

Jodi Golinsky
Vice President &
Senior Regulatory Counsel

MasterCard International

Law Department
2000 Purchase Street
Purchase, NY 10577-2509

914 249-5978
Fax 914 249-3648
E-mail jodi_golinsky@mastercard.com
www.mastercard.com

*MasterCard
International*



Via Electronic Mail

August 16, 2004

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex S)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FACTA Notices, Matter No. R411013

To Whom It May Concern:

MasterCard International Incorporated (“MasterCard”)¹ submits this comment letter in response to the Publication of Proposed Guidance for Forms and Request for Public Comment (“Proposal”) issued by the Federal Trade Commission (“Commission”). The Proposal includes two proposed summaries of consumer rights under the Fair Credit Reporting Act (“FCRA”) and two notices of duties under the FCRA. MasterCard appreciates the opportunity to provide the Commission with its comments on the Proposal.

In General

Section 609(d) of the FCRA, as added by the Fair and Accurate Credit Transactions Act (“FACT Act”), requires the Commission to issue a summary of the rights of fraud or identity theft victims under the FCRA (“Identity Theft Summary”) to be distributed by consumer reporting agencies to victims of fraud or identity theft. Section 609(c) of the FCRA, as amended by the FACT Act, requires the Commission to prepare a model summary of consumer rights under the FCRA (“General Summary”) that must include certain information. The General Summary must be provided to consumers by a consumer reporting agency “with each written disclosure by the agency to the consumer.” Section 607(d) of the FCRA requires the Commission to provide a notice setting forth the duties of furnishers of information to consumer reporting agencies (“furnishers”) and a notice outlining the duties of users of consumer reports (“users”) (the “Furnisher Notice” and the

¹ MasterCard is an SEC-registered private share corporation that licenses financial institutions to use the MasterCard service marks in connection with a variety of payments systems, including stored value cards.

“User Notice,” respectively). Although the FACT Act did not amend Section 607(d), it amended other portions of the FCRA that warrant revisions to the existing notices.

Generally speaking, we believe the Proposal is commendable. The Commission has distilled a vast amount of complex information in a manner that consumers, furnishers, and users should find informative and helpful. We believe the Proposal should be adopted with relatively minor changes. We offer the following comments to assist the Commission in finalizing these model summaries and notices.

Comment of General Applicability

We believe the Commission should be mindful that it has been asked to provide model summaries for rights and duties that consumers, furnishers, or users may not have at the time they receive the information. For example, many of the rights and obligations described in the notices are not effective until December 1, 2004. Other rights will not become effective until after that time, such as the ability of some consumers to obtain a file disclosure free of charge. Therefore, we urge the Commission to consider carefully the effective date of the summaries depending on their content.

Identity Theft Summary

Scope of FCRA

The first sentence in the second paragraph of the Identity Theft Summary states that “The [FCRA] governs the collection and use of information about you, including how you pay your bills.” We believe this statement could provide consumers with an inaccurate understanding of the scope of the FCRA. For example, the FCRA does not govern the collection and use of all information about consumers. It may not even govern the collection and use of how a consumer pays his or her bills, such as if the information is never disclosed to a third party but collected and used only for internal purposes by the creditor. Given that this sentence, and the one that follows, does not appear to convey information to the consumer that the consumer can use, it may be simplest to delete the first two sentences in the second paragraph. We do not believe the usefulness of the Identity Theft Summary would diminish. The alternative approach would require a more fulsome description of the FCRA, which we do not believe would be of assistance to consumers in this context.

Free Disclosures

The Identity Theft Summary states that a consumer has a right to a free file disclosure if the consumer believes the file has inaccurate information “due to fraud or identity theft.” However, the consumer’s statutory rights to a free file disclosure pertain only to inaccurate information resulting from fraud, not from identity theft. Although inaccurate information resulting from identity theft will in virtually all circumstances also involve fraud, we believe the Identity Theft Summary should not inappropriately suggest to the consumer that he or she has a right which is not provided in all circumstances. Therefore, the Identity Theft Summary should not refer to a right to a free file disclosure in connection with identity theft. Furthermore, the Identity Theft Summary should clarify

that the consumer may obtain a free file disclosure *once in any 12-month period* in cases where there may be inaccurate information in the file due to fraud.

