THE FINANCIAL SERVICES ROUNDTABLE

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January 25, 2001

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

Re: Proposed Interpretations of the Fair Credit Reporting Act

Dear Sir or Madam:

The Financial Services Roundtable[1] appreciates the opportunity to comment to the Federal Trade Commission ("Commission") on the proposed interpretations of the Fair Credit Reporting Act ("FCRA"). The Roundtable also appreciates the efforts of the Commission to make the proposed interpretations substantively parallel to the proposed regulations issued by the federal banking agencies ("agencies") and to ensure that the content requirements for an FCRA opt out notice are consistent with the privacy notice required by the Gramm-Leach-Bliley Act ("GLBA"). Both of these objectives will ease the compliance burden on affected companies and benefit American consumers.

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[1]The Financial Services Roundtable is a national association whose membership is reserved for 100 companies selected from the nation's 150 largest integrated financial services firms. The member companies of the Roundtable engage in a wide range of financial activities, including banking, securities, insurance, and other financial service activities. The mission of the Roundtable is to unify the leadership of large, integrated financial service companies in pursuit of three primary objectives:

1. To be the premier forum in which leaders of the United States financial services industry determine and influence the most critical public policy issues that shape a vibrant, competitive marketplace and a growing national economy;

2. To promote the interests of member companies in federal legislative, regulatory, and judicial forums; and

3. To effectively communicate the benefits of competitive and integrated financial services to the American public.

The Roundtable is a CEO-driven association that advocates the interests of integrated financial institutions primarily in the Congress, the federal Commission, and federal courts.

The Financial Services Roundtable has the following comments on the substance of the proposed interpretations of the FCRA.

Reasonable Opportunity to Opt Out (Proposed § 6)

The Roundtable supports the concept that a company should provide its customers with a reasonable time within which to elect to opt out prior to the commencement of information sharing. However, the Roundtable *strongly objects* to the proposed mandatory 30-day waiting period before information may be shared with affiliates. Such a bright line waiting period would inhibit our member companies' abilities to satisfy their customers' needs in a timely fashion. It would have the anti-consumer effect of denying consumers information that they may desire at the time when that information may be most valuable to them. For example, a consumer who applies for a home mortgage from a company may want to receive timely information from that company's insurance affiliate regarding homeowner's insurance, and the value of that information may well be time-dependent. If the affiliate is required to wait 30 days to send the information, the consumer may need to provide application details again to the recommended insurer and may also need to submit to a second pull of a credit report.

In addition, forcing a rigid 30-day waiting period would impose enormous and undue burdens on systems operations. It is extremely difficult for companies to track when a customer receives the notice for purposes of calculating the 30-day period. Virtually no affected company has a tracking system currently in place, and the implementation of such a complex tracking system would be extremely onerous and expensive. It would require a massive overhaul of companies' computer databases and systems and would require companies to capture new and cumbersome information.

Moreover, imposing a 30-day waiting period would directly contradict the understanding that industry leaders had with Congress when both GLBA and the 1996 FCRA amendments were enacted. Congress made a conscious decision not to define "reasonable opportunity" more precisely in order to allow for significant cross-marketing and risk-control opportunities, benefiting both companies and their customers. The "reasonable" time period, for purposes of determining whether a company provided a reasonable opportunity for the customer to opt out, will vary depending upon the medium used for the delivery of the opt out notices. For example, if a company provides an opt out notice electronically, a consumer should be able to maximize the benefits associated with having information shared among the company's affiliates by providing an immediate response declining to opt out. The Commission thus should reduce, rather than increase, the number of examples in this section in the final interpretation, and should not include the 30-day requirement in the examples.

In any event, while it is important that the consumer understand that the right to opt out may be exercised at any time, it is equally important that the consumer understand that the opt out will apply only to future information sharing. The Commission thus should

clarify that a consumer's right to opt out, if exercised, prohibits a company that is not a consumer reporting agency from sharing opt out information with its affiliates subsequent to receipt of the consumer's opt out. Additionally, the Commission should make clear in the interpretations that a company is not required to retrieve or otherwise take action with respect to information on a consumer previously shared with affiliates prior to the receipt of the same consumer's opt out instruction.

Definition of "Opt Out Information" (Proposed § 3(k))

The Financial Services Roundtable believes that the proposed definition of "opt out information" in section 3(k) is too broad. The Commission should clarify what falls under the umbrella of "opt out information," either by providing additional language or by providing additional examples in section 5(d). In any event, the Commission should narrow the scope of the definition. As drafted, the interpretation would expand the type of information covered beyond what is considered a "consumer report" under the FCRA and inappropriately eliminate permissible uses of information under the FCRA. The Commission should make very clear that its interpretation of the notice and opt out requirements in the FCRA apply only to information that otherwise constitutes a "consumer report" under the FCRA and is being communicated by a consumer reporting agency.

