

# MORRISON & FOERSTER LLP

ATTORNEYS AT LAW

SAN FRANCISCO  
LOS ANGELES  
SACRAMENTO  
ORANGE COUNTY  
PALO ALTO  
WALNUT CREEK  
DENVER

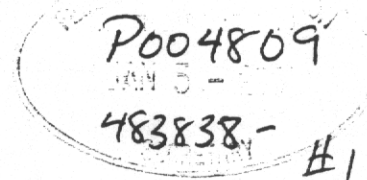
2000 PENNSYLVANIA AVENUE, NW  
WASHINGTON, D.C. 20006-1888  
TELEPHONE (202) 887-1500  
TELEFACSIMILE (202) 887-0763

NEW YORK  
LONDON  
BRUSSELS  
BEIJING  
HONG KONG  
SINGAPORE  
TOKYO

January 5, 2001

ORIGINAL

Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue  
Washington, DC 20580



Re: Proposed FCRA Interpretations

Dear Sir/Madam:

This letter is submitted in response to the request for comment from the Federal Trade Commission ("FTC") on its Proposed Interpretations implementing the affiliate-sharing provisions of the Fair Credit Reporting Act ("FCRA"). The comments set forth in this letter are sent on behalf of one of our financial institution clients regarding the Proposed Interpretations.

## General Comments

The FCRA provides that a consumer report does not include the communication of certain information among affiliated companies if the consumer is informed that the information may be shared and is given the opportunity to direct that such information not be shared. The supplementary information accompanying the Proposed Interpretations notes that because transaction and experience information is not a consumer report such information may be shared among affiliated parties without providing an opt out notice, and the sharing party would not be viewed as a consumer reporting agency.

The FTC should clarify that many other arrangements involving the transmission of nontransaction or nonexperience information by one affiliated party to another affiliated party also would not require an opt out notice, nor would such a transmission expose affiliated entities to the duties imposed on consumer reporting agencies. In particular, it is common for affiliated financial institutions to underwrite transactions through one of several affiliated companies. Typically, these affiliated companies use a common information technology ("IT") system and a common service affiliate to evaluate applications and related information received by the institutions generally, and

January 5, 2001

Page Two

may even share common management and employees. In general, a consumer may submit an application for a financial product to the overall financial holding company, and that information, as well as a consumer report, is entered into the common IT system. The affiliate that is best suited to offer the product to the consumer would then contact the consumer and, as appropriate, disclose the terms and conditions applicable to the financial product.

While we do not believe that any information has been "shared" as envisioned by the FCRA affiliate sharing provisions, we urge the FTC to clarify that the use of information by affiliated parties in circumstances such as these would not require an opt out notice to be provided before such information can be used by those parties. In this case there has simply not been any "communication" of credit worthiness information by a consumer reporting agency -- something that must occur before information meets the definition of a consumer report. Moreover, if there is any sharing of information, it is in order to effectuate the requested transaction, and not for any marketing purposes. Thus, we believe that the FTC should expressly recognize that institutions may use a common affiliate to evaluate application related information in these circumstances without providing an opt out notice.

In addition, requiring a notice and opt out before an application or consumer report could be used in these circumstances would significantly limit the ability of institutions to provide the product that best meets the consumer's needs and would significantly delay, if not prevent, institutions from providing consumers financial products which they have applied for. Requiring an opt out notice in these circumstances would be particularly troublesome if an institution had to do so in writing or wait 30 days before sharing information, as suggested in the FTC's Proposed Interpretations. In this case, institutions simply could not provide the product that best meets the consumer's request. Thus, we believe it is essential for the FTC to clarify in the final Interpretations that this common evaluation process does not involve sharing of information that would trigger an FCRA opt out notice.

### **Proposed Definition of "Opt Out" Information**

The FTC proposes to define "opt out information" as information: (1) bearing on credit worthiness or similar factors; (2) used for eligibility purposes; and (3) that is not transaction or experience information. This definition is too narrow, and could be interpreted to encompass information that is not a consumer report as defined in the FCRA, since it fails to exclude information that is expressly excluded from the definition of a consumer report under section 603(d)(2) of the FCRA.

