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*MasterCard International*

ORIGINAL

**Via Hand Delivery**

January 31, 2001

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

Re: Proposed Interpretation of Fair Credit Reporting Act

Dear Sir:

This comment letter is filed on behalf of MasterCard International Incorporated ("MasterCard")[1] in response to the proposed interpretation of the affiliate sharing provisions of the Fair Credit Reporting Act ("FCRA") ("Proposal") published by the Federal Trade Commission ("FTC"). MasterCard is grateful for the opportunity to comment on the Proposal.

We appreciate the FTC's effort to provide guidance which coordinates compliance with the affiliate sharing provisions of the FCRA with the rules adopted to implement the Gramm-Leach-Bliley Act's ("GLBA") privacy disclosures ("Privacy Rules"). In fact, the FTC has attempted to make its guidance substantively similar to the proposed FCRA rules published by the Board of Governors of the Federal Reserve, the Comptroller of the Currency, the Office of Thrift Supervision, and the Federal Deposit Insurance Corporation (collectively, the "Banking Agencies") on October 20, 2000 ("Banking Agency Proposal"). We believe, however, that an alternative approach would be more appropriate since the affiliate sharing provisions in the FCRA are much simpler than the GLBA's privacy provisions. The FCRA simply requires that consumers be furnished a

[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.

clear and conspicuous notice that information may be communicated among affiliates and that consumers be provided an opportunity to opt out. Unlike the GLBA, 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. Given that these practices may not follow the approach outlined in the Privacy Rules, nor is such an approach contemplated by the FCRA, it would not be appropriate to conform the Proposal entirely to the requirements of the Privacy Rules. Instead, the primary framework for the Proposal should be the plain language of the FCRA itself. We recognize that this approach will produce results that are different than those of the GLBA, but we believe that is what the FCRA requires.

We offer the following comments which we hope will assist the FTC as it moves toward the development of a final interpretation ("Final Interpretation") which provides consumers with meaningful affiliate sharing disclosures while honoring the approach set forth in the FCRA itself.

**Effective Date**

One of the most significant issues raised by the Proposal is the question of when the Final Interpretation will become effective. The FTC states that it plans to "enforce" its Final Interpretation "only after any similar final regulations issued by the [Banking Agencies] have become effective." We applaud the FTC for adopting this approach. However, regardless of when the Banking Agencies make their Final Rule effective, we strongly urge the FTC to study the logistical issues raised with respect to compliance with the Final Interpretation, especially in light of current efforts to comply with the Privacy Rules. At the urging of the FTC, many financial institutions have already printed, or are in the process of developing, their privacy notices in order to comply with the Privacy Rules prior to July 1, 2001. Virtually none of these notices will contain the entirely new information that the Proposal suggests would be necessary. Rather, the privacy notices were drafted in reliance on the plain language of the GLBA and the FCRA. As a result, any suggestion by the FTC that the GLBA privacy notices should be revised in order to conform with the Final Interpretation would essentially force financial institutions to discard and reprint the millions of privacy notices that will have been printed by the time the FTC issues a Final Interpretation.

In order to address this issue, we urge the FTC not to make any Final Interpretation effective until the *later* of July 1, 2002, or the time at which a financial institution sends its annual notice to the consumer in the year 2002. This approach would allow financial institutions to forge ahead with their current compliance programs and deplete their current stock of privacy notices, avoiding

unnecessary costs associated with discarding and reprinting millions of notices. Furthermore, providing the delayed effective date suggested above would save consumers from absorbing the enormous costs of reprinting privacy notices. These increased costs would be difficult to justify, particularly since consumers already receive appropriate affiliate sharing notices under the FCRA. Specifically, financial institutions that wish to share "opt out information" with affiliates already provide the affiliate sharing notice and opt out based on the existing statutory language of the FCRA. Moreover, any privacy notices furnished to consumers pursuant to the GLBA 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.

It is just as important that the FTC apply the Final Interpretation prospectively only. Specifically, the Final Interpretation should apply only to notices provided on or after July 1, 2002. It is particularly important that the FTC clarify that the Final Interpretation does not suggest that financial institutions should (i) send a revised FCRA notice to their consumers solely because the most recent notice provided was not consistent with the Final Interpretation or (ii) send a revised GLBA privacy notice solely because the most recent GLBA notice did not include the new FCRA notice outlined in the Final Interpretation. We believe this is the intent of Section 9 of the Proposal and Section 313.8 of the Privacy Rules. Furthermore, there is no justification for imposing on financial institutions and consumers the compliance burdens and costs associated with providing revised privacy notices given that those consumers would have already received a notice and opportunity to opt out under the FCRA.

