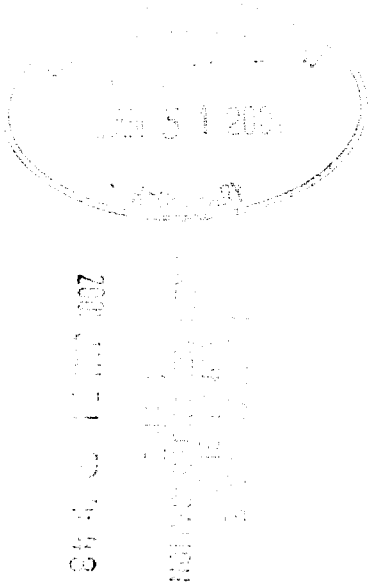
National Multi Housing Council
National Apartment Association
National Association of Realtors
National Affordable Housing Management Association
National Leased Housing Association



January 31, 2001

Secretary, Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Comments on the Federal Trade Commission's Proposed Interpretations of the Provisions of the Fair Credit Reporting Act Regarding Communications between Affiliates

Dear Sir or Madame:

The National Multi Housing Council, the National Apartment Association, the National Association of Realtors, the National Affordable Housing Management Association and the National Leased Housing Association (hereinafter collectively referred to as the commenters) hereby submit the following comments to the Federal Trade Commission ("the Commission") on its notice regarding proposed interpretations of the provisions of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681-1681u, with respect to communications between affiliates.

Collectively, these associations represent most of the multifamily rental housing industry in the nation, providing leadership for the apartment industry on legislative and regulatory matters and promoting the exchange of information to enhance quality, affordable apartment living. They are making this submission in response to the request by the Commission in the Proposed Rule for comments on the appropriate interpretation of FCRA relative to activities that may involve information-sharing between affiliates insofar as they relate to the rental housing industry.

Relevant Rental Industry Background

To place these comments in proper context and provide a frame of reference for the Commission in fashioning interpretative guidance as it may apply to the rental housing industry in the context of FCRA, it is important to note the following. The U.S. rental housing industry provides homes for approximately 33 million families and individuals, representing the entire spectrum of the American population. Of the more than forty thousand business entities that report their business as being "operators of apartment buildings," almost 99 percent qualify as

small businesses under Small Business Administration guidelines. With respect to these, apartments with five or more units account for about 15 percent of the entire housing stock. Apartments with two to four units account for an additional 8 percent of the housing stock, and single family rentals account for an additional 12 percent of the housing stock.

Given their limited resources and the fact that these small business apartment owners are responsible for meeting the housing needs of so much of the American public, it is important that their regulatory obligations under the various federal statutory regimes emphasize consistency, be easily understood and implemented, and be as free of unnecessary administrative burdens as is practical, consistent with the objectives of Congress and the public interest to be advanced by the applicable law.

In the present instance, this is all the more so because the Commission is attempting to provide interpretative guidance to harmonize compliance and reporting obligations under two complex, related statutory regimes, FCRA and the Gramm-Leach-Bliley Act ("GLBA").[1] As is generally reflected in these comments, however, much of the information upon which these small apartment owners rely in making rental decisions is transaction and experience information, not consumer credit information provided by consumer reporting agencies. In addition, apartment owners and managers do not function as "financial institutions."

In view of the above, we commend the Commission's efforts to ease compliance and promote consistency by providing guidance conforming its interpretation of the regulatory requirements of these two statutory regimes where appropriate.[2] At the same time, we hope that the results of that effort will be responsive to the needs of the small businesses that comprise the rental apartment industry and be consistent with prior regulatory interpretations specific to that sector that have previously been addressed by the Commission in the context of FCRA.

