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August 13, 2004

Office of the Comptroller of the Currency  
250 E Street, SW  
Mail Stop 1-5  
Washington, DC 20219

Re: Fair Credit Reporting Act - Affiliate Marketing Regulations; Docket No. 04-16

Ladies and Gentlemen:

This comment letter is submitted on behalf of MBNA America Bank, N.A. ("MBNA") in response to the notice of proposed rulemaking ("Proposed Rule") and request for public comment issued by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of Thrift Supervision (collectively, the "Agencies"), published in the Federal Register on July 15, 2004. Pursuant to the Fair Credit Reporting Act ("FCRA"), as amended by the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), the Proposed Rule would prescribe regulations to implement section 624 of the FCRA concerning affiliate marketing. MBNA appreciates the opportunity to comment on this important topic.

### **Background**

The FCRA permits financial institutions to share transaction and experience data between affiliated entities without limitation, and to share information that otherwise would be considered a consumer report with affiliates if customers are provided notice and an opportunity to opt out prior to any sharing. However, section 624 of the FCRA, as amended by section 214 of the FACT Act, limits the ability of financial institutions to use certain information by providing that "eligibility information" received by one affiliate from another cannot be used for marketing purposes unless the consumer is provided notice and an opportunity to opt out.

The Proposed Rule would implement section 624 of the FCRA, but would impose requirements that differ in nature and structure from the requirements of section 624 of the FCRA, as well as the privacy provisions of the Gramm-Leach-Bliley Act ("GLBA"), and raise questions as to the scope and operation of the affiliate marketing provisions in section 624.

## **The Financial Institution Sharing Eligibility Information with an Affiliate Should Not Have Any Notice Obligation**

The Proposed Rule provides that if a financial institution shares “eligibility information” with an affiliate, the affiliate may not use this information for consumer marketing purposes unless the financial institution first provides to consumers notice and an opportunity to opt out, and the consumers do not opt out.

We believe the final rules issued by the Agencies (“Final Rule”) should not impose a notice obligation on the financial institution that shares eligibility information with an affiliate. Section 624 of the FCRA does not establish a general restriction on the sharing of information with or among affiliates; it provides only that an affiliate that receives eligibility information may not use it for marketing purposes (absent an applicable exception) unless and until the consumer has been given notice and an opportunity to opt out. The Agencies recognize this point in the Supplementary Information, which states that section 624 “governs the *use* of information by an affiliate, not the *sharing* of information with or among affiliates”, and that the section “is drafted as a prohibition on the affiliate that receives [eligibility] information from using such information to send solicitations, rather than as an affirmative duty imposed on the affiliate that sends or communicates that information.” While affiliated companies might decide, for operational and other reasons, to have the “sharing affiliate” provide the notice, the statute does not impose such an obligation on that entity.

The only reasonable and practical way to address the affiliate marketing limitation in section 624 is to impose the notice and proper use requirements on the affiliate using the information, as reflected in the statute itself. Moreover, since section 624 does not limit the ability of financial institutions to share eligibility information with affiliates, the Proposed Rule goes beyond the requirements of section 624 in imposing duties on financial institutions that share eligibility information, and would expose them to civil liability based on the use of this information by their affiliates. The Proposed Rule is not consistent with the statutory language of section 624 nor with the legislative intent behind this provision. While the FCRA does not specify which entity must provide the opt-out notice, this lack of specification does not override the clear language of section 624(b) that the affiliate using eligibility information received from an affiliate to make a marketing solicitation may provide the notice. Section 624(b) of the FCRA specifically contemplates that the affiliate receiving and using eligibility information for marketing purposes could be the person who provides the notice.

## **The Final Rule Should Not Require a Specific Entity to Provide the Notice**

Further to our position that a financial institution sharing eligibility information with an affiliate should not be required to provide the opt-out notice to the consumer, we believe the Final Rule should not require that any specific entity provide the notice. Rather, the only requirement should be that consumers receive a notice before an affiliate may make a solicitation based on eligibility information received from another affiliate. The identity of the entity that actually provides the notice should be irrelevant.