

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



June 15, 2004

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

Re: The FACT Act Disposal Rule, R-411007

To Whom It May Concern:

MasterCard International Incorporated (“MasterCard”)¹ submits this comment letter in response to the Proposed Rule (“Proposal”) issued by the Federal Trade Commission (“Commission”) regarding the disposal of certain customer information. MasterCard appreciates the opportunity to provide its comments on this important issue.

Background

Section 216 of the Fair and Accurate Credit Transactions Act (“FACT Act”) directs the Commission, among other federal agencies (“Other Agencies”), to issue regulations requiring any person that maintains or otherwise possesses consumer information derived from consumer reports for a business purpose to properly dispose of any such information. The Commission and the Other Agencies must consult and coordinate with one another so that, to the extent possible, the regulations prescribed by each respective agency are comparable with the regulations issued by each other agency. The Commission must also ensure that such regulations are consistent with the information safeguarding regulations prescribed under the Gramm-Leach-Bliley Act (“GLBA Rule”).

Definitions

Consumer Information

The FACT Act requires the Commission to issue a Final Rule with respect to the disposal of “consumer information...derived from consumer reports.” The Proposal incorporates this concept through the use of the term “consumer information,” which

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

means any record about an individual, whether in paper, electronic, or other form, that is a consumer report or is derived from a consumer report. Although the Proposal does not define what it means for information to be “derived from a consumer report,” the Commission notes in the Supplementary Information that the phrase “covers all of the information about a consumer that is taken from a consumer report, including information that results in whole or in part from manipulation of information from a consumer report or information from a consumer report that has been combined with other types of information.” The Supplementary Information also suggests that information received by an affiliate pursuant to section 603(d)(2)(A)(iii) of the Fair Credit Reporting Act (“FCRA”) would be “consumer information.”

Although the Supplementary Information provides some guidance with respect to what could be “consumer information,” a clearer definition of the information covered by the Proposal is essential to allow entities to comply with the Final Rule. Entities disposing of consumer information can face significant liability, including potential class action liability, if they do not take reasonable measures to dispose of such information properly. Therefore, entities must have certainty with respect to what types of information will be subject to the requirements of the Final Rule. Without such certainty, there will be significant amounts of inappropriate liability placed on entities with a wide variety of consumer data.

We do not believe the Commission intends to impose inappropriate liability on entities, and therefore we urge the Commission to provide greater clarity with respect to what types of information will be deemed to be “consumer information.” For example, the Commission’s interpretation suggests that the Proposal could apply to any record which includes only a consumer’s name, regardless of whether the document contained any other information or could be used to commit fraud against the consumer. The Proposal also appears to apply to any “consumer information,” regardless of whether the person possessing such information actually knows that the information was derived from a consumer report.² We do not believe that Congress intended for such a broad and ambiguous application of the Final Rule. Therefore, we urge the Commission to revise the Proposal to limit its application to information that: (i) provides a criminal the ability to commit fraud against the consumer (*i.e.*, at least two pieces of information which can be used together, such as a name and a social security number, or a name and an account number); and (ii) the person disposing of the information actually knows is derived from a consumer report.

The definition of “consumer information” also includes the requirement that the information be “about an individual.” The Commission explains in a footnote in the Supplementary Information that information that does not identify particular consumers would not be “consumer information,” even if it were derived from a consumer report because the information would not be about an individual. In light of the fact that the Proposal is intended to reduce consumer fraud and identity theft, MasterCard does not

² For example, diversified companies maintain common databases and it may not always be clear to an affiliate that accesses information in the common database that the information may, at one point in time, have been “derived” from a consumer report.

believe that consumers would benefit if the Final Rule applied to anonymous or aggregate data. Therefore, we agree with the Commission's interpretation of the definition of "consumer information" in this regard and urge that it be retained in the Final Rule. Given the ambiguity surrounding what may be "derived" from a consumer report, we also believe that it would be helpful for the Commission to clarify other types of information that would not be "consumer information" under the Final Rule. For example, information pertaining to payment transaction processing, or to publicly available information, would not appear to be of the type intended to be covered by Congress.

