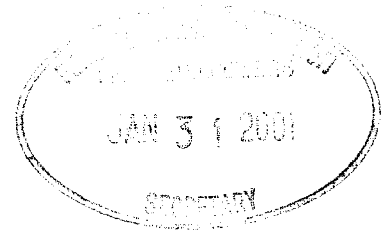
CBA | CONSUMER BANKERS ASSOCIATION



January 31, 2001

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

Dear Mr. Secretary:

This comment letter is filed on behalf of the Consumer Bankers Association ("CBA")[1] in response to the proposed interpretation published by the Federal Trade Commission ("FTC") of the affiliate sharing provisions of the Fair Credit Reporting Act (the "FCRA") (the "Proposed Interpretation"). CBA appreciates the opportunity to comment on the Proposed Interpretation.

In the Proposed Interpretation the FTC has attempted to provide guidance which would coordinate compliance with the affiliate sharing provisions of the FCRA with its rules implementing the Gramm-Leach-Bliley Act's ("GLBA") privacy disclosures ("Privacy Rules"). The FTC's guidance is, in fact, very similar to the proposed FCRA rules published by the Comptroller of the Currency, the Board of Governors of the Federal Reserve, the Office of Thrift Supervision, and the Federal Deposit Insurance Corporation (collectively, the "Federal Banking Agencies") on October 20, 2000. In our comments to the Federal Banking Agencies, however, we have recommended that they take a different approach and we urge the FTC to do so as well. In particular, if the FTC adopts an interpretation on this issue in final form ("Final Interpretation") we urge that it more closely track the statutory language of the FCRA and related precedent.

<u>In General</u>

<u>Coordination with Privacy Rules</u>

CBA appreciates the FTC's desire to ease compliance with the Proposed Interpretation by making it consistent with the Privacy Rules. Where appropriate, consistency between the two rules may facilitate compliance and produce more meaningful disclosures for consumers. The Proposed Interpretation, however, should not mirror the Privacy Rules in every respect. The privacy provisions of the GLBA are vastly different from the affiliate sharing provisions of the FCRA. In fact, the only similarity between the two statutory provisions is that they both involve furnishing notice to consumers and an opportunity to opt-out of certain disclosures. The GLBA goes well beyond a simple notice and opt-out requirement, however, and explicitly dictates the information which must be included in the required notice. For example, section 503 of the GLBA mandates that the GLBA privacy notices must include: the categories of persons to whom information is or may be disclosed, the categories of information that are collected by the institution, and the "policies and practices" with respect to disclosing information to nonaffiliated

[1] The Consumer Bankers Association is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer finance (auto, home equity and education), electronic retail delivery systems, bank sales of investment products, small business services, and community development. CBA members include 85% of the nation's largest 50 bank holding companies and hold two-thirds of the industry's total assets.

Jan.31. 2001 4:42PM CBA GR No.1450 P. 1

third parties. In addition, section 502 of the GLBA sets forth certain limitations with respect to the form in which the opt-out notice must be delivered.

Literally, none of these congressional mandates were included in the FCRA. Instead, the FCRA unambiguously states that the definition of consumer report does not apply where affiliates share certain information "if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity" to opt out before the information is initially shared. The FCRA establishes absolutely no additional requirements with respect to the content of the notice and imposes no limitation on the form in which the notice must be delivered. We believe that, based on the plain language of the FCRA, much of the detail required in the Proposed Interpretation cannot be justified. Indeed, if the simple language set forth in the FCRA were deemed to provide sufficient basis for all of the content in the Proposed Interpretation, then much of the language Congress included in the GLBA would have been entirely unnecessary.

Conversely, had Congress intended FCRA notices to be as detailed as those required under the GLBA, Congress would have further amended the FCRA in Title V of the GLBA. Congress did not. Instead, Congress expressly stated that the GLBA was not intended "to modify, limit, or supersede the operation of the Fair Credit Reporting Act." Since Congress chose not to "modify, limit, or supersede the operation" of the FCRA, it is our hope that the FTC will refrain from doing so as well.

Not only are the requirements of the FCRA different from those in the GLBA, but it is not appropriate, from a consumer perspective, to superimpose the GLBA requirements on the FCRA's affiliate sharing provisions. In this regard, one of the strengths of the statutory language setting forth the affiliate sharing exception is that it permits affiliates to convey to consumers important information in a concise and easy to understand format. This is in stark contrast to many other mandatory disclosures which have become too detailed and lengthy for consumers to readily comprehend. The Proposed Interpretation would, to the detriment of consumers, all but eliminate this important simplicity.

Importance of Preserving Consumer Benefits

It is widely accepted that consumers benefit when affiliated entities are permitted to share among themselves information that can be used to improve the services, offerings, pricing options and other choices made available to those consumers. Indeed, it was these types of consumer benefits that, to a large extent, provided the justification for the far-reaching financial modernization reforms enacted as part of the GLBA. At the same time, it is recognized that consumers' privacy interests are implicated when affiliates share certain information about them.