General Comments on the Scope of the Proposed Interpretations

Based upon our review of the Commission notice ("the Notice"), it is our understanding that the proposed interpretations being considered at this time are somewhat circumscribed in scope and also are intended to be consistent with the recently proposed banking regulations. Specifically, Section 621(a) of FCRA[3] contemplates that the Commission will exercise enforcement authority with respect to its provisions, except for matters relating to banks and

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1/ Pub. L. 106-102.

2/ For example, requirements regarding the content and delivery of the FCRA opt out notice that are generally consistent with the corresponding provisions of the GLBA privacy regulations.

3/ 15 U.S.C. 1681s(a).

similar financial institutions that are regulated by the federal banking agencies. *See* Section 621(b)(1-3).[4]

However, prior to 1999, all agencies, including the Commission, were prohibited from issuing regulations implementing the FCRA.[5] The GLBA repealed this prohibition, authorizing the federal banking agencies[6] to jointly prescribe such regulations as necessary to carry out the purposes of the FCRA as to the financial institutions under their jurisdiction.[7] Pursuant to that authority, the federal banking agencies issued proposed FCRA regulations in a Notice of Proposed Rulemaking published in the Federal Register on October 20, 2000 (65 Fed. Reg. 63120).

While the Commission was not given a similar grant of authority, the Notice indicates that the Commission's proposed interpretations are intended to be substantively parallel to the proposed regulations issued by the federal banking agencies in their Notice of Proposed Rulemaking. That is because some entities subject to the enforcement authority of the Commission, rather than the Federal banking agencies, also share information with their affiliates. We agree with the Commission that it is important for such entities to be aware of the Commission's interpretations of the FCRA as to issues on which the Federal banking agencies propose to issue regulations.[8]

Additionally, the GLBA also sets its own standards for disclosure of nonpublic personal information to nonaffiliated third parties ("privacy provisions"), albeit as they apply to *financial institutions*. 15 U.S.C. 6802; *see also* 12 U.S.C. 6803. With respect to the GLBA privacy provisions, the Commission was authorized to issue regulations and has, in fact, taken final regulatory action to implement the GLBA privacy provisions, 65 Fed. Reg. 33646 (May 24, 2000), as have the Federal banking agencies. 65 Fed. Reg. 35162 (June 1, 2000).

4/ 15 U.S.C. 1681s(b)(1-3).

5/ 15 U.S.C. 1681s(a)(4), repealed by section 506(b) of the GLBA.

6/ The Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, and Office of Thrift Supervision.

7/ Section 621(e)(1), 15 U.S.C. § 1681s(e)(1), added by section 506(a) of the GLBA.

8/ The Federal banking agencies have stated their intent to conform their privacy regulations and FCRA regulations where appropriate. 65 Fed. Reg. 63120, 63121. Although Section 603(d)(2)(A)(iii) of the FCRA has been effective since September 30, 1997, the Commission plans to enforce that provision in accord with any interpretations it may issue in this proceeding only after any similar final regulations issued by the Federal banking agencies have become effective.

Because the GLBA privacy regulations do not "modify, limit, or supersede the operation of the Fair Credit Reporting Act," 15 U.S.C. 6806, both the privacy regulations and the FCRA may apply to disclosure of certain consumer information, particularly in the case of a financial institution. Moreover, if a financial institution provides an opt out notice under the FCRA, that notice must be included in certain notices mandated by the privacy regulations, including annual notices to customers. 15 U.S.C. 6803. Therefore, the Commission has generally indicated that information-sharing policies and practices should take into account both the GLBA (and its privacy regulations) and the FCRA.

Consistent with this, the Commission apparently intends the proposed interpretations to focus on providing guidance on compliance with the affiliate information sharing provisions, addressing such matters as the content and delivery of the appropriate "opt out" notices to consumers. In addition, the proposed interpretations appear intended to allow companies to provide notices and process opt-out elections in a manner similar to the final regulations implementing the privacy provisions of the GLBA.

