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January 30, 2001

VIA HAND DELIVERY

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

Re: Proposed Interpretations of the Fair Credit Reporting Act
16 C.F.R. Part 600–Comment

Dear Mr. Secretary:

The following comments are submitted on behalf of Creditors International ("CI") in response to the Federal Trade Commission's request for written comments on the proposed interpretations of the Fair Credit Reporting Act ("FCRA") affiliate information sharing provision. *See* 65 Fed. Reg. 80802 (Dec. 22, 2000) (hereinafter "Proposed Interpretations"). CI has enclosed five copies of the comments.

I. Statement on Creditors International.

Creditors International, a division of the American Collectors Association, is a trade association composed of professionals involved in all facets of the credit cycle. Headquartered in Minneapolis, Minnesota, CI represents over 1,150 credit professionals in the United States, Canada and other countries around the world. Many CI members are responsible for their company's credit, collection or risk function. Further, CI members represent a wide variety of business in various stages of growth ranging from Fortune 500 companies to businesses employing as few as 10 employees.

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CI commends the Commission for its attempt to develop objective standards to clarify the meaning of the affiliate information sharing provision of the FCRA.[1] CI's comments underscore the need for an interpretation of the affiliate information sharing provision that provides consumers with meaningful disclosure of an institution's affiliate sharing practices. At the same time, CI believes that any interpretation of the affiliate information sharing provision must accurately reflect the statutory provisions clearly set forth in Section 603(d)(2)(A)(iii). The following comments address the most significant issues that must be addressed as part of any effort to adopt the Proposed Interpretations.

II. Comments on the Proposed Interpretations.

A. The Commission Should Clarify That the Proposed Interpretations Are Voluntary and Advisory.

CI believes that the Proposed Interpretations must be clarified to clearly inform the public of their advisory and voluntary nature. As the Commission is aware, the FCRA, and particularly the Consumer Credit Reporting Reform Act of 1996 (Pub. L. 104-208), expressly barred implementing regulations of the FCRA by federal agencies. 15 U.S.C. § 1681s(a)(4) ("Neither the Commission nor any other agency referred to in subsection (b) may prescribe trade regulation rules or other regulations with respect to this title"). Further, the FCRA limited interpretative authority to the Board of Governors of the Federal Reserve System. 15 U.S.C. § 1681s(e).

Section 506(b) of the Gramm-Leach-Bliley Act ("GLBA") removed the express prohibition against issuing implementing regulations by the Commission. 113 Stat. 1441. Section 506(a)(2) gave certain Federal banking agencies – but not the Commission – the authority to prescribe regulations concerning the affiliate information sharing provision in 603(d)(2)(A)(iii). The result of these changes is that Congress only authorized the Federal

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[1] The affiliate information sharing provision is set forth in Section 603(d)(2)(A)(iii) of the FCRA. It excludes from the definition of a "consumer report" "any. . . (iii) communication or other information among persons related by common ownership or affiliated by corporate control, 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 information is initially communicated, to direct that such information not be communicated among such persons." 15 U.S.C. § 1681a(d)(2)(A)(iii) (2000).

banking authorities to issue FCRA regulations. P.L. 106-102 at Section 506(a). As the Commission correctly notes, Congress "did not grant such regulatory authority to the Commission." 65 Fed. Reg. at 80803.

In the absence of an express grant of regulatory authority by Congress, the Commission has submitted the Proposed Interpretations. Although the Federal Register notice does not cite any authority for adopting the Proposed Interpretations, CI does not dispute the discretionary authority of the Commission to issue interpretations under the FCRA when it is in the public interest. That is, the Commission is authorized to issue interpretations of "provisions of the Fair Credit Reporting Act on its own initiative . . . *when it appears to the Commission that guidance as to the legal requirements of the Act would be in the public interest and would serve to bring about more widespread and equitable observance of the Act.*" 16 C.F.R. § 1.73(a)(1) (2000) (emphasis added). *Accord* Federal Trade Commission Operating Manual § 8.6.1 ("While these interpretations are intended to clarify the requirements of the Acts that they describe, they are not substantive rules and do not have binding force and effect on members of the public. Like industry guides, they are advisory in nature. . . ."). However, the Federal Register notice has no finding that the Commission believes the Proposed Interpretation to be "in the public interest and would serve to bring about more widespread and equitable observance of the Act." *Id.* To the contrary, the Federal Register notice merely indicates that the Proposed Interpretations are designed to ensure that the Commission's views on Section 603(d)(2)(A)(iii) are substantively the same as the Federal banking agencies.

CI also is concerned that the Commission failed to clarify for the public the advisory and voluntary nature of the Proposed Interpretations.

> *The interpretations are not substantive rules and do not have the force or effect of statutory provisions. They are guidelines intended as clarification of the Fair Credit Reporting Act, and, like industry guides, are advisory in nature.* They represent the Commission's view as to what a particular provision of the Fair Credit Reporting Act means for the guidance of the public in conducting its affairs in conformity with that Act, and *they provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry.*

16 C.F.R. § 1.73(a)(2) (2000) (emphasis added). Indeed, certain statements in the Proposed Interpretation suggest that Commission will enforce Section 603 (d)(2)(A)(iii) "in accord with any interpretations it may issue in this proceeding. . . ." 65 Fed. Reg. at 80803 ("Although Section 603(d)(2)(A)(iii) of the FCRA has been effective since September 30, 1997, the

Commission plans to enforce that provision in accord with any interpretations it may issue in this proceeding only after any similar final regulations issued by the Federal banking agencies have become effective").

