**NATIONAL RETAIL FEDERATION**

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January 31, 2001

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

Re: Comments Regarding the Fair Credit Reporting Act Interpretations: Proposed Interpretations, 16 C.F.R. Part 600

Dear Secretary:

The National Retail Federation ("NRF") submits this response to the request for comments issued by the Federal Trade Commission ("FTC") regarding implementation of provisions of the Fair Credit Reporting Act, 15 U.S.C. §1681 et seq. ("FCRA"), that permit institutions to communicate consumer information to their affiliates without incurring the obligations of consumer reporting agencies.

The NRF is the world's largest retail trade association; its members include the leading department, specialty, independent, discount, and mass merchandise stores in the United States and 50 nations around the world. The NRF's mission is to protect and advance the interests of the retail industry through programs and services in research, education, training, information technology, and government affairs. Since a number of NRF members are affiliated with financial institutions that offer credit plans to their customers, the affiliate-sharing provisions of the FCRA have a direct impact on the retail industry.

The NRF supports the FTC's efforts to clarify the content and delivery of FCRA notices to consumers and generally supports the goal of harmonizing, to the extent feasible, the notice and delivery requirements under the FCRA with the regulations recently promulgated under Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. §6801 et seq. ("GLBA"). Nevertheless, it is crucial to recognize that wholesale incorporation of the standards set forth in the GLBA regulations would be inappropriate under the FCRA since the two statutes are structured quite differently and apply in differing, if overlapping, contexts. Moreover, in enacting the GLBA, Congress expressly preserved the differences between these two statutes and clarified that nothing in the GLBA should "be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act." 15 U.S.C. §6806(c). Instead, Congress granted certain agencies limited rulemaking authority to "prescribe such regulations *as necessary to carry out the purposes" of the FCRA* -- not to alter those purposes or the standards set forth in the FCRA, whether to conform them to the GLBA or for any other reason. 15 U.S.C. § 1681s(e) (emphasis added). With this guiding principle in mind, the NRF submits the following comments with respect to selected issues raised by the FTC's proposal.

*Comments*

*I. As to Question B(3), the definition of "opt out information" is potentially overbroad and should be revised to clarify that it does not include consumer identity information that, under the criteria set forth in the FCRA, does not constitute a "consumer report."*

If information is not a "consumer report" under the FCRA, the notice and opt out provisions of the statute (and therefore the regulations) are wholly unnecessary and thus should be inapplicable. In this regard, it is important to note that the FCRA opt out provisions themselves impose no direct notification obligations on anyone. Instead, they are part of a statutory exclusion from the definition of "consumer report." In order to permit certain types of information sharing among affiliates without triggering the regulatory obligations imposed by the FCRA, Congress decided to carve out from the definition information that would otherwise constitute a consumer report where the information is communicated among affiliates but the consumer is provided a disclosure and an opportunity to opt out of the information sharing. 15 U.S.C. § 1681a(d)(2)(A)(iii).

As noted above, Congress did not delegate the authority to alter the FCRA or to expand its scope. Their only power is to carry out the purposes set forth in the statute. To the extent that information would not fall within the definition of the term "consumer report" without regard to the affiliate-sharing exemption, there is neither any reason nor any statutory requirement that opt out notices be provided. We agree that it should be clear that information that would not constitute a "consumer report" under the FCRA is not "opt out information" and is not subject to the disclosure or opt out provisions.

We are concerned that the examples cited as to the scope of the term "opt out information" in the proposal section 5(d) is overbroad. They suggest that categories of opt out information may include information from a consumer's application or credit report, among other sources, and that examples of information within these categories "include a consumer's: (i) Income; (ii) Credit score or credit history with others; (iii) Open lines of credit with others; (iv) Marital status; and (vi) Medical history." Proposed Reg. § _.5(d)(2)-(3).

In crafting such broad categories and examples of opt out information, the FTC has impermissibly included within the scope of that term certain consumer identity information that is not a consumer report communicated by a consumer reporting agency subject to regulation under the FCRA. In particular, the regulations list marital status as one example of opt out information when that information is, like other consumer identity information, not a consumer report and therefore cannot be opt out information. Indeed, under the Equal Credit Opportunity Act, marital status cannot (except in very limited circumstances) lawfully be utilized in connection with a determination of a consumer's eligibility for credit, and therefore, by definition, falls outside the scope of a consumer report. 15 U.S.C. § 1691(a)(1), (b)(1). Nevertheless, retailers and their financing affiliates have legitimate reasons for exchanging information about the marital status of their customers, since (as the Equal Credit Opportunity

Act expressly acknowledges) that information may be relevant in defining the rights of creditors under various state marital property regimes. At a minimum, the proposal should clarify that a person's marital status is not opt out information and that the other examples and categories set forth in the proposal are "opt out information" only if, but for an opt out notice, they would fall within the FCRA's definition of "consumer report."

The FCRA limits the definition of "consumer report" to:

> any written, oral, or other communication of any information by a consumer reporting agency *bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living* 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 (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 604. 15 U.S.C. §1681a(d)(1) (emphasis added).

To the extent that information does not bear on these seven statutory criteria or to the extent that it was not used, expected to be used or collected for purpose of serving as a factor in determining a consumer's eligibility, it does not constitute a "consumer report" under the FCRA. For this reason, it has long been recognized that separately communicated 'above-the-line' or credit header information, including information about marital status, is not a consumer report.

