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December 5, 2000

Via Federal Express

Office of the Comptroller
of the Currency
Communications Division
250 E Street, S.W.
Washington, D.C. 20219
Attention: Docket No. 00-20
regs.comments@occ.treasury.gov

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance
Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Attention: Comments/OES
Comments@fdic.gov

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th and C Streets, N.W.
Washington, D.C. 20551
Attention: Docket No. R-1082
regs.comments@federalreserve.gov

Manager
Dissemination Branch
Information Management and
Services Division
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attention: Docket No. 2000-81
www.ots.treas.gov

Re: Proposed FCRA Affiliate Sharing Regulations

Ladies and Gentlemen:

The member banks of The New York Clearing House Association L.L.C.,[1] (the "Clearing House") are writing to comment on the notice of proposed rulemaking (the "Proposal") of the Office of the Comptroller of the Currency (the "OCC"), the Board of Governors of the Federal Reserve System (the "Federal

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[1] The member banks of the Clearing House are: The Bank of New York, The Chase Manhattan Bank, Citibank, N.A., Morgan Guaranty Trust Company of New York, Bankers Trust Company, HSBC Bank USA, Fleet National Bank, and European American Bank.

Reserve"), the Federal Deposit Insurance Corporation (the "FDIC"), and the Office of Thrift Supervision (the "OTS") (together, the "Agencies") relating to the Agencies' implementation of the affiliate-sharing provisions of the Fair Credit Reporting Act ("FCRA"). 65 Fed. Reg. 63,120-63,141 (Oct. 20, 2000).

Introduction

The Commenting Banks appreciate the opportunity to comment on the Proposal. As a general matter, we are in favor of the Agencies' attempt to conform the proposed FCRA regulations (the "Proposed Regulations") to the privacy regulations implementing Title V of the Gramm-Leach-Bliley Act (the "GLB Act") and believe that a level of uniformity in disclosure will benefit consumers. We are concerned, however, that in attempting to achieve uniformity, the Agencies have failed to recognize important differences between FCRA and the GLB Act and have not incorporated existing exceptions and exclusions to FCRA. We are particularly concerned that the Proposal incorporates the compliance deadlines under the GLB Act privacy regulations.

In enacting Title V of the GLB Act, Congress expressly stated that the new statute was not intended "to modify, limit, or supersede the operation of the Fair Credit Reporting Act." 15 U.S.C. § 6806(c). Congress granted the Agencies' only limited rulemaking authority to "prescribe such regulations *as necessary to carry out the purposes*" of the FCRA, 15 U.S.C. § 1681s(e) (emphasis added), not to alter the existing structure and scope of FCRA.

Compliance Deadline

The final FCRA regulations should not incorporate the compliance deadlines under the GLB Act privacy regulations.

Institutions have been providing opt-out notices to consumers under the affiliate sharing provisions of FCRA for several years. The new disclosures required under the Proposed Regulations are significantly more detailed than those currently provided and will require substantial changes to institutions' existing FCRA opt-out notices. The July 1, 2001 implementation date simply does not provide institutions adequate time to prepare and distribute the notices required by the Proposed Regulations. This problem is exacerbated by the requirement in the GLB Act privacy regulations that the initial privacy notice to customers (which must be provided by the July 1, 2001 deadline) must include the FCRA opt-out notice.

Providing a few short months for institutions to comply under FCRA is clearly insufficient when compared to the one-year delayed implementation date under the GLB Act privacy regulations. Considerable effort has already been made by our member banks to prepare and produce their initial privacy notices in order to comply with the July deadline. Those notices include, where applicable, the institutions' current FCRA disclosure regarding affiliate information sharing. By the time the Proposed Regulations are final, our member banks will have finalized their notices and completed production. Requiring the new FCRA disclosure in those notices by July 1, 2001 could require institutions to reprint millions of notices on an expedited basis, adding enormous expense and administrative burden to their already costly efforts to comply with the GLB Act deadlines.

In fact, given the uncertain timing for finalization of the Proposed Regulations, it may well be impossible for our member banks to distribute their GLB Act privacy notices in time to assure full compliance with the GLB Act and FCRA requirements by the implementation date. With a comment deadline of December 4, 2000, the Proposed Regulations may not be finalized until

February or March 2001 at the earliest. This simply does not provide adequate time for institutions to incorporate the FCRA notice into its GLB Act notice and distribute the notice to customers.

We respectfully suggest, therefore, that the Agencies provide for a staggered implementation schedule for the new FCRA disclosures, as follows: (i) for existing customers as of July 1, 2001, the new FCRA opt-out language should be provided by the earlier of the date of the first annual privacy notice issued under the GLB Act privacy regulations or July 1, 2002; and (ii) for new customers as of July 1, 2001, the new FCRA opt-out notices should be provided by the earlier of July 1, 2002 or the date by which the first annual GLB Act privacy notice should be provided to those customers. This schedule should provide adequate time for institutions to comply with both the GLB Act privacy notice requirements and the new FCRA opt-out requirements, where applicable, in a manner that reduces compliance cost and burden and provides consumers with meaningful and timely disclosure.

