or employment decision is not a consumer reporting agency. 16 C.F.R. Part 600, App. § 603(f) – 8. For this reason we assume that a company that shares a consumer report with a "joint user" affiliate does not need to give the consumer notice and an opportunity to opt out of such sharing. *See also* 16 C.F.R. § 313.15(a)(5)(ii) (can share information from a consumer report). Similarly, we assume that a company that shares identifying information (so-called "above-the-line" or "header" information), that is not used to make a credit, insurance, or employment decision, does not need to give consumers notice and an opportunity to opt out of such sharing. *See* 16 C.F.R. Part 600, App. § 603(d) – 4(F) (name and address is not a consumer report). Finally, we assume that sharing information with an affiliate for the purpose of servicing an account or processing data is not "opt out information." *See* 16 C.F.R. §§ 313.13 and 313.14 (specifically excepting from the Privacy Rule's opt out requirements nonpublic personal information provided to data processors and service providers).

IV. FCRA Authority

A. Rulemaking Authority

As the Commission recognized in its release proposing the FCRA interpretations, it has no authority to make rules under the FCRA. 65 Fed. Reg. 80,802, 80,803 (Dec. 22, 2000). Nonetheless, from our perspective, by proposing this new FCRA Commentary, the Commission is engaging in a rulemaking.

Rules generally impose additional substantive requirements on regulated persons, while interpretations simply clarify or explain the law. *See Bailey v. Sullivan*, 885 F.2d 52, 62 (3d Cir. 1990). An interpretation should fill in interstices in the law or provide guidance where it is needed, but should not impose affirmative obligations not contemplated in the law. We do not believe that the Commission can do by interpretation what it cannot do by rule.

The Commission's proposed Commentary imposes substantive obligations not imposed by the FCRA on companies that might share consumer information with their affiliates. For instance, the Commentary (1) mandates the content of the notice, (2) effectively requires a 30-day waiting period before a consumer can be deemed to have not opted out, (3) requires that a company allow a consumer to opt out at any time, (4) requires that an opt out notice be in writing, (5) requires that a revocation of an opt out be in writing, (6) requires that the notice be in a form that can be retained and accessible, (7) imposes a new requirement that consumers be given a "reasonable opportunity and means" to opt out and then defines those terms to impose still other requirements on companies, (8) imposes new requirements with respect to delivery of opt out notices, (9) imposes new requirements with respect to joint applicants, and (10) requires certain procedures to be followed when a consumer terminates his relationship with a company. While we do not object to many of these requirements, we believe that they make the Commentary look more like a rule than an interpretation.

Moreover, the Commentary tracks the language of the banking agencies' rules word-for-word.[2] In those few instances where a mandatory requirement from the banking rules is replaced with more precatory language, the Supplementary Information in the Commission's release makes clear that the provision is indeed a requirement. For instance, while the Commentary provides only that a company "clearly discloses" a notice if the notice is retained and accessible, the banking agencies' rules explicitly require retention and accessibility of opt out notices ("[y]ou must provide an opt out notice so that it can be retained or obtained at a later time"). *Compare* Commentary § 8(d) *with, e.g.,* OCC Proposed Rule § 41.8(d). Although the difference in language with the banking agencies' rules seems to demonstrate that the Commentary's provision is not a requirement, the Commission's staff analysis nonetheless states that "a company *must* provide the notice so that the consumer can retain it or obtain it at a later time." 65 Fed. Reg. 80,802, 80,805 (Dec. 22, 2000) (¶(H)) (emphasis added). Thus, to all appearances, the Commission itself is unsure that it can require affirmative undertakings – although it has hedged the language of the Commentary, it has used the section-by-section analysis to impose a new requirement on regulated persons.

B. Interpretive Authority

In our experience, an interpretation is intended to eliminate confusion, uncertainty, or ambiguity, and is appropriate where a statute is unclear or of doubtful construction. On the other hand, an unambiguous statute should not be altered or supplemented by an interpretation. We do not see any ambiguity in the FCRA's affiliate sharing provisions, and have not seen any ambiguity in those provisions since they were made a part of the FCRA in 1996. On the

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2 The only notable omission from the Commentary as compared to the bank rules is the requirement that companies not discriminate against consumers who have elected to opt out of information sharing.

contrary, we believe the FCRA affiliate sharing provisions to be a model of clarity and simplicity – consumers must be given clear and conspicuous notice that information concerning them may be communicated to affiliated companies and they must be given an opportunity to opt out of such sharing. Moreover, there is no indication that these provisions have not performed as intended and will not continue to perform as intended.

While we have no doubt that the Commission has general authority to interpret the statutes that it enforces, we believe that the Commission may not have authority to issue interpretations under the FCRA. The 1996 amendments to the FCRA gave interpretive authority to the banking agencies, but did not extend such authority to the Commission. The 1990 FCRA Commentary was issued by the Commission under its general administrative enforcement authority in FCRA Section 621 and its authority under 16 C.F.R. Section 1.73 to issue FCRA interpretations. However, the 1990 Commentary (and 16 C.F.R. Section 1.73, the Commission Rule of Practice on which it was based) were promulgated when the FCRA was still silent on Commission interpretive authority. Congress can be presumed to know that the Commission was issuing interpretations under the FCRA, and it cannot have been accidental when Congress in 1996 gave the banking agencies interpretive authority but failed to give such power to the Commission.

Conclusion

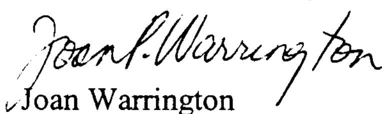
We believe that the Commission's proposed Commentary to the FCRA is unnecessary. Every indication is that the FCRA opt out provisions are operating as intended, and that consumers are being notified adequately of their right to opt out of information sharing. Moreover, we believe that the proposed Commentary is ill-advised to the extent that it may may confuse consumers and may interfere with implementation of the more urgent GLBA and the Commission's accompanying Privacy Rule. Finally, we believe that the Commission is without authority to promulgate the proposed Commentary.

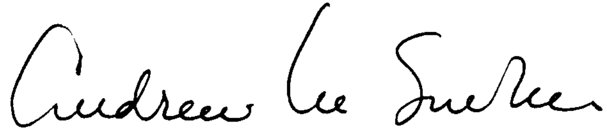
However, should the Commission determine to proceed with the Commentary, we suggest several modifications and clarifications. We recommend generally that the Commentary preserve needed flexibility so that companies may have the leeway to notify consumers of their FCRA rights in the clearest and most sensible way, given each company's technical capabilities, planned use of the data and the content of other notices provided to consumers. More specifically, the effective date of the Commentary should be delayed until companies' first annual notices are due under the Privacy Rule. Notices and revocations of opt out should not be required to be in writing. The Commentary should not require that consumers must acknowledge notices given electronically. Consumers should be able to consent to information sharing. Notices should be able to be given on applications, and if consumers choose not to opt out, their information should be able to be shared immediately. The Commentary should not require retention and accessibility of notices. The Commentary should make clear that it is not retroactive, that the method of opt out need not be determined consumer-by-consumer, that

revised notices are not required where new categories of affiliates or information were adequately described in earlier notices, and that a new notice is not required where a consumer renews his relationship with a company. Finally, the Commentary should clarify that generally recognized exceptions to the definition of "consumer report" (*e.g.*, the "joint user" exception, the "header information" exception, and the servicer exception) apply to "opt out information" as well.

Thank you for your consideration of our comments. Please feel free to contact Joan Warrington at (212) 506-7307 or Andrew Smith at (202) 942-3952, if you have questions or need further information.

Yours very truly,





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