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January 30, 2001

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

Re: Proposed Fair Credit Reporting Act Interpretations

Dear Secretary:

On behalf of the National Association of Mutual Insurance Companies ("NAMIC"), we respectfully submit to the Federal Trade Commission ("the Commission") these comments on the proposed Fair Credit Reporting Act ("FCRA") interpretations published in the Federal Register on December 22, 2000.[1]

NAMIC is a full-service national trade association with more than 1,200 member companies that underwrite 39 percent ($118 billion) of the property/casualty insurance premiums in the United States. NAMIC's membership includes four of the eight largest property/casualty carriers, every size regional and national property/casualty insurer and hundreds of farm mutual insurance companies. Both NAMIC itself and many of its member companies are affiliates of other financial institutions, including affiliated insurers. The affiliate information-sharing provisions of the FCRA thus importantly affect NAMIC and its members and NAMIC has a significant stake in the outcome of the Commission's interpretations of those provisions.

Our comments below focus on those aspects of the Commission's proposed interpretations that we believe should be clarified or otherwise amended and certain of the issues on which the Commission has specifically solicited comment. Our proposed amendments are designed to provide what we believe is necessary to ensure appropriate reconciliation of the FCRA regulations, the regulations implementing the Gramm-Leach-Bliley Act of 1999 ("GLBA"), other functional regulator rules and the medical information privacy standards recently promulgated by the Department of Health and Human Services ("HHS"). In particular, our comments are aimed at facilitating financial

[1] Fair Credit Reporting Interpretations, 65 Fed. Reg. 80,802 (proposed Dec. 22, 2000) (to be codified at 16 C.F.R. Part 600).

institutions' development of appropriate privacy policies and ensuring that the FCRA affiliate information-sharing restrictions are both meaningful for consumers and practicable for integrated financial institutions operating in the context of financial modernization.

All references herein to "FR" are to the Federal Register version of the proposed FCRA interpretations. All references to "the Preamble" are to the Commission's introductory commentary published with the proposed interpretations. Specific sections of the proposed interpretations are identified as the proposed sections of chapter 16 of the Code of Federal Regulations in which the interpretations would be codified.

A. Purpose and Scope (Proposed Section 1)

Proposed Section 1 describes the purpose and scope of the Commission's interpretations. As with respect to other sections of the proposed interpretations, proposed Section 1 is generally consistent with the proposed FCRA rules of the federal banking regulators published on October 20, 2000.[2] However, unlike the parallel section of the banking regulators' proposal, the Commission's proposed Section 1 makes no reference to the privacy regulations promulgated by HHS pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). We believe such a reference is critical to clarify the relationship between the interpretations (and accordingly, the Commission's FCRA enforcement policy) and the HIPAA privacy rules. To provide such clarification, we propose that a new subsection (iii) be added to Section 1, to read as follows:

> *(c) Relation to other laws. Nothing in this Appendix shall be construed as interpreting the FCRA to modify, limit or supersede the standards governing the privacy of individually identifiable health information promulgated by the Secretary of Health and Human Services (HHS) under the authority of sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d-1320d-8). In the event of an inconsistency between these interpretations and the HHS privacy standards, the latter shall control.*

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[2] Fair Credit Reporting Regulations, 65 Fed. Reg. 63,120 (proposed Oct. 20, 2000) (to be codified at 12 C.F.R. Parts 41, 222, 334 and 571).

B. Definitions (Proposed Section 3)

1. Consumer Report – Credit Header-type Identifiers

Proposed Section 3(g)(2)(i) excludes from the definition of "consumer report" "[a]ny report containing information solely as to transactions or experiences between the consumer and the person making the report." Neither the FCRA nor the proposed regulations explicitly state that such "transaction or experience" information includes identifying data, such as a consumer's name, address or Social Security number, that is used solely for purposes of identifying the consumer. However, the Commission has determined that such information is not within the scope of a "consumer report" because it does not bear on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.[3] Particularly in light of recently heightened attention to consumer privacy issues, we believe that it would be helpful both to consumers and financial institutions for the Commission to expressly state in its FCRA interpretations that mere "identifier" information is not "consumer report" information. Accordingly, we propose that Section 3(g)(2)(i) be amended to read as follows (new proposed language is in italics):