While these comments are intended to address the matters referenced in the Notice, we believe the final Commission interpretations should also clarify and provide guidance to the regulated community in delineating those circumstances in which the GLBA does not apply to matters covered by FCRA, such as when the information that is shared among affiliates does not involve financial institutions or other entities encompassed by the GLBA.

Additionally, the Commission's interpretations will be most beneficial if they address not only the requirements related to the delivery and content of opt out notices, but more generally explain those threshold circumstances in which information sharing among affiliates does not fall within the scope of FCRA or trigger any notice obligation.[9] In this respect, to the extent that the Commission intends to issue additional interpretative guidance in the future addressing these matters or others beyond the scope of the opt-out provisions, we look forward to the opportunity to provide further comment at that time.

It should also be observed that the Commission's Notice indicates that the proposed interpretations would be added as Appendix B to 16 CFR Part 600 following the "Commentary on the FCRA" that the Commission issued in 1990, which would be redesignated as Appendix A. We strongly urge the Commission to retain the comprehensive 1990 Commentary on FCRA, along with the new proposed interpretations. While the 1990 Commentary does not address the

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[9/] For example, while the Notice addresses the circumstances under which "other" non-consumer report information covered by FCRA may be communicated to affiliates, *see* Notice at 7, it does not fully explain those circumstances in which shared information will constitute neither a consumer report nor "other" information covered by FCRA.

extensive changes and additions made in the 1996 Amendments,[10] we agree with the Commission that the Commentary will continue to be of use to the public because of its guidance in areas not affected by the 1996 Amendments or not included in the proposed new interpretations. The Commission's proposal not to withdraw the Commentary at this time will assist the regulated community by continuing to make this additional long-standing guidance available.

Interpreting the Scope of FCRA

FCRA generally sets forth legal standards governing the collection, use, and communication of credit and other information about consumers. Section 602(b) of the FCRA[11] states that the principal purpose of the statute is to require that *consumer reporting agencies* ("CRAs") adopt reasonable procedures for meeting the needs of commerce for consumer credit in a manner that is fair and equitable to consumers. The focus of FCRA therefore generally falls upon situations involving consumer reporting agencies.[12]

However, while FCRA imposes requirements with respect to the reporting of information obtained from CRAs, such as consumer credit report information, an entity may normally freely share such data with its affiliates if it has complied with the notice and opt-out procedures set forth in the 1996 Amendments to FCRA. Those provisions were specifically intended to allow businesses to share information with affiliated companies without becoming CRAs, as long as they followed prescribed procedures to allow consumers to "opt out" of such information sharing. *See* FCRA Section 603(d)(2)(A)(iii).[13]

10/ We note, however, that the Commissions letter interpretations based on the Commentary have addressed the relationship of the 1996 Amendments to the 1990 Commentary on a case by case basis.

11/ 15 U.S.C. § 1681(b). FCRA was extensively amended in 1996 by the Consumer Credit Reporting Reform Act of 1996 (Pub. L. 104-208)(the "1996 Amendments"). The 1996 Amendments afforded consumers a number of new protections, particularly as they relate to consumer reporting agencies.

12/ FCRA defines the term "consumer reporting agency" to mean any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. 15 U.S.C. § 1681a(f).

13/ Those requirements are very similar to those set forth in Section 502(b)(1) of the GLBA. The principal type of entity subject to the requirements of the GLBA, however, is a "financial institution" which the GLBA defines to be "any institution the business of which is engaging in financial

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Specifically, the 1996 Amendments have excluded certain types of information sharing with affiliates from the definition of "consumer report," thereby relieving companies[14] making such communications (designated as "other information") from the obligations imposed on CRAs by FCRA. Such "other information" may be exchanged readily among affiliates, so long as the consumer, having been given notice and an opportunity to opt out, does not opt out.[15]

"Other information" covered by the FCRA does not, however, extend to a report containing information solely as to transactions or experiences between the consumer and the person reporting the information. Such information, therefore, should not be subject to either the CRA requirements or the FCRA opt out provisions. Indeed, the FCRA's definition of "consumer