Fraud Alerts

The paragraph pertaining to fraud alerts states that “You have the right to place a ‘fraud alert’ on your consumer report...”² MasterCard believes that the Identity Theft Summary should clarify that the fraud alerts pertain *only* to the “nationwide” consumer reporting agencies. Although other consumer reporting agencies may insert a fraud alert in the consumer’s file upon request, they would do so voluntarily and not because the consumer has a “right” to have the fraud alert inserted.

Rights under Section 609(e)

The Identity Theft Summary also explains that the consumer has “the right to obtain documents relating to accounts opened in your name” and provides a brief summary of the rights provided under Section 609(e) of the FCRA. We urge the Commission to amend this provision to clarify to consumers that there are other requirements associated with these rights (*e.g.*, the request must come to a specific address, the business entity can decline to provide the information in certain circumstances, etc.). Therefore, the second sentence in the relevant paragraph could begin with “In certain circumstances,” and the paragraph could conclude with “For more information about these rights, see www.____.gov/____.” We believe this will alleviate the potential for confusion created by the Identity Theft Summary over what rights a consumer may have under Section 609(e) of the FCRA.

Ability to Block Information from Being Furnished

The Commission proposes a brief description of the consumer’s right to block a furnisher from furnishing information to a consumer reporting agency in certain circumstances. We believe that this provision should be clarified to assist the consumer in understanding his or her rights and responsibilities. For example, the Identity Theft Summary should indicate that the consumer will need to identify the information he or she wants the furnisher to block. Furthermore, the Identity Theft Summary suggests that the submission of an identity theft report is optional. However, in order to trigger the rights provided by the FCRA in this regard, the consumer *must* provide an identity theft report to a furnisher. We urge the Commission to amend the Identity Theft Summary accordingly in order to provide consumers with a more complete understanding of this new right.

Credit Scores and Other Rights

The last two paragraphs of the Identity Theft Summary include a description of some other rights under the FCRA available to consumers that do not necessarily pertain to identity theft. We urge the Commission to delete these paragraphs because they are

² We note that the Identity Theft Summary and other model documents in the Proposal reference “consumer report” in many instances when it should likely refer to the consumer’s file at a consumer reporting agency.

superfluous to the requirement to provide identity theft victims with a summary of “the rights of consumers under [the FCRA] with respect to the procedures for remedying the effects of fraud or identity theft” in certain circumstances. The rights described in the last two paragraphs of the Identity Theft Summary do not pertain to the procedures for remedying the effects of fraud or identity theft. Consumers will be given a more complete description of their rights when they receive file disclosures from consumer reporting agencies. Therefore, it is not necessary as part of the Identity Theft Summary.

If the Commission retains the last two paragraphs of the Identity Theft Summary, we urge the Commission to clarify that the consumer has a right to obtain a credit score *for a fee*. We believe that some consumers may read the existing language in the Proposal to suggest that the credit score should be provided at no charge. Therefore, we ask the Commission to clarify to consumers that they may be required to pay a fee for access to a credit score. The Identity Theft Summary should also reference “a” credit score instead of “you[r]”³ credit score. As drafted, the Proposal suggests to consumers that they each have a single credit score. Revising the Identity Theft Summary to refer to “a” credit score removes this inappropriate implication.

