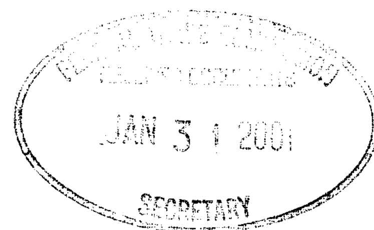

Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

In re	)	
	)	
Proposed Interpretations of the Fair Credit Reporting Act	)	FTC Matter No. P004809
	)	

COMMENTS OF THE
ELECTRONIC RETAILING ASSOCIATION

The Electronic Retailing Association ("ERA") appreciates the opportunity to submit these comments on the Federal Trade Commission's ("FTC" or "Commission") proposed interpretations of the Fair Credit Reporting Act ("FCRA") as it relates to affiliate sharing of information.

I. OVERVIEW

ERA is a leading trade association representing electronic retailers – marketers that promote a diverse range of goods and services to consumers through various direct response electronic media including the Internet, television, radio, and telemarketing. ERA's members include household names like America Online, JC Penney, QVC, and Home Shopping Network, leading direct response commercial producers, and the principal membership club marketers, as well as small start-ups and individual entrepreneurs. Our membership also encompasses companies that provide critical support services to electronic retailers, including list services, teleservices providers, fulfillment houses, and media buyers.

ERA appreciates the Commission's efforts to provide guidance to industry about how it interprets and will enforce the requirements of the FCRA. Yet, we

are troubled that the FTC's proposal goes too far and if adopted as proposed, would impermissibly expand on the requirements of the FCRA and unreasonably restrict data exchanges that benefit industry and consumers alike. Moreover, the Commission's proposal sets out "one-size-fits all" requirements that are simply unworkable.

ERA members' marketing efforts regularly depend on accurate and quality marketing data – whether generated in-house or obtained from outside sources – not only to help them identify prospective customers, but also to discern consumer needs and preferences in order to best meet those needs. ERA's members also increasingly rely on joint marketing arrangements, which enable companies to combine their unique expertise and abilities to offer consumers better and more comprehensive services and products. The Commission's proposed interpretations would impose unreasonable burdens and costs on businesses <u>without corresponding benefits for consumers</u>. Prohibiting businesses from providing opt-out notices orally, for example, would require companies that rely on telephone marketing to reconfigure their operations to provide for in-person, electronic, or mail communications. There is simply no basis for the Commission to presume that oral notices are insufficient. ERA urges the Commission to make several modifications to its proposal that would protect consumers as required by the FCRA without unduly burdening industry.

The Commission's proposal is flawed in three major respects. First, the FTC must clarify that, particularly through its use of "illustrations" or "examples," it is not expanding on the type of information covered by the FCRA, as defined by

the FCRA. Second, the proposed definitions of "company," affiliate," and "control", taken as a whole, are too narrow, and could be construed to deprive many businesses of the opportunity provided by the FCRA to exchange information without incurring the obligations of consumer reporting agencies ("CRAs"). Third, the proposed opt-out procedures are unduly burdensome and exceed the requirements of the FCRA.

II. SCOPE OF THE INTERPRETATIONS

The FCRA governs the use of "consumer reports," defining this term to include any communication that bears on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living and is "used or expected to be used or collected" for determining whether the consumer is eligible for credit or insurance primarily for family, personal, or household purposes; employment purposes; or other purposes authorized by the FCRA.[1] As the Commission's proposal notes, however, the FCRA excludes from the definition of a consumer report "information solely as to transactions and experiences" between the person who makes the report and the consumer. Additionally, persons related by common ownership or corporate control may share information that is covered by the FCRA, but is not limited to transaction or experience data (what the Commission terms "opt-out 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, before the time that the

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[1] 15 U.S.C. § 1681a(d).

information is initially communicated, to direct that such information not be communicated among such persons.[2]

In outlining its proposed interpretation of the required content of opt-out notices, the Commission identifies categories of information, as well as examples of specific types of information that, if identified, would satisfy this disclosure obligation. Specifically, Section (d)(3) of the proposed interpretation lists "examples" of types of information the Commission believes fall under the categories of opt-out information (which are identified in Section (d)(2) of its proposal), such as income, credit score, open lines of credit with others, employment history with others, marital status, and medical history. These examples, however, identify information that in some instances will constitute transaction or experience information. It is, therefore, critical that the Commission clarify that the data it identifies as examples of "opt-out information" only constitute "opt-out information" if and to the extent that the data is otherwise covered by the FCRA.