The affiliate sharing provisions of the FCRA are designed to balance between these potentially competing interests. The plain language of the FCRA affiliate sharing provisions appears to appropriately strike this balance. We are concerned, however, that the Proposed Interpretation may substantially upset this balance by departing from the plain language of the FCRA in at least one significant respect. Specifically, the Proposed Interpretation appears to establish a general rule that, after providing an affiliate sharing notice to a consumer, the affiliate must wait at least 30 days before sharing any opt-out information with affiliates. We are concerned that this general rule may inadvertently restrict consumer choice by forcing an affiliate to wait 30 days before sharing information even where the consumer wishes to have the information shared more quickly. For example, the Proposed Interpretation appears to suggest that when a consumer applies for one financial product but is interested in obtaining information about other products offered by affiliates that the consumer may qualify for, the consumer could be forced to wait at least 30 days before the 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.

Jan. 31. 2001 4:42PM CBA GR No.1450 P. 2

The 30-day waiting period produces inappropriate results in other contexts as well. For example, under the 30-day rule, financial institutions would 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 this issue be addressed when the Final Interpretation is issued. We believe that this issue can be adequately addressed through three modest clarifications. 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 or signature cards. If the consumer submits the application or completes the signature card and chooses not to opt out at that time, the affiliates must be permitted to share the information unless and until the consumer subsequently opts out.

Second, the Final Interpretation should 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 unambiguously indicated an intent not to opt out at that time and the sharing must 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 be important to 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, it should be clarified that the affiliate sharing rules do not apply when a bank shares information with an affiliate who performs services for the bank. 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.

Effective Date

The FTC states that it plans to make its Final Interpretation effective "only after any similar final regulations issued by the [Federal Banking Agencies] have become effective." We believe this is a sound approach.

In order to address this issue, CBA had recommended to the bank agenices that the Final Interpretation not be effective until the later of July 1, 2002, or the time at which the financial institution sends it annual notice required under GLBA for the calendar year 2002. As of January 31, 2001, the bank agencies have not issued a final rule. It appears possible that a final rule, if adopted, may not be issued until late this year. As banks continue their efforts in the privacy area, unanticipated issues / problems with unknown consequences arise. We would welcome the opportunity to discuss them with bank regulators and the FTC.

In addition, we urge the FTC to make it clear that the Final Interpretation applies prospectively. In this regard, the Final Interpretation should apply only to notices provided on or after July 1, 2002. It would be particularly important to clarify that the Final Interpretation would not require financial institutions: (i) to send a revised FCRA notice simply because the previous FCRA affiliate sharing notice did not comply with the Final Interpretation; or (ii) to send a revised GLBA privacy notice because the most recent GLBA notice did not include the new FCRA notice required by the Final Interpretation. We

believe that this is the intent of section 9 of the Proposed Interpretation and section 313.8 of the Privacy Rules but request specific clarification to avoid any ambiguity on this point.

As the FTC considers this extremely important issue, we urge it to take into account two additional important factors. First, any financial institution that wishes to engage in affiliate sharing already is required to first provide the affiliate sharing notice and opt-out based on the existing statutory language of the FCRA. Second, any notices furnished to consumers under the Privacy Rules also must contain an affiliate sharing notice and opt-out that complies with the FCRA. As a result, implementation of the affiliate sharing notice and opt-out rules, unlike implementation of the Privacy Rules, is not an urgent matter. Consumers already are receiving the key FCRA information – notice of the sharing and an opportunity to opt out.

Examples (§ 2)

We applaud the FTC for including several helpful examples in the Proposed Interpretation and we urge the FTC to include examples in the Final Interpretation. The use of examples proved helpful to institutions in developing compliance programs for the Privacy Rules and will serve the same purpose for institutions attempting to comply with the Final Interpretation. We also urge the FTC to retain in the Final Interpretation the clarification that the examples are not exclusive and that conformity with an example or use of a sample notice, constitutes conformity with the Final Interpretation itself. These are important clarifications which should be included in the Final Interpretation.

Definitions (§ 3)

"Opt Out Information"

The Proposed Interpretation defines the term "opt out information" 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. Also, the definition properly excludes information solely as to transactions or experiences between the consumer and the person reporting the information.

This definition appears to be intended to reflect a basic statutory limitation on the scope of the FCRA affiliate sharing provisions. Specifically, this definition attempts to clarify that there is no need to comply with the FCRA affiliate sharing provisions unless the information to be shared would otherwise meet the definition of "consumer report." Because the definition of "opt out information" only includes certain components of the definition of "consumer report," however, this important clarification has not been fully realized in the Proposed Interpretation. In order to more precisely implement this limitation on the scope of the affiliate sharing notice requirements, we recommend that the Final Interpretation include an additional clarification. Specifically, we urge that the Final Interpretation make it clear that the definition of "opt out information" only applies to information that satisfies the general definition of consumer report set forth in section 603(d)(1) of the FCRA if that information is not excluded from the definition of consumer report by virtue of the exceptions set forth in section 603(d)(2)(A)(i) or (ii), or (B), (C) or (D).