Consumer report is defined as the communication of information "by a consumer reporting agency" bearing on a consumer's credit worthiness or similar factors, that is used to establish eligibility for credit or other purposes specified in the FCRA. The

January 5, 2001

Page Three

proposed definition of "opt out information" fails to recognize that only information communicated by a consumer reporting agency may be a consumer report. This is an essential part of the definition of a consumer report, and the Proposed Interpretations should incorporate this provision in the definition. In addition, all of the exclusions from the definition of a consumer report in the FCRA should be reflected in the definition of opt out information. As drafted, this definition expands the scope of the opt out right beyond the type of information covered by the FCRA.

### **Content of Opt Out Notice**

The FTC proposes that institutions must explain the categories of information about the consumer that may be communicated with affiliates; the categories of affiliates; the consumer's ability to opt out; and a reasonable means to opt out. The amount of detail required by the FTC in the Proposed Interpretations for the categories of information that may be communicated with affiliates far exceeds the requirements of the FCRA itself. In addition, the communication of such detailed information is not likely to benefit consumers. For example, informing consumers that their marital status may be shared is unlikely to provide meaningful information to most consumers that will assist them in making a decision about whether they should opt out of the sharing of information. In fact, providing detailed notices may increase the likelihood that consumers will not read or comprehend the disclosures provided. Thus, the FTC should track more closely the FCRA language itself in describing the affiliate sharing notice.

### **Reasonable Opportunity to Opt Out**

The FTC states that an institution provides a reasonable opportunity to opt out if it provides a reasonable period of time for the consumer to opt out. All of the examples dealing with the opt out notice provided by the FTC in the Proposed Interpretations state that a reasonable opportunity has been provided by an institution if "at least 30 days" has been given to the consumer to opt out before information is shared. A thirty-day period is simply too long a time period to apply in all circumstances. A reasonable opportunity may entail a shorter time period when, for example, a notice is provided electronically to a consumer. Providing that 30 days is appropriate in all circumstances is not consistent with the approach taken by the FTC in its final privacy regulations and is not required by the FCRA. In addition, this approach will impair the ability of consumers to obtain, and the ability of institutions to effectively and efficiently deliver, financial products.

### **Delivery of Opt Out Notice**

The FTC proposes that the FCRA affiliate sharing notice must be provided in writing or electronically. Oral notices would not be permitted. We believe the final Interpretations should authorize institutions to provide notices orally. The FCRA does

January 5, 2001

Page Four

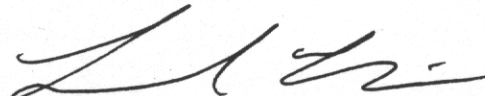
not require written notices. In addition, oral notices can provide an effective and meaningful notice to consumers, for example, when consumers conduct business by telephone. Furthermore, when a transaction is conducted by telephone, permitting oral notices would enable consumers to more easily obtain products offered by affiliated institutions, without the burden, inconvenience, and delay required for a paper notice.

#### **Joint Notice with Affiliates**

The FTC proposes that institutions may provide a joint notice with one or more affiliates as long as the notice identifies each person providing it. We believe consumers may benefit from the ability to receive a single notice from multiple affiliates, rather than numerous notices from such parties; thus, institutions should have the flexibility to provide notices in this manner. However, as currently worded, the proposal might be read to suggest that the name of each affiliate must be provided on the notice. In the case of numerous affiliates a lengthy list of names is unlikely to be meaningful to consumers or to assist them in deciding whether to opt out of sharing. A description of the types of entities could minimize institutions' burdens and increase consumer understanding. Thus, we suggest clarifying in the final Interpretations that institutions that provide a joint notice with one or more affiliates may provide either the names of such affiliates or a description of the types of affiliates.

Thank you very much for the opportunity to comment on these important issues. If you have any questions concerning these comments, or if we can otherwise be of assistance in connection with this matter, please do not hesitate to contact me at (202) 887-8778.

Sincerely yours,



Leonard Chanin