General Summary

Free File Disclosures

The General Summary states that the consumer is entitled to a free file disclosure “if [the consumer is] the victim of identity theft.” As noted above, this is not necessarily true as a matter of the consumer’s statutory rights. Although victims of identity theft may be able to obtain free file disclosures for one of several reasons (*e.g.*, inaccurate information in the file due to fraud, placing an initial fraud alert in the consumer’s file at a nationwide consumer reporting agency), being a victim of identity theft does not automatically give the consumer the ability to request a file disclosure free of charge. Furthermore, the General Summary should clarify that the rights to a free file disclosure are rights to obtain a free file disclosure once in any 12-month period.

Credit Scores

For the reasons discussed above, MasterCard suggests referencing “a” credit score instead of “your” credit score in the General Summary.

Inaccurate Information

The General Summary states that “A consumer reporting agency or furnisher must remove or correct information verified as inaccurate....” It may be more appropriate to state that “Inaccurate information must be removed or corrected....” In this regard, consumers may not understand the term “furnisher.” Furthermore, a furnisher cannot

³ We note that the Identity Theft Summary refers to “you credit score” and it should probably read “your credit score.”

remove information from the consumer's file at a consumer reporting agency, only the consumer reporting agency can remove information from the consumer's file.

Seeking Damages from Violators

The General Summary states that a consumer may sue some entities in state court for violations of the FCRA. This is true in an abstract manner. However, the General Summary should be revised to indicate that the defendant may remove the case to federal court. The consumer should be aware that regardless of where the case is filed, he or she has a significant chance of litigating the case in a federal court.

We also note that the General Summary suggests that users may be subject to private rights of action in all instances. This is not the case. For example, there is no private right of action with respect to issues relating to the risk-based pricing notice. We believe that the General Summary should make note of this. We also urge the Commission to make more clear that a private right of action exists for consumers only in limited circumstances with respect to furnishers. The majority of furnisher obligations are not subject to private rights of action, and we believe the General Summary should reflect this fact.

Furnisher Notice

Resupplying the Notice

Because of the significant changes to the FCRA resulting from the FACT Act, the Commission has proposed amending the existing notice provided to furnishers. We agree that amending the current notice is appropriate, and we generally believe the Furnisher Notice in the Proposal is well crafted. In the Supplementary Information, the Commission states that the Furnisher Notice should be resupplied to all furnishers. In light of the costs involved, we do not believe that this is necessary. If the Commission insists on the approach described in the Supplementary Information, we ask for the Commission's assurance that it will not require another notice to be sent to furnishers if the notice is further revised once the FACT Act rulemakings are complete.

References to Commission Rules

The Furnisher Notice includes several provisions with references to upcoming rulemakings. Included in these provisions is a statement to the effect that the Commission's rules will be available at www.ftc.gov/credit. As a general matter, we believe that such references will be helpful to those entities who are subject to the Commission's jurisdiction. However, we request that the Commission revise the Furnisher Notice to indicate that regulations issued by other agencies, and not by the Commission, may apply to the furnisher. We believe this will provide a more accurate description to the furnisher of the applicability, or lack thereof, of the Commission's regulations to the furnisher. Alternatively, if the Commission intends to provide links to the other agencies' rules on its web site, the Furnisher Notice could state that the regulations (without reference to the Commission) will be available at the Commission's web site.

State Law

Section 623 of the FCRA establishes the obligations for furnishers. Section 625(b)(1)(F) provides that no state may impose additional requirements with respect to furnisher obligations. Relatively minor exceptions were granted with respect to specific provisions in Massachusetts and California law. However, the Furnisher Notice states that “State law may impose additional requirements” on furnishers. Given the almost complete preemption of state law with respect to furnisher obligations, we ask the Commission to revise the Furnisher Notice to delete the reference to state law. Alternatively, the Furnisher Notice could state “For furnishers subject to Massachusetts or California law, there may be relatively minor variations on these requirements.”

