



January 12, 2004

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
Office of the Secretary
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Attention: Docket No. R-1175

Email: regs.comments@federalreserve.gov

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Attention: Project No. P044804

Email: FACTAdates@FTC.gov

Re: Interim Final Rules for the Fair and Accurate Credit Transactions Act of 2003

Ladies and Gentlemen:

This comment letter is submitted by MBNA America Bank, N.A. ("MBNA") in response to the Joint Interim Final Rules ("Interim Rule"), promulgated by the Board of Governors of the Federal Reserve System and the Federal Trade Commission (collectively, the "Agencies"), which establish the effective dates for those provisions of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") that determine the relationship between state law and the Fair Credit Reporting Act ("FCRA") and for those provisions that authorize agency rulemakings or other implementing agency action. MBNA supports the Agencies' determination that December 31, 2003 is the appropriate effective date for section 711(3) which removes the sunset on the existing FCRA preemption provisions, as well as for the provisions of the FACT Act authorizing rulemakings or other agency implementing actions that do not include a specified effective date.

1. It is vital that permanent reauthorization of existing FCRA preemption provisions be effective as of December 31, 2003.

The Interim Rule establishes December 31, 2003 as the effective date for section 711 of the FACT Act, pursuant to the Act's directive that the Agencies prescribe joint regulations establishing effective dates for the provisions of the Act for which no effective date is specified. Section 711, in part, permanently reauthorizes the existing FCRA preemption provisions that

would otherwise sunset on January 1, 2004. In adopting the Interim Rule without advance notice or public comment, the Agencies noted that “[d]elaying final action on these provisions of the FACT Act would undermine the purpose of these provisions and is likely to provoke substantial confusion about the applicability of some state laws in areas that Congress has determined should be governed by uniform nationwide standards.”

MBNA strongly supports the Agencies’ decision to establish December 31, 2003 as the effective date for section 711 in order to prevent the sunset of the existing FCRA preemption provisions. Any delay in final action that would allow the existing FCRA preemption provisions to sunset, even briefly, would be contrary to the clear intent of Congress. The legislative history of the FACT Act makes it abundantly clear that Congress intended to remove the sunset provision applicable to the existing FCRA preemption provisions and to permanently reauthorize those preemption provisions, which preserve and bolster an efficient national credit market. Moreover, given the close proximity between the enactment of the FACT Act and the impending sunset date for the existing FCRA preemption provisions, it would be impractical for the Agencies to provide notice and comment before establishing the effective date for this section. Accordingly, the Interim Rule, which establishes December 31, 2003 as the effective date for the existing FCRA preemption provisions, is clearly appropriate.

2. There needs to be a uniform national standard applicable to FACT Act preemption provisions.

The Interim Rule also establishes December 31, 2003 as the effective date for the provisions of the FACT Act designed to prevent or mitigate the effects of identity theft, as set forth in section 711(2), and for the additional preemption provisions in sections 151(a)(2), 212(e), 214(c) and 311(b). MBNA believes that the effective date established for these provisions is important because of the potential uncertainty that could arise concerning the date when existing state laws, and state laws that will soon become effective, are preempted.

Multiple Compliance Requirements Under Existing State Laws

Several states already have existing laws that address subject matters covered, and conduct required, by the FACT Act. For example, section 151(a)(1) of the FACT Act requires in certain instances that a business entity provide victims of identity theft with records of transactions that are alleged to be the result of identity theft. Nevertheless, several states currently have statutes addressing the subject matter covered by this section. Laws in California, Louisiana and Washington provide identity theft victims with a statutory right to receive application and transactional information from an entity that conducted an unauthorized transaction based upon information derived from identity theft. Section 112 of the FACT Act provides consumers with the right to include a fraud alert on their consumer report. Yet, several states currently have statutes addressing the conduct required by this section. Laws in California, Louisiana and Texas provide consumers with a statutory right to include a security alert on their consumer report to notify users of these reports that the consumer may have been a victim of identity theft. Section 152 of the FACT Act allows consumers to block the reporting of information that resulted from identity theft, while several states currently have statutes addressing the conduct required by this section. Laws in California, Connecticut and Washington provide consumers with a statutory right to prevent consumer reporting agencies

from reporting any information on a consumer report that was the result of identity theft. MBNA believes that institutions currently complying with these state statutes will either continue to comply to do so until the institutions implement compliance with the new provisions of the FACT Act that supersede these state requirements, or will begin to comply with the corresponding FACT Act provision as soon as they are able to do so, regardless of the effective date established for the federal provision.

Multiple Compliance Requirements Under Future State Laws

Several additional state statutes have or will become effective that will regulate subject matters covered, and conduct required, by the FACT Act. These state statutes will impose a significant compliance burden on institutions that must prepare and implement procedures to comply with both the state statutes and the FACT Act.

