New York State
Credit Union League, Inc.
and Affiliates

"Serving and supporting credit unions since 1917."

September 10, 2006

Ms. Mary Rupp
Secretary to the Board
National Credit Union League Administration
1775 Duke Street
Alexandria, Virginia 22314-3428

Dear Secretary Rupp:

The New York State Credit Union League (NYSCUL) represents more than 500 credit unions in New York State with more than $34 billion in assets. I am writing on behalf of NYSCUL to offer my comments and concerns on the proposed Joint Rule intended to comply with certain provision of the Fair and Accurate Credit Transaction (FACT) Act of 2003 mandating that financial institutions develop policies to identify red flags of identity theft. And mandating greater review of address discrepancies in credit reports Given the scope and attendant examination requirements that this proposal will ultimately impose on credit unions, it is my belief that certain provisions could be more narrowly interpreted to accomplish the intended legislative affect.

Overview

In 2003, Congress passed the FACT Act. In doing so, it responded to the very real threat that identity theft poses to consumers and the financial services industry in general. Consequently, it has two distinct thrusts. First, to minimize the inappropriate use of credit information (such as a consumer's medical history) by creditors; and second, to ensure that financial institutions take steps to protect consumers against the potential misuse of their credit information. This proposal is designed to address the latter concern. Specifically, 15 U.S.C.S. §1681m(e) mandates that federal agencies including the NCUA establish guidelines and regulations regarding identity theft with regard to account holders and update such guidelines and regulations where necessary. However, this legislative mandate gives the agencies involved a tremendous amount of discretion in determining what policies and procedures should be put in place to satisfy this new mandate.

NYSCUL has two primary concerns with this proposal. First, it is imperative that regulations be crafted to avoid duplicating existing requirements. Financial institutions have already undertaken a tremendous amount of work to combat identity theft. Second, the regulation should be as narrow as possible to avoid regulations that are so broad and so vague that credit unions do not know how best to comply with them until they meet with their examiners.

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Danger of Duplication

At its core, the proposal calls for financial institutions including credit unions to develop policies and procedures to identify "red flags of identity theft" and to take steps to both detect and deter such theft. The proposal accomplishes this goal not only by mandating red flag procedures but by effectively extending CIP account procedures to credit reports. The proposals will also add a new Appendix J to part 717 of the NCUA's Rules and Regulations providing a list of potential red flags that financial institutions are to take into account when developing and implementing identity theft policies. This list is not definitive.

This proposal is clearly designed to make financial institutions address identity theft compliance issues in much the same way they currently address BSA compliance issues. Under the proposed regulations, in developing appropriate risk evaluation policies, credit unions would have to consider which accounts are at the greatest risk of identity theft and demonstrate what steps they have taken to mitigate such risk by, among other things, monitoring such accounts for evidence of identity theft and, in some cases, filing a suspicious activity report where appropriate. (See e.g. Proposed §717.90(d)(2)(iv)(G)).

If this sounds familiar, it should. The Federal Financial Institutions Examination Council Bank Secrecy Act/Anti Money Laundering Examination Manual, Customer Due Diligence Overview notes as its objective, "Assess the appropriateness and comprehensiveness of the bank's customer due diligence (CDD) policies, procedures, and processes for obtaining customer information and assess the value of this information in detecting, monitoring, and reporting suspicious activity."

Improperly implemented, this proposal will create a tremendous amount of needless duplication. As a result, the new regulations and guidelines that must be issued pursuant to §1681m should clarify instances in which compliance with existing BSA requirements can also satisfy identity theft requirements. This is particularly appropriate since at their core, BSA and identity theft recognize that the key to appropriate enforcement and prevention begins with financial institutions using their judgment to identify abnormal customer activity based on a strong customer identification program.

This approach would also be consistent with the overall intent of the legislation which explicitly provides that the increased verification requirements called for under this statute be consistent with the existing CIP requirements mandated by 31 U.S.C.A. 5318(1). Therefore, it stands to reason that existing CIP provisions used as the basis for the account risk evaluation portion of the proposal are appropriate and additional factors need not be included.

The definition of red flag should be more narrowly defined.

As noted above, a second concern of the League is that the regulations be implemented against the backdrop of the efforts already undertaken by credit unions across the State to rigorously guard against identity theft. Consequently, while recognizing that regulations have to be promulgated in this area, there are elements in this proposal that could be more narrowly defined.

As the proposed regulations note, §114 of the FACT Act requires the promulgation of red flag guidelines related to specific forms of activity that indicate the possible existence of identity theft. In contrast, the proposed rule attempts to identify precursors to identity theft by forcing financial institutions to assess possible risks to account holders. The agencies are concerned that

analysis of the possible existence of identity theft will lead to insufficient identification of potential vulnerabilities. However, forcing credit unions to craft evaluation policies based on possible risk of identity theft could potentially broaden the scope beyond simply assessing legitimate vulnerabilities and instead reacting to potentially chimerical concerns. Furthermore, as a matter of statutory construction, identifying the possible existence of identity theft denotes a system designed to quickly identify theft that may already be taking place; whereas possible risk clearly is a much broader requirement placed on credit unions. In addition, the simple truth is many of the future precursors to identity theft have yet to be conceived; therefore, the agencies should consider qualifying its proposed definition by replacing possible risk with probable risk of identity theft. This slight alteration will underscore that a red flag program is based on sound judgment, not only of what clearly is an identity theft risk, but a reasonable conclusion as to what is not.

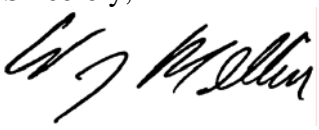
Another area we believe needs further clarification is the area of third party services. The rules should explicitly state that where a credit union engages with a third party provider and such provider must also comply with the red flag requirements that such credit union may rely on the compliance of a third party with these regulations in implementing its own red flag policy. In other words, credit unions that seek to outsource necessary services or work with other credit unions to provide more efficient services for their members should not have to create a duplicate layer of compliance.

Another definitional issue that I would like to take this opportunity to address. The definition of account is clearly much broader than it needs to be to ensure that the regulation adequately covers credit unions. As cooperatives which are limited to specific fields of membership, an account could be defined without any reference to the Bank Holding Company Act. As a matter of fact, account could be defined simply as a demand deposit, savings or other asset account for personal, family, household or business purposes such as a checking or savings account. Consequently, NYSCUL would support a more narrow definition of account than that contained in the existing proposal.

Finally, the agencies have requested comment on whether a transaction that occurs on an account that has been inactive for two years should automatically be considered a red flag or whether the financial institutions should be able to consider simply whether action on an inactive account may be an indicator of identity theft without reference to a two-year timeframe. This latter approach is the one that should be adopted as many states effectively address this issue by establishing a time period after which accounts are to be considered abandoned.

Thank you for the opportunity to comment on this important proposal. We certainly share the goals of both legislators and regulators of deterring and minimizing the impact of identity theft and we hope these comments will assist you in our joint efforts in this regard.

Sincerely,



William Mellin
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