Clarification is warranted to avoid confusion over the effect of the Proposed Interpretations, especially where the Federal banking agencies were given express rulemaking authority by Congress to issue regulations that the Commission now seeks to adopt as administrative interpretations of the FCRA's information sharing provision. 65 Fed. Reg. at 80803 ("The proposed interpretations are substantively parallel to the proposed regulations issued by the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, and Office of Thrift Supervision . . . in a Notice of Proposed Rulemaking published in the Federal Register on October 20, 2000. . . .").

CI also notes the Commission clearly disclosed to the public the advisory nature of the FCRA Official Staff Commentary issued in 1990, which is to be re-characterized as Appendix A . *See Statement of General Policy or Interpretation*, 16 C.F.R. § 600.2(a) ("The interpretations in the Commentary are not trade regulation rules or regulations, and, as provided in Sec. 1.73 of the Commission's rules, they do not have the force or effect of statutory provisions"); 16 C.F.R. § 600.2(b)(1) ("This Commentary . . . is a guideline intended to clarify how the Commission will construe the FCRA in light of Congressional intent as reflected in the statute and its legislative history. The Commentary does not have the force or effect of regulations or statutory provisions. . . ."). Here, the Commission proposes to merely state that "Appendix B has the same status as Appendix A." We believe a more complete disclosure is necessary to avoid confusion.

B. Consistency with the Gramm-Leach-Bliley Act.

CI understands the interest of the Commission to ensure consistency between Section 603(d)(2)(A)(iii) of the FCRA and the privacy rules of the GLBA. Where appropriate, consistency between the GLBA and the affiliate information sharing provision may facilitate compliance and produce more meaningful disclosures for consumers. However, the FCRA does not mandate that the Proposed Interpretations imitate the GLBA in every respect. For the reasons set forth below, CI respectfully submits that the Commission has exceed its authority by proposing an interpretation of Section 603(d)(2)(A)(iii) that is inconsistent with the Congressional intention in enacting the statutory provision.

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The GLBA privacy rules are vastly different and substantively more detailed than the FCRA affiliate information sharing provision. The only similarity between the two statutes is that they 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 regime. It explicitly dictates the information which must be included in the required notice. The GLBA mandates that the privacy notices must include: (1) the categories of nonpublic personal information that are collected; (2) the categories of nonpublic personal information that are disclosed; (3) the categories of affiliates and nonaffiliated third parties to whom nonpublic personal information is disclosed; (4) the categories of nonpublic personal information about former customers that are disclosed; (5) the categories of affiliates and nonaffiliated third parties to whom nonpublic personal information about former customers is disclosed; (6) an explanation of the consumer's right to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, including the methods by which the consumer may exercise that right at that time; and (7) the policies and practices with respect to protecting the confidentiality and security of nonpublic personal information. 16 C.F.R. § 313.6(a)(1)-(8) (2000). Unlike Section 603(d)(2)(A)(iii), the GLBA and implementing regulations contains express mandates with respect to the form of the opt out notice and the method of delivery. *See* 16 C.F.R. § 313.6(a)(8) (2000).

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. 15 U.S.C. § 1681a(d)(2)(A)(iii) (2001). Simply stated, unlike the GLBA notice and opt out provisions, the FCRA does not contain any additional requirements concerning the content of the notice and the opt out and imposes no limitation on the form in which the notice must be delivered.

Further, the intent of the Proposed Interpretations to substantially restrict the scope of Section 603(d)(2)(iii) contradicts the clear intention of Congress to loosen pre-existing restrictions on affiliate information sharing. Prior to the 1996 amendments, affiliates sharing information were deemed to be consumer reporting agencies because they shared "consumer report" information. This placed substantial, unnecessary burdens on affiliates who were required to comply with the heightened FCRA requirements governing consumer reporting agencies. With the 1996 amendments, however, Congress removed this restriction and expressly permitted the affiliates to share the information by providing a simple notice and opt

out without becoming consumer reporting agencies. There can be no doubt that, in so doing, Congress intended the affiliates to encounter less – not more – regulation. The Proposed Interpretation undermines this Congressional mandate.

CI believes that, based on the plain language of the FCRA, much of the detail required in the Proposed Interpretations cannot be justified. If the clear language in the FCRA was deemed to provide a sufficient basis for the expansive content suggested in the Proposed Interpretations, then the detailed language Congress included in the GLBA would be superfluous. Because we know that this is not the case, it is no answer for the Commission to superimpose the highly detailed GLBA requirements on the general requirements contained in Section 603(d)(2)(A)(iii) of the FCRA. If Congress intended the FCRA notices to be as detailed as the GLBA, it would have further amended the FCRA in Title V of the GLBA to specify its intentions. Congress did not. Instead, it expressly stated that the GLBA was not intended "to modify, limit, or supersede the operation of the Fair Credit Reporting Act." 15 U.S.C. § 6806 (2000). Because Congress directed the Commission to not "modify, limit, or supersede the operation" of the FCRA, we believe that the Commission should refrain from adopting an interpretation of Section 603(d)(2)(A)(iii) that clearly would have this affect.