**Examples (§ 2)**

We commend the FTC for including examples in the Proposal, and we urge that the FTC include examples in the Final Interpretation. 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 Interpretation. It is also important that the FTC maintain in the Final Interpretation the language in the Proposal clarifying that the examples are not exclusive.

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

with the Final Interpretation by using applicable clauses set forth in the sample notice and that 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 suggests notices should 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 "[c]ompanies have flexibility in determining how to make their notices clear and conspicuous." We urge the FTC to retain this clarification in the Final Interpretation.

The FTC specifically requests comment as to how "clear and conspicuous" should be interpreted in order to ensure clear and conspicuous disclosures under the GLBA and the FCRA. 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 federally mandated consumer disclosures (*e.g.,* the Privacy Rules, portions of Regulation Z, and others such as Regulations B, E, and the rest of Z). These discrepancies have 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 this issue, we urge that the FTC incorporate into the Final Interpretation 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 relevant statute/regulation/interpretation. For example, if an affiliate sharing notice is included with a notice provided under Regulation Z, the affiliate sharing notice should comply with the "clear and conspicuous" standard in the Final Interpretation, while the Regulation Z notice should comply with the separate "clear and conspicuous" standard 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 attempt 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: "It also includes an electronic communication to a consumer, if the consumer agrees to receive the communication electronically."

*"Opt Out Information"*

The FTC defines "opt out information" by incorporating 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 Proposal properly excludes information relating solely to transactions or experiences between the consumer and the person reporting the information from the definition.

It appears that the definition is intended to clarify that the affiliate sharing notice and opt out provisions apply only to information that would otherwise meet the definition of "consumer report." However, since the definition of "opt out information" incorporates only certain components of the statutory definition of "consumer report," this important clarification is not fully realized in the Proposal. Therefore, we recommend that the definition of opt out information state that the term 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).

The FTC specifically asks whether the term "FCRA opt-out information" would be a better term to use in the Final Interpretation. We believe it would be. However, we also believe it is important that the FTC's terminology remain consistent with that of the Banking Agencies, to the extent applicable. Therefore, we would urge the FTC to modify the term only if the Banking Agencies do the same.

**Contents of the Opt Out Notice (§ 5)**

Under the Proposal, the FTC suggests that the affiliate sharing opt out notice should 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) a reasonable means to do so. This is similar to the requirements under the GLBA. However, the plain language of the FCRA, the law which the Proposal purports to interpret, does not require or mention 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.

The statutory language of the FCRA is in stark contrast to the plain language of the GLBA which mandates disclosure of certain categories of information collected and categories of those who will receive the information. This distinction is important, and we urge the FTC to honor it in the Final Interpretation. In particular, we urge that the Final Interpretation indicate that a financial institution may comply with the FCRA's affiliate sharing notice requirement without having to disclose the categories of opt out information or categories of affiliates to which the information is communicated. Such a clarification in the Final Interpretation would be necessary to implement the requirements and intent of the FCRA affiliate sharing provisions more accurately.

If the FTC nevertheless chooses to interpret the FCRA as imposing notice requirements that go beyond the plain language of the statute, the FTC should ensure that financial institutions are able to draft clear and concise notices. In so doing, it would be important that the FTC not suggest any other notice requirements in the Final Interpretation that go beyond the plain language of the FCRA. This goal is relevant to the FTC's specific request for 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 FTC not include these suggestions in the Final Interpretation. Given that these additional disclosures would detract from the essential components of the FCRA affiliate sharing notice (*i.e.* that the sharing will take place and how the consumer can opt out), such disclosures would not be a net benefit for consumers.

Also, in the event the Final Interpretation goes beyond the language of the FCRA and suggests that disclosure of categories of information or affiliates is required, the FTC should enable affiliates to craft the disclosure in anticipation of future activities. In this regard, it would be important to retain the language 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 portion of the Proposal clarifying that financial institutions may allow consumers to opt out of certain information sharing programs while continuing to permit others. This flexibility should be retained in the Final Interpretation since it is important to financial institutions and consumers alike.

The FTC also specifically asks whether it is "clear from these interpretations that the [FTC] views as insufficient a very general notice that states that the company may share any information it obtains on the consumer with any of its affiliates." In fact, such an interpretation is not clear in the Proposal, nor should it be. This interpretation would be a fundamental error insofar as it does not reflect the different ways in which a financial institution may incorporate its FCRA notice into its GLBA notice. For example, it is conceivable that a financial institution could make a meaningful GLBA/FCRA disclosure stating that it may share all of the information it collects with all of its affiliates, subject to an opt out. Such a notice may cover all information the financial institution collects (as opposed to limiting the notice to "nonpublic personal information") and list the types of affiliates within the corporate family, each with appropriate examples. Despite the Proposal's apparent prohibition on such a statement, the financial institution in this example could, in fact, make a meaningful disclosure to the consumer by stating that it may share all of the information it collects with its affiliates. This approach not only gives a meaningful disclosure to the consumer, but it allows for simple integration between the GLBA and the FCRA notices. To suggest that a financial institution must develop a disclosure more consistent with the sample notice provided in the Proposal would not be appropriate and could result is unnecessarily fragmented GLBA/FCRA disclosures. Therefore, the FTC should clarify its Final Interpretation, noting that a financial institution may integrate its FCRA disclosure with its GLBA privacy disclosure in a manner that provides the consumer with all of the information required by the FCRA, regardless of whether the approach is modeled strictly on the sample notice.

