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July 23, 2004

VIA FACSIMILE

Ms. Jennifer Johnson, Secretary
 Board of Governors of the Federal
 Reserve System
 20th Street and Constitution Avenue, NW
 Washington, DC 20551
 202-452-3819
 Attention: Docket No. R-1199

Office of the Comptroller of Currency
 250 E Street, SW
 Public Information Room
 Mail Stop 1-5
 Washington, DC 20219
 202-874-4448
 Attention: Docket No. 04-13

Mr. Robert E. Feldman
 Executive Secretary
 Federal Deposit Insurance Corporation
 550 17th Street, NW
 Washington, DC 20429
 202-898-3838
 Attention: RIN # 3064-AC77

Regulation Comments
 Chief Counsel's Office
 Office of Thrift Supervision
 1700 G Street, NW
 Washington, DC 20552
 202-906-6518
 Attention: No. 2004-26

Re: Docket No. R-1199; Docket No. 04-13; RIN # 3064-AC77; No. 2004-26

Dear Sir or Madam:

The Wisconsin Bankers Association (WBA) is the largest financial institution trade association in Wisconsin, representing over 300 state and nationally chartered banks, savings and loans associations, and savings banks located in communities throughout the State.

The WBA appreciates the opportunity to comment on the proposed rule issued by the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS) (hereinafter, the Agencies), concerning the implementation of section 216 of the Fair and Accurate Credit Transaction Act of 2003

4721 SOUTH BILTMORE LANE
 MADISON, WI 53718

P. O. Box 6880
 MADISON, WI 53708-8880

608-441-1200
 Fax: 608-661-9391

www.wisbank.com

(FACT Act), which amends the Fair Credit Reporting Act (FCRA) by creating a new section 628. The proposed rule would require financial institutions to develop, implement, and maintain appropriate measures to properly dispose of "consumer information." The FACT Act mandates that the Agencies' regulations be consistent with the Gramm-Leach-Bliley Act (GLB Act), as well as other federal laws.

The WBA recognizes the importance of creating and implementing reasonable measures to protect consumers in general, as well as customers, from the unauthorized access and use of personal private financial information. Therefore, to this end, the WBA supports the proposed amendments to the Interagency Guidelines Establishing Standards for Safeguarding Customer Information (Guidelines). The WBA, nevertheless, would like to direct the Agencies' attention to the following issues created by the Guidelines as currently written.

The Definition Of "Consumer Information" Is Exceedingly Broad And The Agencies Should Further Clarify The Interpretation Of The Statutory Phrase "Derived From Consumer Reports."

First, the proposed language defines "consumer information" as "any record about an individual, whether in paper, electronic, or other form, that is a consumer report or is derived from a consumer report and that is maintained or otherwise possessed by or on behalf of the bank for a business purpose." The definition also encompasses a compilation of such records. The WBA believes that the use of the word "any," without more, and in conjunction with the statutory phrases "derived from a consumer report" and "compilation of such records" is exceedingly broad. Thus, literally any record a financial institution has which is derived from a compilation of consumer report data, but which contains no nonpublic personally identifiable information would end up being disposed of pursuant to guidelines intended to protect the security, confidentiality, and integrity of sensitive nonpublic information. Mandating that "consumer information" must have personally identifiable information would eliminate ambiguities associated with the phrase "any record about an individual."

Second, the WBA believes that the current attempt to distinguish between "customer" and "consumer" information does not espouse the interests of consistency and clarity. The WBA appreciates the Agencies' attempt to explain the difference between these two terms; however, the Agencies noted that the definitions "will sometimes overlap, but will not always coincide." Operationally this has the potential to become confusing and problematic for the employees of the affected institutions, as they are the individuals that ultimately put theory into practice.