Duties to Report Dates of Delinquencies

The FACT Act amended Section 623(a)(5) of the FCRA with respect to the reporting of dates of delinquencies. In general, the amendment made by the FACT Act pertains to the reporting of delinquencies on accounts obtained by furnishers after the accounts have become delinquent. In the Furnisher Notice, the Commission implies that these provisions pertain only to “[d]ebt collectors.” Although Section 623(a)(5)(B) of the FCRA will apply to debt collectors, we do not believe there is any language in the statute limiting its applicability to debt collectors. We ask that the Commission amend the Furnisher Notice accordingly.

Duties of Financial Institutions When Reporting Negative Information

The Furnisher Notice states that “Furnishers who are financial institutions must notify consumers in writing if they furnish negative information to a CRA.” Although the Commission has succeeded in proposing relatively succinct, complete, and useful disclosures in the Furnisher Notice, we believe that this provision should be expanded to reflect the furnisher’s obligation more accurately. Therefore, we ask the Commission to amend the provision to read “Financial institution creditors that regularly and in the ordinary course of business furnish information to CRAs that compile and maintain files on a nationwide basis must notify consumers in writing if they furnish negative information to such a CRA. The furnisher may provide the notice anytime prior to, or no later than 30 days after, furnishing the negative information.” We believe that this revision provides a more complete description of the obligations imposed under Section 623(a)(7) of the FCRA while remaining as brief and succinct as possible.

Duties When Identity Theft Occurs

Section 623(a)(6)(B) of the FCRA provides that if a consumer submits an identity theft report to a furnisher using the address specified by the furnisher, the furnisher may not furnish information relating to the identity theft to the consumer reporting agency except in limited circumstances. However, the Furnisher Notice states only that “Furnishers must also establish procedures so that information reported directly to the furnisher by consumers about accounts that are linked to identity theft will not be furnished to the CRA” except in limited circumstances. MasterCard requests the Furnisher Notice to

specify that the consumer must provide an identity theft report to the furnisher at the address specified by the furnisher before the furnisher's obligations are triggered.

User Notice

References to Commission Rules

Our comments with respect to references to the Commission's regulations in the Furnisher Notice are also applicable with respect to the User Notice.

Adverse Action

The User Notice describes the user's obligation to provide a notice to the consumer in connection with an adverse action. As examples of adverse action, the User Notice states that "offering credit on less favorable terms than requested" constitutes adverse action. We note that this is not necessarily true. Such circumstances may constitute adverse action only if the consumer does not accept the creditor's counteroffer.

Fraud Alerts

The FCRA, as amended by the FACT Act, includes provisions pertaining to fraud alerts and active duty alerts. Section 605A(h) of the FCRA describes the obligations imposed on users of consumer reports that include such alerts. The obligations are limited to certain circumstances involving credit, and even then significant exclusions are provided. However, the User Notice suggests that the fraud and active duty alert obligations apply in all circumstances to all users. We believe that this implication could be corrected if the User Notice states that "Section 605A(h) imposes limitations *in certain circumstances* on users of reports. *In such circumstances*, for initial fraud alerts...."

Risk-Based Pricing Notice

According to the User Notice, if a creditor that uses consumer report information "makes a credit offer to a consumer 'on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers,' Section 615(h) of the FCRA requires the credit grantor to disclose this fact to the consumer." This statement is not necessarily accurate. For example, there may be times when such an "offer" is made, but the risk-based pricing notice is not required, such as in connection with prescreening or if the consumer will receive an adverse action notice. Furthermore, the statute does not require the creditor to disclose the fact that the terms are materially less favorable than the most favorable terms available to a substantial proportion of consumers. Rather, the substance of the required notice is described in Section 615(h)(5) of the FCRA. We urge the Commission to revise the User Notice accordingly.

The User Notice states that "Consumers who receive a [risk-based pricing] notice will be entitled to a free copy of their consumer report." MasterCard strongly urges the Commission to delete this sentence. As a primary matter, the sentence is gratuitous because it has no impact on the user's obligation to provide the risk-based pricing notice. Furthermore, the issue of whether a consumer's receipt of a risk-based pricing notice