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[13] (...continued)
activities as described in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. § 1843(k)." 65 Fed. Reg. 11174 (Mar. 1, 2000) (internal quotation marks omitted). According to the Federal Reserve Board interpretation adopted by the Commission, companies that are "leasing real...property (or acting as agent, broker, or advisor in such leasing) *without operating, maintaining or repairing the property*" are engaged in "financial activities." 65 Fed. Reg. 33647, n. 7, citing 12 CFR 225.28(emphasis added). That interpretation emphasizes that real estate activities are only permissible "financial activities" for financial institutions if the lease is on a *non-operating* basis. 12 CFR 225.28(b)(3)(i).

Most rental housing providers issue leases on an operating basis and are involved in the maintenance of the leased real property and should therefore fall outside the definition of "financial institution" for purposes of the GLBA. *See* 12 CFR 225.28(b)(3)(ii)-(iii). Similarly, leasing activities which do not recover the full investment of the lessor in the property during the lease term or result in a greater than 25 percent residual value of the property at the culmination of the lease distinguish real property leasing from real estate investment activities covered by the GLBA. 62 Fed. Reg. 9290, 9306 (Feb. 28, 1997). General real property leasing arrangements do not involve either of these objectives. *See also* 12 C.F.R. § 225.28 (indicating that the activities of real estate brokers, agents and advisors should be consistent with the general scope of real property leasing activities).

[14] The Commission's Notice defines affiliate generally based upon those FCRA provisions that apply to information sharing with persons "related by common ownership or affiliated by corporate control," "related by common ownership or affiliated by common corporate control," or "affiliated by common ownership or common corporate control." *See*, FCRA, Sections 603(d)(2), 615(b)(2), and 624(b)(2). We think an overly restrictive definition of control is not consistent with the ownership structures that have traditionally existed in real estate. Any meaningful common ownership alone should be considered sufficient to confer affiliate status.

[15] Prior to the 1996 Amendments to the FCRA, each affiliate could disclose its own transaction or experience information directly to another affiliate, but could not pool such information in a common database, without being considered a CRA. The 1996 Amendments facilitated the disclosure of such information *among* affiliates. However, as the Commission notes, the affiliates may still become CRAs if they share pooled data *outside* the affiliate family.

report," reflected in proposed Section 3(g)(2)(i), has always excluded communication of information solely as to transactions or experiences between the consumer and the person making the report, regardless of whether the parties are affiliated.

Moreover, notwithstanding the1996 amendments, the Commission has taken the position in the Commentary that the owner-resident relationship is not a "credit" relationship and consistently reaffirmed that view.[16] As a result, property owners generally have no obligation under Section 615(b)(1) to provide notices when they base a rental decision upon information obtained from persons other than consumer reporting agencies (*e.g.*, information from an applicant's previous landlord). Such a decision does not constitute a denial of, or an increase in the charge for, "credit" within the meaning of FCRA. [17]

Information Shared in the Rental Context

The above considerations are significant for purposes of evaluating the obligations, if any, of apartment owners when information is shared among affiliated entities. Consistent with this, we believe the Commission's interpretations with respect to the application of FCRA in the various aspects of the rental context should reflect these considerations and clearly delineate those circumstances in which FCRA obligations may not attach. Such a discussion may prove most helpful to the regulated community in understanding and applying the applicable law and would assist the Commission in meeting Small Business Regulatory Enforcement Fairness Act requirements. (Public Law 104-121.)

