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July 23, 2004

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Office of the Comptroller of the Currency
250 E Street, S.W.
Public Reference Room, Mail Stop 1—5
Washington, DC 20219

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, DC 20552
Attention No. 2004-26

Re: Proper Disposal of Consumer Information Under the Fair and Accurate Credit Transactions Act of 2003, **OCC** Docket No. 04-13; **FRB** Docket No. R-1199; **FDIC** RIN 3064-AC77; **OTS** No. 2004-26; 69 Federal Register 31913 (June 8, 2004)

Dear Sir or Madam:

The American Bankers Association (“ABA”) offers the following comments on the interagency proposal to implement section 216 of the Fair and Accurate Credit Transactions Act of 2003 (“the FACT Act”) by amending the Interagency Guidelines Establishing Standards for Safeguarding Customer Information (“Guidelines”). The proposal would require each financial institution to include as part of its information security program appropriate measures to properly dispose of consumer information derived from consumer reports to address the risks associated with identity theft.

The ABA brings together all elements of the banking community to represent the interests of this rapidly changing industry. Its membership – which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, and savings banks – makes ABA the largest banking trade association in the country.

The ABA and its membership have long been active in the battle to prevent identity theft. In June 2000, the ABA Task Force on Responsible Use of Customer information developed voluntary guidelines that reaffirmed the industry commitment to maintaining confidentiality and security of customer data. In the same period, ABA published its *Communications Kit for Identity Theft* to assist member efforts to promote the sensible and secure handling and disposal of financial information among bank employees and their customers. In 2002, ABA released its *Safeguarding Customer Information Toolbox*, a member service to guide banks through the process of assessing information security risks and establishing appropriate policies and controls to manage those risks and protect customer information.

The ABA supports this proposal as a flexible and sound method for achieving appropriate disposal of consumer information consistent with the banking industry's commitment to safeguard an individual's sensitive financial information and combat the risks of identity theft that threaten both consumers and their banks. We recognize and endorse the agencies' efforts to integrate the obligations mandated by section 216 of the FACT Act within the established Guidelines that govern the implementation of industry customer information systems. By incorporating the consumer information disposal requirements within the Guidelines, the agencies' proposal fosters the adoption of a comprehensive and secure information disposal program, while avoiding undue regulatory burden that could otherwise result from imposing separate standards independent from the existing guidance regimen. ABA applauds this integrated approach.

We comment more specifically below on certain features of the proposal.

Personally Identifiable Records

The ABA considers the proposal's inclusion of the requirement that any record of consumer information be "about an individual" to be vital to properly tailoring the Guidelines to the information security risks relevant to guarding against identity theft. As explained in the preamble, a record is not "about an individual," if "it does not identify a particular consumer." This element of the definition of consumer information is essential to drawing the necessary operational lines for staff to follow to distinguish between information whose disposal does or does not contribute to the risk of identity theft. This requirement also ensures parallel treatment by the Guidelines of customer information and consumer information, because both will be predicated on the concept of being personally identifiable.

Accordingly, ABA recommends that the Guidelines' definition of consumer information explicitly incorporate the requirement of "personally identifiable" in addition to the qualification that a record be "about an individual." The current

definition of *customer* information contains a similar emphasis by using both the description “nonpublic personal information as defined in [§XXX.3(n)]” and the qualifying phrase “about a customer.” The regulatory definition of “nonpublic personal information” expressly requires such information to be “personally identifiable.” See e.g., 12 C.F.R. §40.3(n)(1)(i). It is therefore consistent with the existing definition of customer information in the Guidelines to have the parallel definition of consumer information expressly include both modifiers: “personally identifiable” and “about an individual.” Consequently, ABA urges the agencies to change the proposed definition to begin as follows: “*Consumer information* means any personally identifiable record about an individual, ...” Making this insertion in the final rule will clarify the agencies’ intent as expressed in the preamble, underscore the identity theft prevention goals of section 216 of the FACT Act and realize the statutory direction to ensure information security requirements under GLBA and the FACT Act are consistent.

Information from Consumer Reports

The agencies solicit comment on the definition’s use of the statutorily required phrase “derived from [a] consumer report[s]” as applied by examples in the preamble. ABA understands that the point of the examples and commentary is to capture as consumer information, personally identifiable records that (i) contain information extracted from a consumer report, (ii) combine information from a consumer report with information from other sources, and (iii) have lost their legal status as consumer reports by operation of affiliate sharing after opt-out under FCRA. ABA considers this scope to be a reasonable application of the statute’s intent in using “derived from consumer reports.”

