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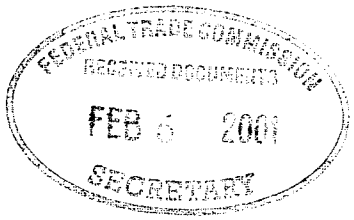
The Market Funded Lending Industry



February 5, 2001

Via Hand Delivery

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

Re: Proposed Interpretations of the Fair Credit Reporting Act

Dear Sir or Madam:

The American Financial Services Association ("AFSA") is the trade association for approximately 360 non-traditional market-funded providers of financial services to consumers and small businesses. It was founded in 1916. AFSA members have over 10,000 offices in the United States with outstanding receivables of over $200 billion. Market-funded lenders provide between 15% and 20% of all consumer credit in the United States.

This letter is submitted by AFSA in response to the request for comment from the Federal Trade Commission (65 Fed. Reg. 80802; December 22, 2000) on its proposed interpretations dealing with the affiliate sharing provisions of the Fair Credit Reporting Act ("FCRA"). The comments set forth in this letter address a number of issues raised in the proposed FCRA interpretations.

Timing of Effective Date

In light of the detailed new disclosures required under the FTC's proposed FCRA interpretations, it is imperative for the FTC to provide an adequate period of time to implement the final FCRA interpretations. The FTC also should provide more specific guidance to financial institutions on how these proposed new requirements would interact with current efforts by financial institutions to comply with the GLB Act privacy interpretations. Encouraged by the FTC to comply with the GLB Act notice requirement as soon as they can do so, many financial institutions already are in the final stages of preparing their GLB Act privacy notices and soon will begin printing those notices, some in the next four to six weeks. However, the FTC's GLB Act privacy interpretations require the FCRA opt-out notice to be included in the GLB Act

privacy notice. If the provisions in the proposed FCRA interpretations are adopted in their final form with too short of an implementation period, it will force financial institutions to significantly alter their existing GLB Act compliance plans and could require institutions to revise and reprint millions of GLB Act privacy notices to comply with the final FCRA interpretations. Providing too short of an implementation period also could prevent many financial institutions from providing privacy notices to existing customers before the July 1, 2001 full compliance date of the GLB Act.

The affiliate sharing provisions in the FCRA have been in effect since 1996. Thus, for several years, institutions have been providing opt-out notices to consumers in order to share certain information with affiliates. The FTC's proposed FCRA interpretations would require significant changes to the opt-out notices currently provided by institutions to their customers. There simply is no policy reason to require institutions to implement these significant changes in an unfairly short time period, particularly when doing so would impair the ability of financial institutions to comply with the GLB Act requirement to provide privacy notices to existing customers before the July 1, 2001 full compliance date, or substantially increase their cost of doing so.

If the FTC provides an inadequate implementation time period, many institutions simply will not be able to comply with the GLB Act despite their best efforts. Such an outcome would benefit neither consumers nor financial institutions. Therefore, in order to avoid adversely affecting the ongoing efforts of financial institutions to comply with their transitional notice requirements under the GLB Act, the FTC should make it absolutely clear that financial institutions need not attempt to incorporate any new FCRA affiliate sharing notice requirements in the initial GLB Act privacy notices given to their existing customers. Instead, financial institutions should be permitted to satisfy any new FCRA affiliate sharing opt-out notice requirements in connection with the first annual GLB Act privacy notices provided by those institutions to their existing customers. That is, for existing customers who must be provided with a GLB Act privacy notice before July 1, 2001, institutions should not be required to change the privacy notices given to those customers to reflect the more detailed disclosures required by the FTC's FCRA interpretations. In addition, for those customers who establish account relationships with financial institutions on or after July 1, 2001 and prior to January 1, 2002, the FCRA interpretations should be effective on the date by which the first annual privacy notice must be provided to those customers. This will provide sufficient time for institutions to modify their notices, while allowing institutions to utilize their existing stock of forms. This approach also will enable financial institutions to comply with both the GLB Act privacy notice requirements, and the new FCRA notice provisions, in a manner that minimizes compliance costs and burdens, and provides consumers with meaningful information in a reasonable manner.

Definition of Opt-Out Information

The proposed FCRA interpretations introduces a new concept, "opt-out information," which is defined, in part, as information that bears on creditworthiness and that is not transaction or experience information. While the FTC has attempted to provide some clarification on what information falls under the umbrella of "opt-out information," the FTC' proposed interpretations

would grant an "opt-out" right for more types of information and for more types of "sharing" than is provided for under the FCRA. Specifically, as drafted, the proposed FCRA interpretations would significantly expand the type of information covered beyond the definition of "consumer report" under the FCRA and, thus, it is imperative that the FTC narrows the scope of this definition.

In particular, only information that otherwise constitutes a consumer report under the FCRA should be subject to notice and opt-out requirements. For example, the FTC should expressly provide that only information that is "communicated" by a consumer reporting agency and that otherwise meets the definition of a consumer report is covered by the opt-out notice. Under the FCRA, a financial institution clearly may share information with an affiliate, without providing an opt-out notice, where the purpose of the sharing is to enable that affiliate to process or evaluate information on the financial institution's behalf. In this case, the sharing of information would not constitute the sharing of a consumer report because there has been no communication of information between the financial institution and its service-providing affiliate within the meaning of the FCRA. Likewise, information may be shared with an affiliate so that the affiliate may provide other services on the financial institution's behalf, such as data processing, or account maintenance. This type of arrangement does not include the communication of information for purposes of the FCRA, and should not be included in the definition of opt-out information.