C. The Proposed Interpretations Are Inconsistent with Previous Commission Statements.

The Commission's GLBA Final Rule underscores the fact that the Proposed Interpretations are broader than mandated by Congress and violate the Congressional prohibition against modifying, limiting or superseding the FCRA. The Commission's Final GLBA Rule took issue with comments that challenged the Commission's inclusion of affiliated entities as a category in information that must be disclosed by financial institutions. *See Privacy of Consumer Financial Information*, 65 Fed. Reg. 33646 (May 24, 2000) (hereinafter "Final Rule") (*codified* at 16 C.F.R. § 313 *et seq.* (2000)). The Commission argued that the "language and legislative history of section 503 [of the GLBA] support requiring disclosures of affiliate sharing *beyond what may be required by the FCRA.*" 65 Fed. Reg. at 33663 (emphasis added). It stated that "[w]hile the FCRA disclosures would be a subset of the disclosures required by section 503(a)(1) [of the GLBA], they may not be sufficient to fully satisfy that requirement." *Id.* According to the Commission,

> the legislative history of the [GLBA] suggests that *Congress intended for the disclosure to provide more information about affiliate sharing than what may be required under the FCRA*. The history underscores the Congressional intent of ensuring that the individuals are given the opportunity to make informed

> decisions by reviewing the privacy policies and practices of financial institutions. *The Commission believes that limiting the disclosures about affiliate sharing just to those disclosures required under the FCRA would frustrate that purpose.*

Id. (emphasis added) (footnote omitted).

As such, the Commission argued that affiliate sharing information should be included because Congress intended to "provide more information about affiliate sharing than" required of affiliates under Section 603(d)(2)(A)(iii) of the FCRA. *Id.* Now the Commission asserts that the Proposed Interpretations "allow companies to provide notices and process opt-out elections in a manner similar to the final regulations implementing the privacy provisions of the" GLBA. 65 Fed. Reg. at 80803. CI respectfully submits that this contradictory position is not supportable and will have the effect of modifying or superceding Section 603(d)(2)(A)(iii). If, as stated by the Commission during the GLBA rulemaking, the GLBA privacy protections provide more information about affiliate sharing than required under the FCRA, then the Proposed Interpretations must modify or supercede the FCRA by requiring that more information be disclosed than is required by Section 603(d)(2)(A)(iii).

D. The Proposed Interpretations Should Clarify the Meaning of "Other Information."

Finally, the Proposed Interpretations should clarify and provide specific examples of the Commission's interpretation of "other information" as that term is used in Section 603(d)(2)(A)(iii). As the Commission notes, the 1996 FCRA Amendments:

> . . . excluded from the definition of "consumer report" the sharing of "other information" among affiliates, so long as the consumer, having been given notice and an opportunity to opt out, did not opt out. *"Other information" refers to information that is covered by the FCRA and that is not a report containing information solely as to transactions or experiences between the consumer and the person making the report.*

65 Fed. Reg. at 80803 (emphasis added). Proposed Section 3(k) uses the term "opt out information" to describe "other information." That is, information that (i) bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, (ii) is used or expected to be used or collected for one of the permissible purposes listed in the FCRA (e.g., credit transaction, insurance

underwriting, employment purposes), and (iii) that is not a report solely as to transaction or experience information between the consumer and the person reporting or communicating the information.

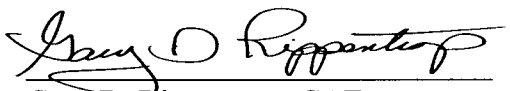
While the Commission's interpretation of "other information" highlights that compliance with the affiliate information sharing provision is triggered only if the information to be shared otherwise satisfies the criteria of a "consumer report," *see, e.g.*, Proposed Section 3(g) (defining "consumer report" and discussing exclusions), it does so too restrictively. Section 3(k) from the Proposed Interpretations only identifies selective parts of the definition of a "consumer report." A more accurate interpretation is that "opt out information" (that is "other information" in the meaning of Section 603(d)(2)(A)(iii)) only applies to information satisfying the criteria for "consumer report" and which is not excepted by operation of the exclusions from a "consumer report" in the FCRA. CI also believes that the Commission should provide specific examples of what constitutes "opt out information" under the Proposed Interpretations.

III. Conclusion.

CI appreciates the Commission's consideration of these comments. We strongly encourage the Commission to adopt an interpretation of the affiliate information sharing provision in Section 603(d)(2)(A)(iii) that both provides consumers with meaningful disclosure of an institution's affiliate sharing practices, while accurately reflecting the statutory provisions in Section 603(d)(2)(A)(iii).

If you have any questions, contact Robbie Thompson, Director of Creditors International, at (952-928-8000 ext. 143).

Respectfully submitted,



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