> (i) Any report containing information solely as to transactions or experiences between the consumer and the person making the report, *including any identifying information, such as name, address, Social Security number or other personal characteristic, that is used or expected to be used solely for the purposes of identifying the consumer.*

2. Consumer Report – Usage Limitation

Both the FCRA itself and the Commission's proposed interpretations define "consumer report" as a consumer reporting agency's communication of certain information "which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . credit or insurance" or for any of the other "permissible purposes" identified in FCRA section 604 (15 U.S.C. § 1681b). We believe it is important for the Commission's interpretations to

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[3] See In re Trans Union Corp., FTC Docket No. 9255, 2000 WL 257766 (FTC Feb. 10, 2000) at *22 ("we find that the 'bearing on' limitation, set forth in Section 603(d) excludes from the FCRA's definition of consumer report certain predominantly identifying information").

include express language clarifying that information of a type referenced in this definition (i.e., information "bearing on a consumer's credit worthiness, credit standing, credit capacity," etc.) constitutes a "consumer report" only if the information is in fact "used or expected to be used or collected" for any of the section 604 "permissible purposes." We believe such clarification would help ensure that consumers understand that information of a type listed in the "consumer report" definition may be shared among affiliated companies without the provision of an opt out notice where the recipient affiliate does not use, expect to use or collect the information for any of the FCRA section 604 "permissible purposes."

In order to provide the recommended clarification, we propose that the Commission insert an additional paragraph in Section 3(g)(2) ("Exclusions"), to read as follows:

> *( ) Any communication among affiliates of information that the recipient of the information does not use, expect to use or collect in whole or in part for any of the purposes authorized under section 604 of the Act (15 U.S.C. 1681b).*

3. Consumer Report – Joint Users

As currently interpreted by the Commission, the FCRA permits sharing of consumer report information among affiliates without the provision of an opt out notice when those affiliates are "joint users" of the information for permissible purposes authorized by the consumer to whom the information pertains. See FTC Staff Opinion Letter re "Joint users" – FCRA §§ 603(f) and 604(a)(3)(A)" (Nov. 20, 1998) (letter from Helen G. Foster, Esq. to Linda J. Throne). We believe this interpretation should be codified as part of the Commission's formal FCRA interpretations, in order to prevent confusion regarding the application of the statute to "joint users." To accomplish this, we propose inserting an additional exclusion to the definition of "consumer report" in Section 3(g)(2), to read as follows:

> *( ) Any communication of opt out information among affiliates, either directly or indirectly through an independent contractor agent or broker representing those affiliates, if those affiliates are jointly involved in uses of the information for permissible purposes under section 604 of the Act (15 U.S.C. 1681b) and the consumer initiated those joint uses by the affiliates prior to the communication.*

4. Opt Out Information

The Commission has solicited responses to several questions regarding its proposed definition of "opt out information."[4] Among other things, the Commission has asked whether this term would be likely to create confusion in the event that consumer information is shared with both affiliates and third parties, subject to both the GLBA and the FCRA opt out provisions. We believe such confusion might well result from the Commission's proposed use of the term "opt out information," and we believe that, as suggested by the Commission, the term "FCRA opt-out information" would be a better term to use in the FTC interpretations. We accordingly recommend that Section 3(k) of the interpretations define "FCRA opt out information" rather than "opt out information" as currently proposed.

In addition, we believe that the proposed definition of "opt out information" is deficient in an important respect: it fails to include the reference to "communication . . . by a consumer reporting agency" that is part of the FCRA (and proposed Section 3(g)) definition of "consumer report." Absent such reference, "opt out information" could be construed to include information from any source that is used, expected to be used, or collected for a section 604 "permissible purpose." Such a construction would be misleading and is apparently inconsistent with the Commission's intention. Accordingly, we strongly recommend that the introductory clause of Section 3(k) be amended by adding "communicated by a consumer reporting agency" between the words "information" and "that."