When correcting the overly broad scope of opt-out information, it also is important for the FTC to reflect in the final FCRA interpretations other exclusions from the definition of a consumer report under the FCRA. As an example, the Federal Trade Commission ("FTC") Commentary makes it clear that a report consisting of consumer names and addresses with no connotations as to creditworthiness or other characteristics does not constitute a consumer report. The same analysis should apply to any identification information which does not include references bearing on the characteristics enumerated in the FCRA. It is important that the definition of opt-out information recognizes this exclusion.

Similarly, the FTC has recognized that joint users may share information without providing an opt-out notice and without being viewed as a consumer reporting agency, because the information is used by both parties for the same purpose -- for example, to consider a consumer's application for credit. Furthermore, an institution may transfer assets from one affiliate to another, and the related transfer of customer information does not require an opt-out notice. As these examples illustrate, it is essential for the FTC to recognize in the final FCRA interpretations that there are many common business practices where information may be shared, without the use of the opt-out notice, and without the sharing-institution being viewed as a consumer reporting agency.

The FTC also should recognize and incorporate into the final FCRA interpretations the many other circumstances where an affiliate can have access to information of another affiliate without constituting the transfer of consumer reports. For example, the final FCRA interpretations should allow financial institutions to provide information to an affiliate when a consumer provides consent. In addition to paralleling the FTC' GLB Act privacy interpretations, this would allow institutions to share, for example, a consumer's application with an affiliated

party, if the consumer does not qualify for the product he or she initially applied for, as the FTC staff has permitted in the case of nonaffiliated lenders. Moreover, this would allow a consumer to instruct one affiliate to provide a copy of the application submitted by that consumer to other affiliates so that the consumer can seek additional products from those other affiliates without the burden and inconvenience of completing additional applications for those other affiliates, a practice that already is approved by existing guidance from the OCC. Additionally, it is essential that the final interpretations recognize all of the exclusions from consumer reports in section 603(d)(2) of the FCRA.

Contents of Opt-Out Notice

The FTC has requested comment on whether financial institutions should be required to disclose how long a consumer has to respond to an opt-out notice before financial institutions may begin disclosing such information. The FTC should not require financial institutions to disclose how long a consumer has to respond to an opt out notice because it is not required by the FCRA and such a disclosure likely would be confusing to customers. For example, because a consumer has an ongoing right to opt out, stating that consumers have "X" days to respond could lead consumers to believe that they have a right to opt out *only* during that time period. Also, the inclusion of such a disclosure would be inconsistent with the opt-out notice provided in the GLB Act privacy interpretations. To make the final FCRA interpretations consistent with the GLB Act privacy interpretations and to avoid consumer confusion, the interpretations should not impose such an additional notice requirement.

Reasonable Opportunity To Opt Out

The proposed FCRA interpretations provides an example for electronic opt-out notices which suggests that financial institutions must obtain acknowledgements from customers of the receipt of such electronic notices. The FTC should not require financial institutions to obtain acknowledgements from consumers that they have received such notices. Such a requirement would be overly burdensome to financial institutions and is inconsistent with the FCRA and with the opt-out rules adopted by the FTC in the GLB Act privacy interpretations. In addition, consumer financial protection laws and regulations that require delivery of information (for example, Regulations B, E, and Z) do not require acknowledgements from consumers to meet the requirement for the delivery of individual notices or disclosures under those regulations, and such acknowledgments should not be added to the FCRA interpretations.

Reasonable Method of Opting Out

The proposed FCRA interpretations permit an institution to require each customer to opt out through specific means, as long as *that* means is reasonable within the meaning of the FCRA interpretations. It is important that the FTC retain this provision in the final interpretations, with certain clarifications. This approach has been used in other consumer notice laws, including the GLB Act privacy interpretations, and by allowing financial institutions to specify the specific means that a consumer must use to opt out, financial institutions will be able to effectively and efficiently receive and implement consumer opt-out requests. However, the FTC should modify

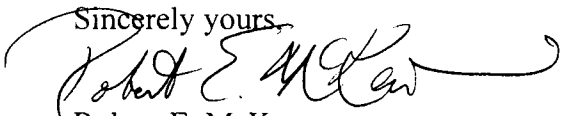
the language in the final FCRA interpretations. As proposed, the interpretations could be read to suggest that an individualized determination for each consumer is needed to provide the specific means for opting out; clearly, financial institutions should be able to adopt a single opt-out policy that applies to all of its customers.

Time By Which Opt-Out Must Be Honored

The FTC have solicited comment on whether a fixed number of days should be established that would be deemed to be a reasonable period of time for financial institutions to comply with a consumer's opt-out direction. The FTC should not set a fixed number of days for financial institutions to comply with consumer opt-out requests. What constitutes a reasonably practicable time period will vary due to numerous factors, such as the technology used by the particular financial institution or the delivery method of the opt-out notices. The time period should be flexible to enable institutions, both large and small, to establish their own reasonable procedures for honoring customer opt-outs. Moreover, the GLB Act privacy interpretations do not have a fixed time period, and the final FCRA interpretations should be consistent with the GLB Act privacy interpretations in this respect.

Once again, we would like to emphasize the importance that the final affiliate sharing interpretations is consistent with the provisions of the Fair Credit Reporting Act itself. It is similarly crucial that the final interpretations become effective in a manner that does not interfere with financial institutions' ongoing efforts to comply with the GLB Act and its implementing interpretations. We appreciate the opportunity to comment on this important subject. If we can assist you further, or if you have any questions regarding the above, please feel free to call me at (202) 296-5544.

Sincerely yours,



Robert E. McKew
Vice President and General Counsel