

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*



July 16, 2004

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

Re: FACT Act Section 318(a)(2)(C) Study, Matter No. P044804

To Whom It May Concern:

MasterCard International Incorporated (“MasterCard”)¹ submits this comment letter in response to the request for public comment (“Request”) issued by the Federal Trade Commission (“Commission”) regarding its study on the effects of providing a consumer with a copy of the consumer report used by the creditor if the creditor takes adverse action against the consumer. We note that the scope of the Request, and therefore the scope of our comments, is restricted only to credit transactions. MasterCard appreciates the opportunity to provide its comments in response to the Request.

Background

The Fair Credit Reporting Act (“FCRA”) includes provisions to ensure that a consumer who is the subject of “adverse action” is informed of the action and has the opportunity to view at no cost the contents of his or her file at the consumer reporting agency (“CRA”) which furnished the consumer report that was the basis for the adverse action.² A consumer who is the subject of adverse action also has other rights under the Equal Credit Opportunity Act (“ECOA”). For example, the ECOA, as implemented by Regulation B, also requires that the consumer be provided either a statement of specific reasons for the action taken or a disclosure of the applicant’s right to such a statement.³ In

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.

² For ease of reference, we will refer to all of the information disclosed to the consumer by the CRA as a result of adverse action as the consumer’s “consumer report.”

³ Although Regulation B does not mandate that a specific number of reasons be disclosed, the Federal Reserve Board has provided guidance that “disclosure of more than four reasons is not likely to be helpful to the applicant.”

the credit context, the term “adverse action” in the FCRA has the same meaning as the term is given in the ECOA. Generally, “adverse action” means: (i) a refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer and the applicant uses or expressly accepts the credit offered; (ii) a termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor’s accounts; or (iii) a refusal to increase the amount of credit available to an applicant who has made an application for an increase.

When a consumer is subject to adverse action under the FCRA, the consumer has the right to contact the CRA that furnished the consumer report to the creditor, and if the consumer so requests, the CRA must provide the consumer with a copy of his or her consumer report at no charge. The consumer can review the contents of the consumer report to understand what is currently being reported by the CRA. The consumer can also use the consumer report in conjunction with the statement of reasons provided pursuant to the ECOA to understand with more specificity the reasons for which the consumer was subject to adverse action. Of course, consumers can take the opportunity to review the consumer report for errors, as well.

MasterCard believes that the adverse action provisions in the FCRA have provided consumers with at least two critical benefits. First, the consumer has the opportunity to learn about the importance of his or her credit history. Second, the consumer can take the opportunity to review the current contents of his or her consumer report to ensure the report’s accuracy.⁴ In fact, as Chairman Muris has recently testified, the adverse action provisions provide consumers with a “self-help” mechanism to ensure that their consumer reports are accurate. The Commission has now been charged by Congress to review the effects of requiring that a consumer who has experienced an adverse action based on a consumer report receive “a copy of the same credit report that the creditor relied on in taking the adverse action.” The Commission’s study must specifically address the extent to which providing such historical consumer reports to consumers “would increase the ability of consumers to identify errors in their credit reports” and “the extent to which providing such reports to consumers would increase the ability of consumers to remove fraudulent information from their credit reports.”

Current Consumer Report or (Incomplete) Historical View?

As noted above, we believe the adverse action provisions in the FCRA serve at least two key purposes. First, the consumer has the opportunity to become better educated about his or her credit history. Second, the consumer can review the contents of the consumer report and improve its accuracy if needed. With this in mind, we strongly believe that the adverse action provisions in the FCRA serve a consumer’s best interests by providing the consumer with a copy of a *current* consumer report. With a copy of the current consumer report in hand, the consumer can view the contents of his or her file as is presently being reported by the CRA and understand what his or her *current* credit history looks like. MasterCard believes that a consumer who has an accurate understanding of his

⁴ The adverse action provision is not the only tool provided to consumers with respect to these objectives.

or her current credit profile is best equipped to make future credit-related decisions. We also note that if the consumer is to judge the accuracy of the information on file with a CRA, the consumer should review the most up-to-date information and correct it as necessary. As is discussed in more detail below, correcting a historical document may not be sufficient for purposes of ensuring the accuracy of the information in a CRA's current files.