Reasonable Opportunity to Opt Out (§ .6)

Section _.6 of the Proposed Regulations provides that an institution gives a consumer a "reasonable opportunity to opt out" if it gives the consumer a "reasonable period of time" to opt out after the institution delivers its opt-out notice. The Proposed Regulations do not define "reasonable period of time," but in each example in Section _.6 the institution waits 30 days after delivery of the opt-out notice before sharing information with affiliates. As Section _.2 of the Proposed Regulations makes clear, the examples are intended to provide guidance, not to illustrate the exclusive means of compliance. We assume, therefore, that the Agencies did not intend by the examples in

Section _.6 to imply that a 30-day waiting period is required in every instance.

In fact, requiring institutions to wait 30 days prior to sharing information with affiliates could deny consumers the opportunity to obtain related products at the time they are most useful to them. For example, a consumer who applies for a home mortgage may want to receive timely information from its financial institution's insurance affiliate about homeowner's insurance, and the value of that information could well be time-dependent. If the financial institution is required to wait 30 days before sharing relevant application information with its affiliate, the consumer may need to provide updated application details to the insurer and a second credit report may be required.

As another example, a consumer may wish to commence a new branch banking relationship with a financial institution, with associated credit, including overdraft protection, credit cards, and back-up second mortgage. These products may all be provided by different affiliates of the financial institution. If the institution is required to wait 30 days before sharing information about the consumer with those affiliates, the consumer may be required to provide the same information repeatedly, which could lead to inaccuracies and customer confusion. Also, the repeated credit report drawings could be costly and may also adversely affect the customer's credit score based on commonly used credit scoring models.

Institutions would also be required to put in place new tracking systems to assure that no impermissible sharing takes place during the 30-day period. Such a complex tracking system would be expensive and require the capture of new information, such as the date of mailing of an application or disclosure to individual consumers.

While we understand that the examples in the Proposed Regulations are not controlling, it would be useful if the examples in Section _.6 recognized that in some circumstances a long waiting period is not appropriate or required. For instance, if the opt-out notice is provided within or in conjunction with an application (or with an account opening) submitted by a consumer (whether in person, by mail, by telephone, or electronically), and the consumer chooses in submitting the application not to opt out, the institution should be able to share the relevant information immediately. To find otherwise assumes that the consumer "did not mean it" and may wish to change his mind. As the Proposed Regulations recognize, however, a consumer has the choice to opt out at any time. It is unnecessary and potentially costly to the consumer to assume that he needs a cooling off period after submission of application data to reconsider his decision not to opt out.

We are also concerned about the implication in example 3 under Section _.6(b) that when an institution provides an opt-out notice electronically it must obtain an acknowledgment of the customer's receipt of the notice. Such acknowledgments are not required by other consumer protection statutes (such as Regulations B, E, and X) and are not required by the GLB Act privacy regulations. To add such an acknowledgment requirement here would go beyond the requirements of FCRA.

Delivery of Opt-Out Notices

Section _.8(c) of the Proposed Regulations contains a blanket prohibition on oral delivery of opt-out notices, either in person or over the telephone. Nothing in FCRA bars the provision of oral notices, and there is no reason to create a new and burdensome requirement here for written or electronic notices. When the customer establishes the relationship over the telephone, it is most convenient and efficient to provide oral

notice. Indeed, because customers can engage in many significant transactions over the telephone – including obtaining a loan, credit card, or brokerage account – they may find it hard to accept that they cannot receive information regarding affiliate sharing and immediately authorize that sharing in a similar manner. Accordingly, an oral notice (including a description of the consumer's opt-out rights) should, in and of itself, constitute full compliance with the FCRA.

As an alternative, oral notice should be permitted if it is subsequently followed by a written or electronic notice within a reasonable time. In such case, immediate sharing of information with affiliates should be allowed. The GLB Act privacy regulations contemplate such oral notice when a customer agrees over the telephone to enter into a customer relationship involving the prompt delivery of a financial product or service and agrees to receive the notice at a later time.

Time by Which an Opt Out Must Be Honored (§ .10)

The Proposal requests comment on whether opt-outs must be honored within a specific time period and suggests as an example 30 days as an appropriate period of time for complying with a consumer's opt-out direction. Our member banks believe that the flexible standard in the Proposed Regulations, which provides that an institution must comply with a consumer's opt-out direction as "soon as reasonably practicable", is the better approach. In enacting the GLB Act privacy regulations, the Agencies considered, and rejected, a similar proposal to set a bright-line standard regarding implementation, and the reasons motivating that decision are equally applicable here – namely, that differing institutions have differing compliance capabilities and that any bright line-standard will be outdated by technological advances.