For example, income would only be an example of opt-out information if it is used or expected to be used or collected to determine a consumer's eligibility for credit or another purpose set forth in the FCRA, and is not information solely as to transactions or experiences between the person making the report and the consumer. There are situations, such as communications by a current employer, when income information will reflect transactions or experiences between the person making the report and the subject consumer. Likewise, an open line of credit with another party may be transaction or experience information between a

[2] 15 U.S.C. § 1681a(d)(2)(A)(iii).

merchant and a consumer who uses a credit card issued by a financial institution that is not affiliated with the merchant to buy a product from the merchant. An individual's medical history information also might be a consumer report in some cases, but like the other examples the FTC's proposal lists, whether or not it is covered by the FCRA will depend on the purposes for which it is used or collected, and who communicates the information. Indeed, examples of information that might reflect on "personal characteristics" or "mode of living" are potentially boundless. An individual who purchases several items of sports equipment might be said to have the "personal characteristic" of having an active lifestyle. Yet, for the business that sold the equipment, information about the items the individual purchased is transaction or experience data.

The manner in which the Commission's proposal identifies the examples listed in Section (d)(3) of its proposed interpretations leaves room for question about whether it is expanding the scope of the FCRA. Therefore, the Commission must clarify in the context of these examples, not merely by way of other definitions, that the items of information listed would only be examples of opt-out information if they are otherwise covered by the FCRA.

III. DEFINITION OF AFFILIATED ENTITIES

The Commission's proposal sets out 3 inter-related definitions that, in combination, would define the types of entities that may share information that is subject to the FCRA, but is not limited to transaction or experience information ("opt-out information"). These definitions could be construed to exclude both

joint ventures and partnerships, and ERA believes partnerships and joint ventures should both be deemed affiliates.

First, Section 3(b) of the proposal defines an affiliate generally to mean "any company that is related or affiliated by common ownership, or affiliated by corporate control or common corporate control, with another company." Companies are related under this definition if they are "controlling, controlled by, or under common control with, another company."

Second, a "company" is limited to "any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization." Section 3(e).

Third, Section 3(i) defines "control" as:

> (1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;
> (2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or
> (3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company.

The proposed definition of a "company" might be broad enough to include both of these arrangements; indeed, the definition at least identifies partnerships. Yet, entities would only be "affiliates" under the Commission's definition if they are "related or affiliated by common ownership, or affiliated by corporate control or common corporate control." Many businesses that share common goals and interests embark on joint ventures to enable them to pursue those goals without necessarily taking an ownership interest in one another, or creating a separate entity. In some instances the only thing two wholly-owned corporate subsidiaries

may have in common is a corporate parent, while for purposes of a joint venture and day-to-day management of their combined operations, joint venturers and partnerships are at least as closely tied and interdependent – and often more so – than many corporate subsidiaries. They may share office space, management personnel, and other resources in furtherance of combined and unifying goals. Perhaps most relevant for the Commission's purposes, such entities will generally share a common interest in information they gather about their customers, and have ongoing responsibilities for how the data is used. The Commission's interpretations of the FCRA must not discriminate against these businesses, and must permit them to operate and compete on equal footing with businesses that are part of a large web of corporate ownership. Thus, the Commission should clarify that joint ventures and partnerships are encompassed by these definitions at least where the entity sharing the information continues to share in responsibility for or control of the way the information is used.

IV. OPT-OUT PROCEDURES

The Commission's proposal sets forth highly detailed "interpretations" of what methods the Commission believes are adequate to satisfy the notice and opt-out requirements of the FCRA with respect to data sharing among affiliates. If the Commission intended with this proposal only to outline "safe harbors" – practices that, if followed, will ensure that a company has satisfied its FCRA obligations – then that must be made explicit. As it stands, the proposal does not make clear that the methods the Commission sets forth are merely alternatives for ensuring compliance, but do not rule out other reasonable measures that

would also be adequate. Moreover, even if they are viewed as "safe harbors," the Commission's proposed standards are overly prescriptive and restrictive.

First, a business must be permitted to specify the methods by which it will provide notices and permit consumers to opt-out so that they are consistent with the business' operations. The FCRA does not require, nor should the FTC interpret it to require, that a business use any particular method for providing an opt-out notice, as long as the means the business selects is or are reasonable. Section 8(c) of the FTC's proposed interpretation, however, states that an oral description of an opt-out notice is insufficient. Section 8(d) similarly provides that a company "clearly discloses" an opt-out opportunity if it is furnished so it can be retained or obtained later in writing.