**Reasonable Opportunity to Opt Out (§ 6)**

The Proposal appears to establish a general rule that once an financial institution provides an affiliate sharing notice to a consumer the financial institution must wait 30 days before sharing information about the consumer with other affiliates. Such an interpretation is inconsistent with the language and intent of the affiliate sharing provisions of the FCRA. In many instances, it also would be detrimental to consumers because it may inadvertently force a financial institution to wait 30 days before sharing information *regardless of whether the consumer*

*wishes to have the information shared more quickly*. For example, the Proposal suggests that when a consumer applies for one financial product but is interested in obtaining information about other products offered by affiliates for which the consumer may qualify, the consumer would be forced to wait at least 30 days before any opt out 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.

Aside from needlessly inconveniencing the consumer, a 30-day waiting period could produce inappropriate results in other contexts as well. For example, if the FTC maintains its the 30-day rule, financial institutions could 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 the FTC address this issue when the Final Interpretation is adopted. First, the Final Interpretation 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 should be permitted to share the information unless and until the consumer subsequently opts out.

Second, the Final Interpretation 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 a desire to have information shared among affiliates. Such sharing would 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 avoid any suggestion that affiliates must ignore a consumer's choice to authorize sharing immediately.

Third, the Final Interpretation should clarify that it does not in any way affect 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, the Final Interpretation should clarify that the affiliate sharing rules do not apply when a financial institution shares information with an agent who performs services for the financial institution. 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 FTC suggests that a financial institution must wait 30 days from the date a consumer "acknowledges" receipt of the electronic notice. We urge the FTC to eliminate this approach. There simply is no reason to suggest that acknowledgement of a notice delivered electronically is required. At this point in time, it appears 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 suggests 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, Electronic Fund Transfer Act, and other portions of the FCRA, the FTC should not suggest that acknowledgement is required for any component of the notice required under the Proposal.

Furthermore, as the FTC considers this issue, it should account for 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 track each consumer's notice to determine whether a given 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. Requiring acknowledgement 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 suggests that a financial institution must 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 FTC to incorporate this clarification into the Final Interpretation 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 FTC intended to establish such a subjective, individualized standard, and we urge that the FTC clarify that an opt out method is acceptable provided that it satisfies the general suggestion of providing "a reasonably convenient method of opting out."

**Delivery of Opt Out Notices (§ 8)**

As noted above, the Proposal suggests 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 GLBA, 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 Interpretation. Accordingly, we urge the FTC to modify the Proposal to recognize oral disclosures of the FCRA opt out notice as sufficient. This would 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, or request information about, 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.

The FTC also requests comment on whether "the proposed delivery standard, which does not require actual notice, [is] faithful to the statutory exclusion that applies only if the opt out right is 'disclosed to the consumer.'" We appreciate the FTC's desire to remain faithful to the plain language of the FCRA in

this instance. In fact, although we agree with the standard, we believe that a standard of providing notices with a reasonable expectation of actual notice goes beyond the requirements of simply disclosing information to the consumer. Furthermore, to suggest that consumers receive "actual notice" would require costly compliance programs (*e.g.* separate signature requirements or return receipt mailings) with absolutely no justification for the increased costs and inconvenience.

**Revised Opt Out Notice (§ 9)**

The Proposal 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 FTC intends this approach to be consistent with the Privacy Rules. The Proposal, however, does not include any of the clarifications set forth in Section 313.8 of the Privacy Rules. For example, unlike the Privacy Rules, the Proposal 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 Proposal 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 Interpretation.

**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 suggestion should be adopted in the Final Interpretation.

The FTC has solicited comment as to whether it 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. We believe that the FTC should not establish a definition of "reasonably practicable." There may be instances when the opt out could be processed in a period of time less than what ever is suggested in the Final Interpretation. In other circumstances, it may require more than the defined time to effectuate an opt out completely. Therefore, we urge the FTC to refrain from defining the term "reasonably practicable."

**Duration of Opt Out (§ 11)**

The FTC proposes 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 FTC to delete the suggestion

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 FTC to delete the suggestion that an opt out revocation must be in writing.

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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
General Counsel

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