C. Communication of Opt Out Information to Affiliates (Proposed Section 4)

Proposed Section 4 lists three circumstances under which, collectively, a company's communication of opt out information about a consumer is not a consumer report. The Commission has inquired whether this interpretation, when combined with others in the proposed interpretations, is sufficient to encompass the opt out notice and procedure provided in Section 603(d)(2)(A)(iii) of the FCRA.[5] We believe that proposed Section 4 is sufficient for this purpose, with one exception. We believe it is important to include an additional circumstance, apparently contemplated by the Commission but not expressly stated in the proposed interpretations, which is the communication of such

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[4] FR 80,804.

[5] Id.

information based on a consumer's consent. Such an exception to the opt out notice requirement is included in the Commission's GLBA regulations,[6] and confirming its existence by express reference in the FCRA interpretations would provide meaningful consistency.[7] Accordingly, we propose adding, as a new paragraph of Section 4, an exception independent of the existing three-condition exception, to be followed by the existing subsections of that Section. Specifically, we propose substituting subsection (a) of proposed Section 4 with the following:

> *(a) The consumer has consented, in a written authorization at the time of application for a product or service of a company, to the sharing of opt out information among the company's affiliates, or*

The existing subsections of proposed Section 4 would follow, and be redesignated accordingly.

D. Categories of Opt Out Information (Proposed Section 5)

The Commission has requested comment on the extent to which the categories of information listed in proposed Section 5(d)(2) should be considered consistent with similar categories in the GLBA privacy regulations in order to reduce compliance burdens and consumer confusion.[8] We believe that the first two categories listed in proposed Section 5(d)(2) (information (i) from a consumer's application or (ii) from a consumer credit report) are consistent with the GLBA privacy regulations' categories. We do not believe, however, that the second two categories listed in proposed Section 5(d)(2) (information (iii) obtained by verifying representations made by a consumer or (iv) provided by another person regarding its employment, credit, or other relationship with a consumer) are likewise consistent. We find these latter two proposed categories obscure, and we believe that their addition to the list of categories of information already required to be included in an institution's privacy notice would be both confusing to consumers and burdensome (as well as confusing) for financial

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[6] 16 C.F.R. § 313.15(a)(1).

[7] We also note that where a consumer has affirmatively consented to affiliate information-sharing, not only would it be an unwarranted expense for each affiliate to have to request separate consumer reports on the same consumer, but also such multiple requests may be adversely treated by credit scoring models, to the detriment of the consumer.

[8] FR 80,805.

institutions. Further, we believe that, if any categories of opt out information are to be identified in the FCRA interpretations (we note that the FCRA itself does not identify any such categories), they should be those reflected in the legislative history of the FCRA, see preamble to federal banking agencies' joint notice of FCRA rulemaking,[9] and therefore be limited to the first two categories listed in proposed Section 5(d)(2).

E. Reasonable Opportunity to Opt Out (Proposed Section 6)

1. Proposed 30-day waiting period

The Commission has requested comment on whether the proposed time period of 30 days is the appropriate time period to require companies, before sharing opt out information with affiliates following the delivery of a FCRA opt out notice, to provide for the consumer to opt out.[10] We do not believe 30 days is uniformly a reasonable period of time for this purpose. Requiring a 30-day waiting period in certain circumstances could adversely affect consumers who might otherwise benefit from company services. For example, a consumer applying for a home mortgage may need to obtain homeowners' insurance as a condition of the mortgage agreement and, to facilitate this, may wish to have his or her mortgage application information shared by the mortgage lender with an affiliated homeowners' insurer. Such a consumer should be able to authorize such information-sharing to take place immediately after he or she has communicated a decision not to opt out. The consumer should not have to duplicate the provision of his or her application information simply because of an inflexible 30-day prohibition against the lender sharing the information after providing its opt out notice. Affording the flexibility to permit prompt service of a consumer's needs would particularly benefit consumers in cases where an institution provides an opt out notice electronically and the consumer provides an immediate response declining the offer to opt out.

To address these considerations, we propose that Section 6(b)(3) be amended to read as follows (proposed new language is in italics):

> (3) By electronic means. A company notifies the consumer electronically and provides at least 30 days after the date that the consumer acknowledges receipt of the

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[9] Fair Credit Reporting Regulations, 65 Fed. Reg. 63,120, 63,123 (proposed Oct. 20, 2000).