These proposals, in effect, mandate how a business can conduct its operations and, therefore, impermissibly exceed the requirements of the FCRA and the limited authority it confers on the FTC. Many businesses have elected to market their products and services, and thus communicate with consumers only after the consumer responds by telephone to a television or radio advertisement, or in some cases solely by telephone. The FCRA requires only that it be "clearly and conspicuously disclosed to the consumer that the information may be communicated among" affiliates and that consumers be "given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated."[3] The express language of the FCRA, therefore, does not require companies to adopt any particular method for

[3] 15 U.S.C. § 1681a(d)(2)(A)(iii).

furnishing an opt-out notice, and certainly does not purport to require companies to change their business methods.

The FTC's proposed interpretations of what constitutes reasonable notice would preclude the use of oral notices and require that notices be provided in a form consumers can "retain." That, in turn, would require companies that rely exclusively on telephone calls to communicate with customers or complete a transaction to restructure their operations or forego opportunities to share data among affiliates that the FCRA expressly permits. Such obligations would further impose unreasonable costs on businesses that rely on telephone marketing, and notably, the Commission has not demonstrated that telephone notices are inherently unreasonable or that they are not or can not be provided clearly and conspicuously. The Commission must, therefore, amend its proposal to provide that opt-out notices may be furnished orally so long as the notice is reasonable, clear, and conspicuous.

The Commission's proposal also impermissibly expands on the requirements of the FCRA by suggesting that a business only provides a "reasonable opportunity" for consumers to opt-out if it affords consumers a continuing right to opt-out at any time. Certainly some and perhaps most companies may elect to offer that opportunity, and such a policy would certainly comply with the FCRA. All the FCRA requires, however, is that consumers be given the chance to opt-out "before the time that the [opt-out] information is initially communicated" to an affiliate.[4] The Commission can not require more.

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[4] Id.

Businesses also should not have to tailor their notices to individual consumers' unique preferences. Section 7(d) of the FTC's proposal states that "a company may require each consumer to opt out through a specific means as long as that means is reasonable *for that consumer*." (Emphasis added). Companies must be permitted to adopt standardized practices, and should not have to modify their business practices to suit individual consumer preferences. The appropriate standard, and all that the FCRA requires, is that the method for providing notices be reasonable for reasonable consumers.

The FTC also has proposed to interpret the FCRA as requiring business to provide a "reasonable period of time" for consumers to opt-out after delivering an opt-out notice. ERA has no objection to this basic standard. Yet, the Commission's examples of what constitutes a "reasonable period of time for different means of delivery" are in all cases 30 days.

We question whether the Commission may or should adopt interpretations that include any specific timetables. Yet, if the Commission ultimately determines to provide guidance in this area, the proposed timeframes are too long, and fail to reflect significant differences in each delivery method. E-mail communications, for instance, allow for virtually instantaneous reply by consumers.

A 21-day opt-out period may be an <u>example</u> of a reasonable time when a business provides its notice by mail, in light of the time required for mail delivery. When a business elects to provide its notice by other means – in person, electronically, or by telephone – 5 business days is a reasonable opt-out period.

When notices are provided by any of these methods, consumers will have the opportunity and ability to respond instantaneously, and 5 business days provides ample opportunity for consumers to make an election. Moreover, as the Commission provided in its regulations implementing the Gramm-Leach-Bliley Act, for isolated transactions with a consumer, businesses should be permitted to require that consumers decide, as a necessary part of that transaction, whether or not to opt-out before completing the transaction.

CONCLUSION

ERA believes the Commission must emphasize, far more clearly than it has in the current proposal, that the examples it sets forth in interpreting the affiliate data sharing provisions of the FCRA are safe harbors, or at least merely illustrations, not rules that must be followed in all cases. This is especially important in the context of providing guidance on the types of information that may or may not be subject to the FCRA or trigger the affiliate data sharing opt-out provisions. The Commission must, in interpreting the notice and opt-out requirements, be mindful of the limits of the statute itself. The FCRA does not, for example, mandate how many days businesses must give consumers to opt-out, requiring only that consumers "be given an opportunity" to opt-out before sharing information subject to the FCRA with affiliates, and does not prescribe any particular methods for providing opt-out notices or opportunities. Under the FCRA, businesses remain free to decide what methods for communicating with consumers and complying with the FCRA will best meet their needs and those of the consumers they serve. In enacting and amending the FCRA, Congress

adopted clear yet broad standards, leaving the decisions on how best to implement its basic requirements to the sound business judgment of those who would be subject to them. In an effort to provide guidance to industry on what it believes the FCRA requires, the Commission must not eliminate or restrict choices Congress saw fit to leave to those who must bear the administrative and economic burdens of implementing them.

Respectfully submitted,

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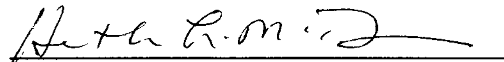

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