Revocation of a Customer's Election to Opt Out (§ .11)

Section _.11 of the Proposed Regulations places the burden on customers of submitting a written or electronic revocation of an election to opt out in order for the revocation to be effective. Such a requirement is not called for within the FCRA and is, in fact, inconsistent with the structure of the Proposed Regulations. Instead, a customer should be permitted to communicate her revocation orally and that revocation should take effect immediately. The Proposed Regulations are inconsistent in that they allow a customer to opt out orally (_.7(b)(4)) but do not permit that same customer to revoke her opt out in the same manner. There is no reason for this distinction, and a customer should not be forced to go through the effort of sending a written or electronic revocation for her choice to be deemed effective.

To the extent the Agencies are concerned with accurately registering and tracking a customer's revocation, that same concern exists with regard to the customer's initial opt-out election and can, in any event, be dealt with by requiring an institution to keep an accurate record of the customer's elections – whether an initial opt-out choice or subsequent revocation.

Definition of Opt-Out Information

The Proposed Regulations blur the definition of "opt-out information" and inappropriately eliminate permissible uses of information under the FCRA. A few examples are listed below, but there are other permissible uses not discussed below, and the agencies should make clear that the regulations do *not* modify any existing permissible types of information sharing or any existing exclusions (including without limitation the exclusions set forth in 15 U.S.C. § 1681a(d)) under the existing body of FCRA law.

Servicing/Agency Arrangements. The Proposed Regulations should be revised to make clear that information shared with an affiliate under an agency relationship or in order to service or process a consumer's accounts or transactions is not subject to the opt-out rules. Such agency arrangements are common in the banking industry where servicing functions often are conducted in nonbank affiliates within a holding company structure. As currently drafted, the Regulations may place institutions in the untenable position of being required to provide an opt-out right to the types of information sharing that are essential to provide consumers with the products and services they request.

The notice and opt-out provisions in the FCRA apply only to information that, but for the provision of notice and an opportunity to opt out of information sharing, would constitute a "consumer report" as defined within the statute. The FTC has stated that when an institution shares a consumer report with its affiliate for a permissible purpose, the institution does not become a consumer reporting agency. 16 C.F.R. § 604(3)(E)-(6A). Information that an institution shares with its affiliate/agent in order to service or process a consumer's accounts or transactions, however, is not a "consumer report" under the FCRA irrespective of the notice and opt-out provisions and therefore may not be included within the definition of "opt-out information" under the Proposed Regulations.

The Proposed Regulations may not modify the scope of the FCRA and must therefore contain a similar limitation in the definition of "opt-out information."

Joint Users. Similarly, the final regulations should clarify that the joint user exception under existing FCRA law continues to be fully applicable under the final regulations. Specifically, the FTC has stated that joint users acting pursuant

to a single consumer request may jointly use a single body of information provided by the consumer without providing an opt-out opportunity and without the danger of becoming a consumer reporting agency. *See* 16 C.F.R. § 600, Comment 603(f)--8. For example, if a lender forwards a consumer report to another affiliated creditor for use in considering a consumer's loan application at the consumer's request, the lender does not thereby become a consumer reporting agency.

Consumer Consent. Where a consumer requests or consents to information sharing between affiliates, that consumer's choice should be given immediate effect, and the institution should be permitted to share information according to the consumer's direction, whether expressed broadly (*e.g.*, permitting sharing of all information with all affiliates with regard to products and services that may be of interest to the consumer) or narrowly (*e.g.*, permitting sharing of a specific type of information with a specific affiliate for a specific purpose). For example, a consumer's request that her information be provided to affiliates to determine her eligibility for products and services offered by those affiliates should be honored. To do so alleviates the burden on the consumer of filling out multiple applications and consenting to multiple credit report drawings with the attendant dangers and pitfalls. Under the language of the FCRA, no provision of information from one affiliate to another takes place in such situations as long as the consumer's consent indicates an intention that all information is being supplied to all the affiliates with respect to products of interest to the consumer.

Fraud Control. It is desirable from both a consumer and an institutional perspective to permit the immediate sharing of information for fraud control purposes and to exempt information shared for this purpose from the scope of "opt-out information." Such information-sharing is in the best interests

of consumers and protects them from the possibility of identity theft and repeated fraudulent transactions under their names.

This exemption should extend not only to transaction and experience information (*e.g.*, that a specific transaction was denied) but also to the underlying information that led to the decision to deny the transaction. Without the full spectrum of information available, affiliates may fail to prevent certain actual or potential fraudulent transactions that could otherwise be avoided.

In recognition of the importance of this type of information transfer, the GLB Act privacy regulations exempt from the scope of their notice and opt-out requirements the disclosure of information to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability. There is no reason to restrict the similar use of information among affiliates.

To allow potentially fraudulent borrowers to prevent the sharing of this and other types of fraud-control information among affiliated lenders by invoking FCRA opt-out rights would subject affiliated lenders to risks that might well exceed those faced by other lenders, who do not face any potential opt-out rights before obtaining similar information from unaffiliated entities that either sell fraud-control systems or provide similar information on a cooperative basis.

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The Clearing House appreciates the opportunity to comment on the Proposed Regulations and would be pleased to discuss any of the points made herein in more detail. If you have any questions, please contact Joseph R. Alexander, Senior Counsel, at (212) 612-9334.

Very truly yours,