We also note that the Commission must study the impact of a consumer who has experienced adverse action receiving "a copy of the same credit report that the creditor relied on in taking the adverse action." However, in many instances, the "same credit report" will be nothing more than a credit score or other piece of limited information which was useful to the creditor but does not present the consumer with a complete picture of his or her credit history. Providing the consumer with a credit score that was computed several months ago does not assist the consumer in understanding what is currently in his or her file. Naturally, receiving only a credit score does not give the consumer the opportunity to correct errors. Thus, the objectives of the adverse action provisions in the FCRA would be frustrated in many instances if consumers were to receive a copy of the "same credit report" used by creditors.

That said, there will also be instances in which the creditor receives a consumer report that more closely resembles all of the information in the consumer's file at the CRA. In such instances, the consumer who receives the "same credit report" used by the creditor would receive a more fulsome disclosure of his or her credit history.⁵ However, we question the value of the consumer receiving the "same credit report" versus an up-to-date consumer report. Although the "same credit report" may provide a glimpse of what the creditor considered, the information does not accurately reflect the consumer's current circumstances, and therefore does not provide a summary of information *on which the consumer can act*. It may be of historical interest to see that a delinquency of almost seven years ago was in the file several months back, but that does not necessarily mean that the information remains in the file. It may be of historical interest to see that accounts were being reported as either current or delinquent, but that does not mean that they are reported as such now. It may be of historical interest to note that information in the file on some previous date was accurate or inaccurate, but the accuracy of the information in the file may have changed.

Not only would an outdated consumer report fail to provide sufficiently useful information to consumers, but it could actually harm consumers. For example, a consumer cannot be sure that issues relating to the historical consumer report are still relevant to the current consumer report. Conversely, a historical consumer report may not provide the consumer with sufficient guidance as to any issues that arise with respect to the *current* consumer report (*e.g.*, as a result of recent identity theft). Providing consumers with an outdated consumer report can therefore provide consumers with a false sense of concern if negative or erroneous information is no longer in the consumer's file, or a false sense of

⁵ We note that the consumer would still not receive all of the contents in his or her file, such as "soft inquiries" relating to prescreening or account reviews.

security if the consumer's file has been damaged more recently than would be reflected in the historical consumer report.

In sum, we believe that a consumer is best served by learning of the most current information in the consumer's file. In many instances, a consumer who receives only the "same credit report" used by the creditor will receive only a credit score or other truncated information. Even if the consumer receives a copy of his or her consumer report from several months back, we do not believe that the goals of the FCRA would be met. It is only *current* information that informs the consumer of his or her *current* credit history. It is only *current* information that provides the consumer a realistic assessment of his or her credit standing. It is only *current* information that provides the consumer an opportunity to review the consumer report for issues related to *current* accuracy. Indeed, it seems obvious and intuitive that a consumer who is the subject of adverse action should receive information as current as possible so that the consumer can better prepare for future applications of credit, not be forced to review old and outdated information that pertains to previously rejected applications.

Risk of Identity Theft

As the Commission is aware, a consumer report contains a wealth of sensitive information that could cause a consumer a great deal of harm if misused by criminals. MasterCard is concerned that if a creditor were required to provide an applicant with the consumer report used to evaluate the application that countless innocent consumers could be put at risk. For example, an imposter could apply for a loan using the identity of another individual, but an address controlled by the imposter. If adverse action were taken with respect to the imposter's application, the required materials could be sent to the address provided by the imposter. Under current law, if the imposter were to attempt to obtain the victim's consumer report as a result of the imposter's "rights" as a result of adverse action, the imposter would likely not have sufficient information to convince a CRA that he or she is actually the victim, and therefore the CRA would not provide the imposter with a copy of the victim's consumer report. However, if the consumer report must be provided to the imposter as a routine matter of course by the creditor with the adverse action notice, the significant identity theft risks are obvious. Indeed, it would appear that such a requirement would establish a mechanism that could be manipulated intentionally to obtain the consumer reports of victims for subsequent identity theft purposes.

Cost and Practicality

The potential costs associated with providing consumers with historical consumer reports are enormous. Under current law, a creditor is required to provide a consumer with certain disclosures if the creditor takes adverse action with respect to the consumer. Among these disclosures is a description of: (i) the consumer's right to contact the CRA that provided the consumer report on which the adverse action was based; (ii) the consumer's right to obtain a copy of his or her consumer report at no charge from that CRA; and (iii) the key factors for the adverse action. These disclosures can be provided in a fairly automated manner, controlling for listing the appropriate CRA(s) and the key

factors. Current law already imposes significant costs on creditors and CRAs in connection with a consumer's adverse action rights. Given that there is little consumer benefit, if any, to providing consumers with historical consumer reports in connection with adverse action, we do not believe that the significant additional costs described below can be justified.