Additionally, proposed section 3(k) fails to reflect all of the exclusions from the definition of a "consumer report" contained in the FCRA. More specifically, proposed section 3(k)(3), which covers transaction and experience information, should be expanded to explicitly cover the other exclusions from consumer reports in section 603(d)(2) of the FCRA, such as the consent exception. The Commission provided an example of the consent exception in the final GLBA privacy regulations. The Commission should explicitly recognize that companies are able to share information through other means besides notice and opt out, including through express customer consent, under an agency relationship, or for fraud control purposes. The Roundtable thus feels that the final interpretation should make clear that notices are not required under the FCRA, that existing exceptions and exclusions to the FCRA under statutory language and regulatory interpretations are preserved, and that companies may obtain and use customer consent to disclose FCRA information.

An area of particular importance to the Roundtable is retention of the "joint user exemption" currently recognized by the Commission.[2] This exemption permits companies to share consumer credit information with affiliates, without having to give notice and opt out, for purposes such as processing applications, making joint credit decisions, and providing back office data processing services. If this exemption is not preserved, many companies that currently rely on this exemption would have to make radical changes that would be disruptive to their business practices and systems. The

[2] *See* FTC Staff Opinion Letter to Linda J. Throne (November 20, 1998), which refers to "Joint users" – FCRA §§603(f) and 604(a)(3)(A).

Roundtable respectfully recommends that the Commission explicitly reference the November 20, 1998 Staff Opinion Letter on this matter to clarify that the "joint user exemption" is fully applicable under the final interpretations of the FRCA.

Duration of Opt Out (Proposed § 11)

The Financial Services Roundtable opposes the requirement in proposed section 11 that a consumer provide either written or electronic revocation. Such a requirement is not imposed by the FCRA and is inconsistent with the overall structure of the proposed interpretations. The proposed interpretations allow a customer to opt out orally but do not permit that same customer to withdraw that opt out election in the same manner. There is no logical reason for this distinction, and customers should not be forced to go through the effort of sending a written or electronic revocation for their choices to be deemed effective. The final interpretations thus should explicitly provide for the oral revocation by consumers, both in person and by telephone. Such a revocation method is convenient to consumers and companies alike.

Delivery of Opt Out Notice (Proposed § 8)

The Financial Services Roundtable opposes the requirement in proposed section 8 that companies provide opt out notices in writing or, if the consumer agrees, electronically. This is, in effect, a blanket prohibition against oral notices. Nothing in the FCRA bars the provision of oral notices, and there is no reason to create a new and burdensome requirement for written or electronic notices, especially in cases where it would be most convenient and efficient to provide oral notice, such as when the customer establishes the relationship over the phone. Thus, the final interpretations should allow oral notice to remain consistent with the FCRA requirements.

As an alternative, if the Commission does require a written notice, the Commission should make it clear that a company has the option to provide the opt out notice either by giving the notice in a form that a customer can retain or allowing the customer to obtain another copy of the company's then current opt out notice at a later time. The Commission should allow companies to provide the initial notice orally, provided a written or electronic notice follows the oral notice within a reasonable time. In addition, if a company provides a paper copy of a notice that can be retained by the consumer, the company should not also be required to provide an additional copy, particularly since the notice must be provided annually as part of the GLBA privacy notice. It is important that the final interpretations provide companies with this flexibility.

In addition, the proposed interpretations could be read to require burdensome customer acknowledgments of receipt of electronic communications. If read in this manner, the proposed interpretations could require a customer who wants the immediate benefit of information-sharing among affiliates to send a mailed or e-mailed form with sensitive data such as account numbers and tax ID number. The potential harm and added burden to consumers would well outweigh any potential benefit to the customer from such a

requirement. To avoid this illogical result, the final interpretations should clarify that in requiring a consumer to acknowledge receipt of electronic communications, a consumer's "click-stream" response to a properly worded inquiry regarding receipt is sufficient. The use of "click-stream" customer acknowledgments is common practice under the E-Sign legislation and should be equally permitted under the FCRA.

The Roundtable also believes that the Commission should retain the joint opt out notice option in the final interpretation. Use of a joint notice, where appropriate, provides a way for companies to reduce costs in providing the FCRA opt out notices. Also, companies need this flexibility to determine how best to structure their FCRA notices to meet the needs of their customers.

Finally, the Roundtable believes that the provision on "joint consumers" in proposed section 8(f) needs further clarification. It is unclear from the proposed wording whether the Commission intends to require that all joint policyholders actually receive the notice. The Roundtable would be opposed to any such requirement. Under similar consumer protection regulations, such as the Federal Reserve Board's Regulation B, companies only have to mail notices to the primary borrower or applicant. The Roundtable thus urges the Commission to include language in the final interpretation specifying that companies can satisfy the delivery requirement for joint consumers by mailing the opt out notice to the primary consumer.