[10] FR 80,805.

electronic notice *or, if the notice is included in an electronic application for a product or service of the company that the consumer may complete electronically, it provides at least the time until it receives the consumer's electronic message containing the completed application.*

2. Continuing opportunity to opt out

Proposed Section 6(c) provides: "A consumer may opt out at any time." We believe it is important to clarify that a consumer's right to opt out, if exercised, prohibits an institution that is not a consumer reporting agency from sharing with its affiliates opt out information subsequent to receipt of the consumer's opt out direction (and during any preceding "reasonable period of time" the consumer has to provide such direction after delivery of the related opt out notice). For example, a consumer may have previously declined opt outs offered by an institution, but, upon receiving a new opt out notice from that institution, might choose to opt out. It is important that the consumer understand that the opt out will apply only to future information-sharing, consistent with proposed Section 10 ("Time by which opt out must be honored"). Accordingly, to make clear that the interpretations do not impose any requirement to retrieve or otherwise take action with respect to information about a consumer that was shared with affiliates prior to the receipt of the same consumer's opt out instruction, we proposed that Section 6(c) be amended to state (new proposed language is italicized):

(c) Continuing opportunity to opt out. A consumer may opt out at any time with respect to sharing among a company and its affiliates of opt out information not previously shared among the affiliates prior to receipt of the opt out notice.

F. Delivery of Opt Out Notices (Proposed Section 8)

The Commission has sought comment on proposed Section 8(f), which describes appropriate methods for delivery of opt out notices in situations where two or more consumers jointly obtain a product or service from a company.[11] We believe that proposed Section 8(f) requires clarification with respect to whether the same opt out notice must be delivered to more than one of such consumers. Proposed Section 8(f)(i)

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[11] FR 80,805.

states that "[t]he company may provide a single notice to all of the joint consumers." (Emphasis added.) We propose additional language to clarify that such single notice need not be sent to each of the joint consumers for his or her individual receipt. Such language would be consistent with Regulation B of the Federal Reserve Board, which permits banks to send single notices regarding joint consumer accounts only to the primary applicant or borrower.

To provide the recommended clarification, we propose that Section 8(f)(i) be amended to read as follows (proposed new language is italicized):

> (i) The company may provide a single notice to all of the joint consumers, *including by providing one notice to the primary or first-listed consumer on the consumers' joint application or joint agreement with the company.*

G. Time by Which Opt Out Must Be Honored (Proposed Section 10)

The Commission has sought comment on whether the interpretations should specify a fixed number of days that would be deemed a "reasonably practicable" period of time for complying with a consumer's opt out direction.[12] We do not believe the interpretations should contain any such specified time period, but rather should retain the Commission's proposed statement that "the company must comply with the opt out as soon as reasonably practicable after the company receives it." There will be a number of factors influencing what constitutes a "reasonably practicable" period of time in this context, depending on the facts and circumstances surrounding the company, including its technological capabilities, complexity, etc., that would make the specification of a particular compliance deadline inappropriate. We therefore recommend that the Commission retain the flexibility provided by the current wording of proposed Section 10.

H. Duration of Opt Out (Proposed Section 11)

Proposed Section 11 provides that "[a]n opt out remains effective until revoked by the consumer in writing or electronically . . . ." (emphasis added). We oppose the proposed limitation of a consumer's means of revoking his or her opt out to a written or electronic method. We believe a consumer should be able to revoke his or her opt out by oral direction as well, consistent with the Commission's approach in proposed

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[12] Id.

Section 7(b)(4), which identifies an oral opt out as among several "reasonably convenient methods" of opting out. The Commission has not explained why it proposed fewer options for a consumer to communicate his or her direction in the revocation context than in the opt out context, and we perceive no meaningful reason for such inconsistency. Accordingly, we recommend that the first sentence of proposed Section 11 be amended by inserting the word "orally" (preceded by a comma) between the words "writing" and "or."

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We appreciate the opportunity to comment on the Commission's proposed interpretations. If you have any questions regarding our comments, please contact the undersigned either by phone at (202) 942-5000 or by fax at (202) 942-5999, or by e-mail to mierzmi@aporter.com or perkina@aporter.com.

Sincerely,

Michael B. Mierzewski
Nancy L. Perkins