ABA is concerned that the concept of “derived from consumer reports” could be applied to information that is so manipulated and removed from the sensitive information contained in the reports themselves as to have no relation to the legislation’s underlying purpose to prevent the compromise and misuse of a consumer’s identity. Exactly where this boundary may be is difficult to ascertain. As long as the revised Guidelines continue to couple consumer information with the risk assessment and control process for the disposal of customer information, ABA expects that agency examination for compliance with the Guidelines will be predicated on a prudent risk-based judgment of the scope of information considered “derived from consumer reports.”

Proper Disposal

The proposal seeks comment on whether the use of “proper disposal” is sufficiently clear. ABA supports the proposed use of the term “proper disposal” in the revised Guidelines without further specification. The existing Guidelines have operated effectively without greater specification of the term “disposal.” There is no demonstrated reason to devise a more detailed definition that could spawn interpretive confusion and the regulatory burden that often results from additional verbiage. Indeed the Federal Trade Commission’s proposed disposal rule illustrates the hazard. By including within its definition of disposal “the sale, donation, or transfer of any medium ... upon which computer information is

stored,” the FTC opened the door to comments seeking to dispel the notion that “disposal” included the sale, donation or transfer of consumer information itself— as opposed to the sale or transfer of the hardware that effectuated a disposal of the electronic records previously contained on such hardware. Accordingly, ABA supports the proposed simple reference to “proper disposal” as being adequate for the affected parties to understand the intended application.

Effective Date

ABA agrees with the agencies’ assumption that banks are already disposing of consumer information appropriately. Nevertheless, procedures that are formally described to comply with the existing Guidelines may require changes that expressly include the controls designed to cover consumer information as well as customer information. Updates to the formal systems, controls and audit protocols to incorporate the scope of “consumer information” must compete for implementation resources with other operational changes. Mandating satisfaction of the revised Guidelines within 90 days of Federal Register publication may defy the ability of some institutions that need to make requisite formal changes to their programs, even when their current disposal practices are sufficiently protective. In addition, under the proposed amendment to paragraph III of the existing Guidelines, an institution is required (as described in the preamble) to “broaden the scope of its risk assessment to include the assessment of the reasonably foreseeable internal and external threats associated with the methods it uses to dispose of ‘consumer information,’ and adjust its risk assessment in light of the relevant changes relating to such threats.” Such an evaluation does not occur overnight, even when the existing practices for information disposal are in reality broad enough to properly dispose of both consumer and customer information. Accordingly, ABA urges the agencies to allow 180 days for achieving compliance with the revised Guidelines. This modest extension of the compliance deadline will not undermine or impede the disposal practices that are already in place to protect consumer information throughout the banking industry.

Exemption Authority

ABA strongly urges all agencies to coordinate their exercise of jurisdiction under 216 of the FACT Act to eliminate any discrepancy in disposal requirements, duplicative oversight, or enforcement redundancy with respect to the application of their respective final rules. Redundant regulation imposes undue compliance burdens on institutions by exposing them to conflicting oversight processes. For example, there is no reason for the FTC to apply its disposal rule to financial institutions that are subject to the banking agencies’ Guidelines. The banking industry is closely supervised for its information security systems through periodic examinations, while there are whole industries subject to FTC jurisdiction alone that have no similar comprehensive oversight. It is a misapplication of limited regulatory resources for the banking industry to be subject to unnecessary concurrent regulation. Despite well-intended efforts by the responsible agencies to coordinate regulatory text, the need for compliance officers to monitor another agency’s rule or interpretive guidance for consistency with the bank’s or savings association’s primary supervisor is an undue burden

and a waste of valuable time when there are so many rules and regulations that deserve attention. Banks or savings associations whose subsidiaries or affiliates are subject to the Guidelines should be exempt from any overlapping regulatory jurisdiction under the authority provided in section 216(a)(3) of the FACT Act. Accordingly, ABA asks that the Federal banking agencies work with their sister financial regulators to implement corresponding exemptions to eliminate redundant regulatory regimes.

In conclusion, ABA supports the agencies' proposal to integrate the FACT Act protections for disposal of consumer information into the established Guidelines for Safeguarding Customer Information and encourages them to adopt the improvements to their proposal recommended by these comments. We believe that the track record of the ABA, its members, and the banking industry at large demonstrates the commitment of America's Bankers to protect the confidentiality of consumer credit information and to guard against the real threat of identity theft.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard R. Riese". The signature is fluid and cursive, with a large loop at the end.

Richard R. Riese
Senior Compliance Counsel