Disposing and Disposal

The Proposal requires any person who disposes of consumer information to take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal. The Proposal provides examples of what "disposing" or "disposal" means. In particular, it includes "the discarding or abandonment of consumer information" and "the sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored." The Supplementary Information also includes helpful guidance, which we believe should be retained in the Final Rule, stating that "the sale, donation, or transfer of consumer information would not be considered 'disposal' under the [Proposal]."

Although we believe the examples provided by the Commission are useful and accurate, MasterCard urges the Commission to adopt a firm definition of what it means to dispose of information. In this regard, for the liability reasons mentioned above, entities must know with certainty what activities will be subject to the Final Rule. We believe an appropriate definition would state that disposing or disposal (or any other use of the root term "dispose") "means the discarding or abandonment of consumer information or the sale, donation, or transfer of any medium upon which consumer information is stored. The term does not mean the sale, donation, or transfer of consumer information."

Scope

The Proposal states that it applies to "any person over which the [Commission] has jurisdiction, that, for a business purpose, maintains or otherwise possesses consumer information or any compilation of consumer information." We believe the scope of the Proposal should be limited to those persons who are not subject to the GLBA Rule. In this regard, financial institutions that are subject to the GLBA Rule already must have comprehensive programs designed to protect the security of customer information, including safeguarding customer data in connection with its disposal as appropriate. In fact, the Commission applies the GLBA Rule to financial institutions possessing any customer information, regardless of whether it is their own customer information or the customer information of another financial institution. Given the Commission's broad application of the GLBA Rule, we do not believe that applying the Proposal to financial institutions subject to the GLBA Rule would provide consumers with increased benefits and urge that the Commission exempt such financial institutions from the Proposal.

Proper Disposal of Consumer Information

The Proposal states that “[a]ny person who maintains or otherwise possesses consumer information...for a business purpose must properly dispose of such information by taking” certain precautions. We believe this provision mistakenly implies that a person must affirmatively dispose of consumer information. MasterCard believes that the Commission should revise this provision to reflect more accurately the Commission’s intent. In this regard, we do not believe the Commission intends to impose a requirement that persons dispose of consumer information. Indeed, there are any number of legitimate and necessary reasons why a company does not dispose of consumer information. We believe the Commission intends to require that the person disposing of the information take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal only if consumer information is being disposed of in the first place. We therefore request that the Commission amend the Proposal accordingly.

The Commission notes in the Supplementary Information that “there are few foolproof methods of record destruction” and that the Proposal “does not require covered persons to ensure perfect destruction of consumer information in every instance.” Rather, the Commission intends covered entities to take “reasonable measures” to protect consumer information in connection with its disposal. We applaud the Commission for taking this approach and strongly urge that it be retained in the Final Rule. The Commission correctly recognizes that a “one size fits all” approach is not appropriate and instead would allow covered entities to take a risk-based approach based on, among other things, the sensitivity of the information in question, the nature and size of the entity’s operations, and the costs and benefits of different disposal methods.

We appreciate that the Commission has provided examples of reasonable measures to protect consumer information in connection with its disposal. In the Supplementary Information the Commission explains that the “examples are illustrative only, not exhaustive.” We urge the Commission to retain examples in the Final Rule as useful guidance for compliance. However, we ask the Commission to revise the Proposal in one minor respect to clarify that the examples are illustrative and not exhaustive. Specifically, the Proposal states that “[r]easonable measures to protect against unauthorized access to or use of consumer information in connection with its disposal would include” certain examples. We believe that the Final Rule should state that “[e]xamples of reasonable measures...would include” such examples. This would clarify that examples of reasonable measures would include the provisions, not that the reasonable measures must include such provisions.

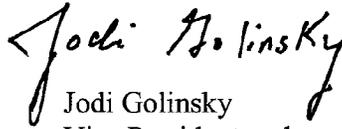
Effective Date

The Commission proposes for the Final Rule to be effective within three months of it being published in the Federal Register. We urge the Commission to provide for at least six months to allow covered persons to assess their situation with respect to the Final Rule and to develop reasonable procedures accordingly. We believe that a period of only three months may not provide sufficient time for compliance.

* * * * *

Once again, we appreciate the opportunity to comment on the Proposal. If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Michael F. McEneney at Sidley Austin Brown & Wood LLP, at (202) 736-8368, our counsel in connection with this matter.

Sincerely,



Jodi Golinsky
Vice President and
Senior Regulatory Counsel

cc: Michael F. McEneney, Esq.