For example, an apartment owner will frequently share nonpublic applicant information with other partnerships in which it has an ownership interest for purposes of making a rental determination. If the source of this information was a CRA, presumably the company would be able to share the information with the affiliated partnership under any circumstances, provided it met the opt out requirements of FCRA Section 603(d)(2)(A)(iii). However, the information the owner considers in such a situation is often transaction or experience information that the company has acquired in the course of its own operations. Therefore, it would not appear to be "other information" (or "opt out information") within the meaning of FCRA or as described in Section 3(k) of the proposed interpretation. Accordingly, in such circumstances, it would appear

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16/ *See* FTC advisory letter to Kevin Jay Long, July 6, 2000, www.ftc.gov/os/statutes/fcra/long.htm; FTC advisory letter to Clarine Nardi Riddle, Mar. 17, 1999, www.ftc.gov/ os/statutes/fcra/riddle.htm.

17/ Congress was concerned in the relevant 1996 amendments with the situation where landlords use consumer reports as a basis for adverse actions. It addressed this issue by adding a fairly broad definition of "adverse action" to the statute and by referencing this definition in Section 615(a).

that the transaction or experience information could be shared without resorting to the opt out procedure.

Another common situation occurs when a fee manager is hired by an apartment owner for management purposes. This may include, among other things, duties such as executing lease agreements with prospective renters on the apartment owner's behalf. Again, because FCRA imposes no limitation on the communication by an entity of information solely obtained solely as a result of its own "transactions or experiences" with a consumer (*e.g.*, the individual's account history), this situation would also appear not to implicate either obligations involving CRAs or "opt out information." Thus, FCRA presumably would not limit use of the consumer information related to transaction or experience information of the fee manager or require an opt out notice. Any management related information that the manager already possesses and uses to make application determinations or shares with the owner who hired him in the course of discharging those employment functions should not be subject to FCRA.

Similarly, a fee manager who is employed or has entered into a contract to provide management services to an owner may possess information based on his management experience with a number of owners. In a subsequent or contemporaneous working relationship which requires the manager to provide similar management services to another affiliated entity, it would appear that the manager should have the ability to share information about applicants and residents (whose applications the fee manager has judged) throughout a common (*i.e.*, affiliated) ownership structure. Moreover, assuming the manager had not pooled the information in such a manner as to become a CRA, with respect to those apartment owners to whom management services were being provided, this would also appear to be a case in which there would not be any disclosure obligations. Even if the manager had assumed CRA status, with respect to those apartments over which there was common control or ownership, such information could be shared subject to opt out disclosure.

Opt Out Information

As noted previously, the 1996 Amendments to the FCRA excluded from the definition of "consumer report" the sharing of "other information" among affiliates, so long as the consumer, having been given notice and an opportunity to opt out, did not opt out. "Other information" refers to information that is covered by the FCRA, and that is not a report containing information solely as to transactions or experiences between the consumer and the person making the report.

Proposed Section 3(k) of the Commission's interpretation uses the term "opt out information" to describe this category of information. It describes it as information that (i) bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, (ii) is used or expected to be used or collected for one of the permissible purposes listed in the FCRA (*e.g.*, credit transaction, insurance underwriting,

employment purposes), and (iii) is not solely transaction or experience information.

Again, though consistent with the language of FCRA, this definition of "opt out information" would prove more useful if the Commission's interpretation made clear that transaction and experience information falls outside the scope of both the limitations on information sharing and the opt-out requirements. Also, given that entities which may fall within the purview of FCRA may not necessarily be financial institutions within the meaning of the GLBA, the Commission's suggestion that such information be designated "FCRA opt-out information" may be preferable and prove less likely to result in confusion.

Similarly, it might prove useful to place in context Section 3(k)(2) of the proposed interpretation that refers to the permissible purposes for which the information may be used or expected to be used. This could be accomplished by explaining that section's relationship to the statutory definition of "consumer report" in Section 603(d) of the FCRA and the impact of the 1996 Amendments on the ability of affiliates to share such information consistent therewith.

We appreciate the opportunity to submit these comments and would be happy to supplement them accordingly should you wish for us to elaborate upon any of the issues we have raised. Please contact Jay Harris or Clarine Nardi Riddle at 202-974-2300 should you have any questions regarding these comments.

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