Information Provided by the Creditor

If a creditor were required to provide the consumer with the "same credit report" the creditor used, the costs of providing a consumer with the required adverse action disclosures could increase significantly. In situations where the creditor had already received the majority of the contents of the consumer's file from a CRA, it is likely the creditor received the data in an automated or machine-readable format that would be meaningless to the consumer. Therefore, the creditor would need to "translate" that data into a format that could be read by a consumer. The creditor would then need to print that data for the consumer, creating a document that can be several pages in length, and mail it to the consumer, each of which are costly undertakings. Of course, each creditor would be required to expend resources to reconfigure its systems to accommodate these requirements. We note that these burdens would especially harm smaller creditors by imposing costs that are less easily absorbed than may be possible for larger lenders.

In situations where the creditor receives only a credit score from the CRA, the Commission's Request appears to contemplate at least two scenarios. Under the first, the creditor could provide the "same credit report" it used, *i.e.*, the credit score. Such a requirement would require a reconfiguration of the creditor's systems and provide no benefit to the consumer. The other scenario would involve the creditor obtaining a more complete consumer report in conjunction with the credit score, and then providing that more fulsome information to the consumer. In addition to the costs noted above, such a requirement would also require extensive systems adjustments to accommodate the receipt of such additional information simply to provide it later to a limited number of consumers. MasterCard also notes that requiring an entity to receive more consumer report information than the entity deems necessary or appropriate to provide the consumer with a product or service would be an unexpected mandate from Congress or the Commission.

Information Provided by the CRA

An alternative to having the creditor provide the historical consumer report to the consumer is to have the CRA provide it to the consumer. However, this alternative is also costly and cumbersome. As a primary matter, it is not clear that the CRA could maintain a historical database of *every consumer report it provides* that could result in adverse action. Yet such a database would be necessary if the CRA would be expected to provide a copy of a historical consumer report in connection with every adverse action taken by creditors. In addition to these perhaps insurmountable costs, the CRA would also incur the printing, processing, and mailing costs described above. However, we believe that the CRAs themselves are in a better position to describe the difficulties they would face in connection with such a mandate, and we will therefore reserve additional comment on this alternative.

Ability to Identify Errors

Congress specifically directed the Commission to study “the extent to which providing [historical consumer] reports to consumers would increase the ability of consumers to identify errors in their credit reports.” MasterCard strongly believes that such a requirement would significantly *decrease* the ability of consumers to identify errors in their consumer reports. As noted above, if a consumer receives a document summarizing what *was* in his or her credit file, that does not assist the consumer in knowing what *is* in his or her credit file. While a historical consumer report may in many ways be similar to a current consumer report, the older report will not reflect any changes that occurred as a result of updates made after the historical consumer report was compiled. For example, data that was incorrect in the historical consumer report may be corrected, such as could occur through the standard process of updating information periodically. Similarly, the historical consumer report will not provide the consumer with any indicia of accuracy with respect to information added since the historical report was provided. We believe that consumers who receive historical consumer reports will form a false sense of what may be in their current files at CRAs, and therefore not review *current* files for *current* errors.

Ability to Remove Fraudulent Information

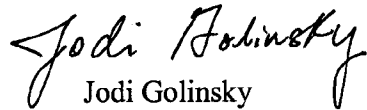
The Commission must also study the extent to which providing historical consumer reports to consumers would “increase the ability of consumers to remove fraudulent information from their credit reports.” MasterCard does not believe that providing consumers with historical consumer reports will increase the ability of consumers to remove fraudulent information from their consumer reports. It is important for a consumer to remove fraudulent information that *is* in his or her file at a CRA, not fraudulent information that may have been there at one time. Therefore, if the consumer is to bring a file current at a CRA, the consumer must have the most up-to-date information provided by that CRA.

We also note that it may be more difficult for a consumer to remove fraudulent information if the consumer is not working from the same set of data as the CRA. For example, when working with a CRA to remove fraudulent information on an outdated consumer report, the consumer may refer to information or tradelines that do not correlate to those currently in the consumer’s file at the CRA. We believe that these types of discrepancies between what the consumer is reviewing and what the CRA actually possesses would make it more difficult for the consumer and the CRA to have a common understanding of problems with the consumer’s file.

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Once again, we appreciate the opportunity to comment on the Request. 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,

A handwritten signature in black ink that reads "Jodi Golinsky". The signature is written in a cursive, flowing style.

Jodi Golinsky
Vice President and
Senior Regulatory Counsel

cc: Michael F. McEneney, Esq.