Contents of Opt Out Notice (Proposed § 5)

The Financial Services Roundtable believes that the Commission's interpretation should not require companies to set a time limit on how long a consumer has to respond to the opt out notice before companies may begin disclosing such information. This requirement is not contained in the FCRA, will likely be confusing to customers, and will create disequilibrium. For example, because the consumer has an ongoing right to opt out, stating that consumers have "X" days to respond could lead many consumers to believe that they have a right to opt out *only* during that time period. Also, the inclusion of such an approach would be inconsistent with the opt out notice provided in the final GLBA privacy regulations. To ensure that the final FCRA interpretations are not more burdensome than the privacy regulations, the interpretations should not require this additional notice requirement.

The Roundtable, however, supports proposed section 5(b), which makes clear that a company's notice can also state that a company reserves the right to communicate certain types of information in the future. The Commission should retain this provision. Providing companies with this flexibility enables them to take into account future practices, without having to go through additional customer notification costs and policy tracking procedures. In addition, this approach is consistent with the GLBA privacy regulations.

In addition, the Roundtable supports proposed section 5(c), which explains that a company may provide the consumer with the option of an opt out that covers only part of the information or certain affiliates. This partial opt out would allow companies to provide consumers with a menu of options. The Commission should retain the partial opt out notice because it enables companies to tailor opt outs to individual customer preferences.

Finally, the Roundtable believes that the Commission should require reference in opt out notices to only two categories: (1) the categories of opt out information that the company may share; and (2) the categories of affiliates to whom the company discloses opt out information. The disclosure of additional categories is unnecessary and will only complicate the overall FCRA disclosure and the privacy policy notices in which it will be included.

Reasonable Means of Opting Out (Proposed § 7)

The Financial Services Roundtable strongly supports proposed section 7(d), which permits a company to require each consumer to opt out through a specific means, as long as that means is reasonable for that consumer. It is essential that the Commission retain this provision in the final interpretations. This approach has been used in other consumer notice laws, including the GLBA privacy regulations, and by allowing companies to specify the means that a consumer must use to opt out, companies will be able to effectively and efficiently receive and implement consumer opt out requests. In addition, the Commission should retain the examples used for reasonably convenient means of opting out, contained in proposed section 7(b).

Revised Opt Out Notice (Proposed § 9)

The Financial Services Roundtable believes that the Commission should not require companies to send revised opt out notices to consumers every time there is a change in the privacy policies of the companies. Instead, the companies should be allowed to provide such information in the annual notices that must be provided by companies to their customers.

Time By Which Opt Out Must Be Honored (Proposed § 10)

The Financial Services Roundtable believes that the Commission should not set a fixed number of days for companies 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 company or the delivery method of the opt out notices. The time period should be sufficiently flexible to enable companies, both large and small, to determine reasonable procedures for honoring customer opt outs. Moreover, the GLBA privacy regulations do not have a fixed time period and the Commission's interpretations should not be more burdensome than the privacy regulation requirements.

Definition of "Clear and Conspicuous" (Proposed § 3(c))
The proposed interpretation's definition of "clear and conspicuous" is generally consistent with the standard used in the GLBA privacy regulations. The Roundtable feels, however, that the Commission should clarify that "clear and conspicuous" as a standard can be complied with in one place for both the GLBA privacy disclosures and the FCRA disclosures.

Examples (Proposed § 2)
The Financial Services Roundtable supports the Commission's use of examples to provide guidance regarding how the interpretations would apply in specific situations. Illustrative examples are helpful to companies in determining how to comply with the obligations of the FCRA. At least at the outset, the Commission should use examples, rather than commentaries or questions and answers, because examples provide better guidance to companies in conforming to the FCRA interpretations as initially adopted. In addition, the Commission should retain in the final interpretations of the FCRA the statement that the examples are not intended to be exclusive. This important statement clarifies that the examples set forth in the interpretations are just that, examples of ways companies may be in conformity with the FCRA interpretations and are not exhaustive means of conformity. Examples should not, however, be used to impose regulatory requirements where none exist in the underlying statute, as in the case of the Commission' "example" of a 30-day waiting period for a consumer to exercise an opt-out.

Also, the final interpretation of the FCRA should continue to state that conformity with an example or use of the sample notice, to the extent applicable, constitutes conformity with the Commission view expressed in the interpretation. This assures companies that conformity with the examples constitutes conformity with the interpretation.

Thank you for considering The Financial Services Roundtable's views on these important issues. If you have any further questions or comments on this matter, please do not hesitate to contact me, Lisa McGreevy, or Maura Solomon of the Roundtable staff at (202) 289-4322.

Sincerely,

Richard M. Whiting

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