Contents of the Opt-Out Notice (§ 5)

The Proposed Interpretation would mandate that the FCRA opt-out notices must disclose: (i) the categories of opt-out information about the consumer that institution communicates; (ii) the categories of affiliates to which the institution communicates the information; (iii) the consumer's ability to opt out;

and (iv) the means to do so. As noted above, the plain language of the FCRA simply does not require that this level of detail be included in the affiliate sharing notice. Accordingly, we urge the FTC to revise the Proposed Interpretation to more closely adhere to the plain language of the FCRA.

The Proposed Interpretation also specifically permits institutions to reserve the right either to communicate new categories of information, or to communicate to new categories of affiliates, in the future. If, notwithstanding the plain language of the FCRA, the FTC decides to require that the affiliate sharing notice include information about categories of information and/or categories of affiliates, this provision should be retained in the Final Interpretation. This clarification would be particularly important in view of the frequency with which corporate affiliations can change in the existing marketplace. The FTC also should retain in the Final Interpretation the clarification that institutions may craft the opt-out notice to allow consumers to selectively opt out of different information programs.

The FTC specifically requested 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 institution may begin disclosing information about that consumer to its affiliates; and (ii) the fact that a consumer can opt out at any time. We urge the FTC to refrain from including any such requirement in the Final Interpretation. As noted above, the FCRA affiliate sharing notice is intended to provide a clear and conspicuous, but concise and simple, disclosure about affiliate sharing. Based on the plain language of the FCRA, the most essential components of that notice are the fact that affiliates will share information about the consumer and how the consumer may opt out of that sharing. These two key components should be conveyed as clearly as possible and additional language such as timeframes for opting out should be avoided. Indeed, additional language included as part of the notice is likely to detract from the key components intended to be conveyed under the plain language of the FCRA.

Reasonable Opportunity to Opt Out (§ 6)

As noted above, the Proposed Interpretation suggests a blanket example of 30 days as appropriate in order to provide consumers a "reasonable opportunity to opt out." For the reasons discussed above, we urge the FTC to delete this approach and instead clarify that: (i) a financial institution may share information among affiliates if the opt-out notice is provided on an application or signature card submitted by the consumer and the consumer did not opt out; (ii) affiliates may share information among themselves if the consumer has consented to such sharing; and (iii) the Final Interpretation does not affect other interpretations of the FCRA that do not involve the affiliate sharing provisions.

Reasonable Means of Opting Out (§ 7)

The Proposed Interpretation states that an institution would provide a consumer with a reasonable means of opting out if it provides a "reasonably convenient" method to opt out. In this regard, the FTC clarifies that a financial institution may require a consumer to opt out through a specific means so long as that method of opting out is reasonable for that consumer. This is an important clarification and we urge that it be incorporated into the Final Interpretation.

Delivery of Opt-Out Notices (§ 8)

The Proposed Interpretation requires 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 is 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

Jan.31. 2001 4:43PM CBA GR No.1450 P. 5

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 Proposed Interpretation to permit oral disclosures of the FCRA opt-out notice. This will 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 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.

Revised Opt-Out Notice (§ 9)

The Proposed Interpretation 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 Proposed Interpretation, 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 Proposed Interpretation 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 Proposed Interpretation 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 Proposed Interpretation notes that an institution must comply with a consumer's opt-out "as soon as reasonably practicable" after it is received by the institution. This requirement mirrors that of the Privacy Rules and should be included in the Final Interpretation.

The FTC has solicited comment as to whether they should establish a time period, such as 30 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 refrain from providing examples of what would be deemed to be "reasonably practicable." There may be instances when the opt-out could be processed in a period of time less than 30 days. In these cases, the 30-day example may be used to *delay* the implementation of an opt-out. On the other hand, in many instances, it may require more than 30 days to effectuate an opt-out completely and a 30-day example would create inappropriate potential for litigation and liability in those circumstances. Therefore, we urge the FTC to refrain from defining "reasonably practicable."

Duration of Opt-Out (§ 11)

The FTC proposes that an opt-out is effective until a 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 requirement that the opt-out must be revoked in writing. There may be instances when a consumer is requesting an additional product by telephone that would require the institution to share opt-out information with, or obtain opt-out information from, an affiliate. If the consumer has previously opted out, that consumer may have to wait several days for the product he or she requested in order to provide a

Jan. 31. 2001 4:43PM CBA GR No.1450 P. 6

revocation of the opt-out in writing. We do not believe that such a result can be justified and we urge the FTC to delete the requirement that an opt-out revocation must be in writing.

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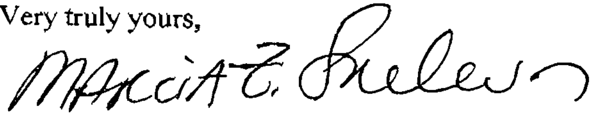
Once again, CBA appreciates the opportunity to provide our comments with respect to the Proposed Interpretation. If you have any questions concerning this comment letter, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to contact me (703-276-3873, msullivan@cbanet.org).

Very truly yours,



Marcia Z. Sullivan
Vice President and Director, Government Affairs

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Jan. 31. 2001 4:43PM CBA GR No. 1450 P. 7