The Federal Trade Commission has explicitly recognized that a "report limited solely to the consumer's name and address alone, with no connotations as to credit worthiness or other characteristics does not constitute a 'consumer report.'" *Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act*, 55 Fed. Reg. 18,804, 18,810, 16 C.F.R. pt. 600, App. (May 4, 1990) ("FTC Commentary"). In addition, the Commission noted that directories, "to the extent they only provide information regarding name, address and phone number, *marital status*, home ownership, and number of children, are not 'consumer reports,'" in part because the information "does not reflect on credit standing, credit worthiness or any of the other factors." *Id.* (emphasis added).

In considering legislation regarding restrictions on the use of social security numbers, Congress recently reaffirmed that credit header information, again including marital status, is not subject to the FCRA:

> In general, consumer reports contain two kinds of information. The 'credit header,' which is listed at the top of the consumer report contains identifying information, such as the individual's name, address, date of birth, *marital status,* mother's maiden name, and SSN among other things. The 'credit report' lists the individual's credit information and the timeliness of payments. . . .

> The FCRA regulates the disclosure and use of an individual's credit report. This information may be disclosed only for certain legitimate purposes, which are outlined in the FCRA. According to FTC rulings, the definition of 'credit report' contained in the FCRA does not include credit header information. *As a result, this identifying information is exempt from FCRA regulations.* H. Rep. No. 106-996(I), at 29 (Oct. 24, 2000) (emphasis added); *See also id.* ("Credit header information contains an individual's SSN and other unique identifying information. This information does not receive the same privacy protections as the rest of the credit report. Consequently, organizations who collect this personal information may make it available to the public or sell it without an individual's knowledge or consent.").

Retailers in particular need to remain free to exchange "credit header" information with their financing affiliates in order to provide their retail customers with timely and valuable merchandise offers. Retailers who operate their own credit systems face no FCRA restrictions on their free use of identifying information about their credit customers. There is no reason to impose more stringent restrictions on retailers that have placed their credit operations in separately incorporated subsidiaries; the privacy and customer benefit issues are identical regardless of corporate structure, and there is no justification for imposing disparate obligations under the FCRA.

*II. The comments should expressly provide for affiliates' joint use of consumer report information.*

The proposed comments' silence may create ambiguity as to the use of consumer report information by corporate affiliates involved in the same transaction or otherwise outside the scope of the FCRA's notice and opt out requirements for affiliate sharing. For example, as the Commission has recognized, when a consumer makes a credit application at a retailer's point of sale, the retailer may transmit consumer report information to a credit card-issuing affiliate. In this case, both entities are involved in a decision for which there is a permissible purpose to obtain a consumer report and, therefore, may jointly use consumer report information under the FCRA. *See* FTC Commentary, 16 C.F.R. pt. 600, App. at ¶ 604(f) – 8 (entities may share consumer reports with others that are jointly involved in decisions for which there are permissible purposes to obtain the reports); *see also* FTC Staff Opinion Letters from *Issac* (June 11, 1996) and to *Throne* (Nov. 20, 1998). A requirement for a "reasonable" 30-day opportunity to opt out before affiliates are permitted to share application and credit report data unfairly targets only affiliates with crippling restrictions, or at best creates unnecessary ambiguity.

The FCRA's notice and opt out provisions for affiliate sharing create an exception to the definition of "consumer report" in Section 603(d)(2) and thus enable corporate affiliates to share information that would otherwise be a consumer report. If affiliates share consumer report information in a manner consistent with the FCRA, the affiliate sharing provisions do not apply. As a result, when a retailer and its affiliate share information submitted as part of an application

for credit at the point of sale, neither the retailer nor its financing affiliate need give written notice to the consumer or wait for an opt out period to expire before extending credit.

Similarly, it is recognized that the FCRA affiliate sharing rules are inapplicable when a user discloses consumer report information to an affiliate acting as its agent in a process that gave rise to the permissible purpose. FTC Commentary, 16 CFR pt. 600, App. at ¶ 604(a)(3)(E) – 6.

Because of the relationship between the "opt out information" and the FCRA's provisions for use of consumer reports, the FTC should specifically recognize the circumstances where the FCRA's notice and opt out provisions are inapplicable to affiliates' joint use of consumer report information.

*III. The Commission should decline to set a rigid deadline by which a consumer's opt out election must be implemented.*

As to question 1, as to whether there should be a fixed number of days (e.g., 30 days) in which to implement a consumer's opt out direction, the NRF respectfully suggests that a rigid deadline is unworkable and undesirable, particularly in a diverse industry like retailing where firms vary widely with regard to the nature, organization, and flexibility of their data processing systems. As recognized by the various agencies that issued GLBA regulations, setting a bright-line rule for implementing an opt out election is undesirable "in light of the wide range of practices through the financial institutions industry." *See*, e.g., 65 Fed. Reg. 35,162, 35,178 (June 1, 2000). Individual institutions have differing compliance systems and varying levels of resources to dedicate to implementing opt out elections and some will undoubtedly be able to effectuate an opt out more quickly than others. A bright-line rule could discourage those institutions that are capable of quicker implementation from processing a consumer's opt out election as early as they might otherwise and, in any event, is likely to become outdated quickly in light of the rapid technological advances in the industry. *Id.* Instead, the NRF would strongly support a provision specifying that an entity "must comply with the opt out as soon as reasonably practicable after it receives it." Such a flexible standard achieves the proper balance between recognition of the varying circumstances faced by entities in complying with the FCRA and the interest of having a consumer's opt out election honored in an expeditious manner.

*Conclusion*

The NRF appreciates the Commission's consideration of these comments.

Sincerely,

Mallory B. Duncan