For example, effective January 1, 2004, California Senate Bill 602 requires a credit card issuer who receives a replacement card request that is associated in time with a change of address to send a change of address notification to the cardholder's previous address. This state law requirement addresses conduct to be governed in detail by the FACT Act's "red flag" guidelines. Furthermore, California Senate Bill 25, to be effective July 1, 2004, will impose obligations on any user of a consumer report that contains a security alert to verify the consumer's identity before engaging in certain transactions. This state law requirement addresses conduct governed by the fraud alert section of the FACT Act. Moreover, effective January 1, 2005, California Senate Bill 27 will require a business that discloses customer-related information to an affiliate for direct marketing purposes to provide the customer, upon request, with detailed information regarding the affiliate and the information disclosed. This state law requirement addresses subject matter covered by both the existing FCRA affiliate sharing provision and the FACT Act provision concerning the use of information from affiliates for marketing solicitation purposes.

Also, effective January 1, 2004, Illinois House Bill 2188 requires a credit card issuer to take steps to verify an applicant's change of address request if the application shows an address different from that in the consumer report obtained in connection with that application. This state law requirement addresses conduct to be governed under the FACT Act's "red flag" guideline. The same Illinois law also imposes specific obligations on any user of a consumer report that contains a security alert to verify the consumer's identity before engaging in certain transactions, requirements that address conduct governed by the fraud alert section of the FACT Act.

These state statutes create substantial and unnecessary compliance burdens for financial institutions. Even as those institutions prepare to comply with the FACT Act's uniform national standards, they have to prepare and implement procedures to comply with varied state requirements. Thus, the effective date of FACT Act preemption provisions is of critical importance.

A comparison of the FACT Act's "red flag" guidelines and California Senate Bill 602 demonstrates the difficulties for an institution that is required to prepare regulatory compliance procedures for two different standards simultaneously. California Senate Bill 602 requires credit card issuers who receive change of address requests within 60 days before or after a replacement

card request to send a change of address notification to the cardholder's previous address of record. In contrast, the FACT Act requires federal agencies to prescribe regulations to ensure that a card issuer who receives an additional/replacement card request within a short time after receiving a change of address notification follows reasonable policies and procedures to ensure that the additional /replacement card is not issued to an identity thief.

If card issuers must prepare to comply with both the federal and California requirements concerning requests for additional cards, they will have to develop, simultaneously, different procedures to comply with different standards. For instance, card issuers would have to establish business procedures to identify additional card requests that come *before* or *after* a change of address request, in order to comply with the California standard, even as they prepare procedures to comply with a federal requirement provision limited to an additional card request that comes *after* the change of address notification. Furthermore, card issuers would have to prepare procedures to notify consumers of the change of address request, in order to comply with the California standard. The federal standard, however, is more flexible; the card issuer may use "other means of assessing the validity of the change of address," without notifying the consumer. The preparation and implementation of procedures to comply with multiple standards will involve an inefficient use of resources. Congress attempted to prevent this result by preempting any state law regulating subject matters covered, and conduct required, by the FACT Act.

Preemption of Marketing Solicitations Based on Affiliate Information and Risk-Based Pricing Notices

MBNA also supports establishing December 31, 2003 as the effective date for the FACT Act preemptions concerning marketing solicitations based on affiliate information (§ 214(c)) and risk-based pricing notices (§ 311(b)). These sections of the FACT Act expand upon existing FCRA requirements that already preempt state law, and have done so since 1996. The subject matter covered by these two provisions is covered by the existing FCRA preemptions on affiliate sharing and adverse action notices; the new FACT Act preemptions were added merely for clarity. Accordingly, since the existing FCRA preemptions must be effective on January 1, 2004, the sections expanding upon existing FCRA preemption provisions should also receive preemptive force by December 31, 2003.

3. It is appropriate to establish December 31, 2003 as the effective date for those FACT Act provisions that authorize agency rulemaking or other implementing action.

The Interim Rule establishes December 31, 2003 as the effective date for those provisions of the FACT Act that authorize agency rulemaking or authorize other implementing agency action, but do not include an effective date (collectively, "Regulatory Provisions"). In adopting the Interim Rule without advance public notice or comment, the Agencies note that "[e]stablishing an early effective date for these regulatory provisions would allow the agencies to begin immediately to perform their responsibilities under the FACT Act." The Agencies state that establishing the effective date for the Regulatory Provisions has no effect on the substantive provisions that will be implemented by the agency action. We support the Agencies' determination to establish December 31, 2003 as the effective date for the Regulatory Provisions. As most provisions of the FACT Act must become effective within one year of enactment, it is necessary for the agencies to begin their regulatory duties immediately. Accordingly, the Interim

Rule that establishes December 31, 2003 as the effective date for the Regulatory Provisions, without advance public notice or comment, is clearly appropriate.

In promulgating the Interim Rule, the Agencies also state that, for those provisions of the FACT Act that require an agency to issue a regulation or take other implementing action within a certain period following enactment, “no joint regulations under section 3 of the FACT Act are required to make these provisions effective.” The Agencies’ determination is based on the belief that Congress specified “the date of enactment as the lawful effective date because that is the predicate for mandating that an agency action be performed within a specified period of time after the date of enactment.” MBNA supports this determination, and believes the Agencies’ decision that there is no need to establish an effective date for these provisions is appropriate.

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MBNA appreciates the opportunity to submit comments on this important topic. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact the undersigned.

Respectfully submitted,

MBNA America Bank, N.A.

By /s/Joseph R. Crouse
Legislative Counsel
(302) 432-0716