The WBA believes consistency and clarity require that the same definition be used for both, "customer" and "consumer," the common element between these two being the sensitive issue of nonpublic personally identifiable information. In defining "customer information", part I, section C.2.c. of the current Interagency Guidelines Establishing Standards for Safeguarding Customer Information relies on Regulation P, 12 CFR 216.3(n), to define "nonpublic personal information." The definition, incorporated

herein as Appendix A, centers around "personally identifiable information." The definition for "consumer information" should also have this very important phrase. Using this phrase in the definition would promote clarity and consistency, and would build upon the practical and legal knowledge institutions have already acquired with respect to "personally identifiable information."

Third, the actual language of the proposed rule does not define "derived from a consumer report." The supplementary information, however, does provide a very useful description of the scope and meaning of the statutory phrase. The WBA believes the Agencies were heading in the right direction in anticipating this issue and in specifically requesting comments about this statutory phrase. The Agencies should incorporate examples or substantive language suitable for the Guidelines' current format. The WBA believes that the use of Regulation P's "nonpublic personal information" in the definition of "consumer information" would bring into sharper focus the scope of the statutory phrase in question.

The Proposed Rule's Current Language May Impose More Requirements In Wisconsin Than Under Current State Law.

Absent explicit language about personally identifiable information, the WBA believes that the proposed rule would impose stricter requirements than the current requirements of Wisconsin law. Our State law is very specific, whereas the language of the proposed rule is more general in substance. Section 895.505 of the Wisconsin Statutes, in relevant part, incorporated herein as Appendix B, enumerates four different procedures financial institutions must follow in order to dispose of records containing personal information. These requirements more or less follow the requirements of the Guidelines. The only point of contention results from our statute defining "personal information" and the proposed rule not limiting the scope of the information to records containing sensitive information. As the WBA pointed out above, the scope of the proposed rule, as drafted, would reach records that do not contain sensitive information. Since the proposed rule, without modification, will likely impose unnecessary additional obligations not required under Wisconsin law, the WBA urges the Agencies to amend the definition of "consumer information" to include personally identifiable information. If that were done, the definition of "consumer information" would be consistent with the definition of "customer information" and Wisconsin State law.

The Proposed Rule Should State That "Dispose" Or "Disposal" Excludes The Sale Or Transfer Of Records For Value.

Current Wisconsin law, Wis. Stat. § 895.505, defines "dispose" as "not includ[ing] a sale of record or the transfer of a record for value." The Federal Trade Commission's (FTC) version of the proposed rules addresses this point by defining "dispose" and "disposal." The FTC was urged to clarify that "dispose" or "disposal" does not include the sale, donation, or transfer for value of consumer information. Absent that clarification, current information sharing arrangements would be disrupted.


The Agencies' version does not address this point. The WBA, therefore, encourages the Agencies to define the word "dispose" and "disposal" to exclude the sale or transfer for value of records or media containing personally identifiable information. The current version of the Interagency Guidelines Establishing Standards for Safeguarding Customer Information does not explicitly define this term. Without clarification, it would be possible to argue that "disposal" or "dispose" includes the sale, donation, or transfer of consumer information pursuant to sharing arrangements. The WBA is concerned that such an interpretation may disrupt current information sharing arrangements.

Finally, interagency coordination should result in assuring that any financial institution subject to examination under the Guidelines by one of the Agencies is not mandated to comply with the obligations under the FTC's disposal rule even if there is joint jurisdiction.

Conclusion

The WBA directs the Agencies' attention to a number of issues. First, the proposed "consumer information" definition, without referring to personally identifiable information, is exceedingly broad. Second, the Agencies' attempt to distinguish between "consumer" and "customer" information is confusing and problematic. The definition of "consumer information," just as in the definition of "customer information," should refer to personally identifiable information. These changes, if made by the Agencies, would facilitate the operations of Wisconsin financial institutions because the Guidelines would be consistent with our State law. Third, the Guidelines should include language or examples that elaborate on the "derived from consumer report" statutory phrase. The use of personally identifiable information in the language or examples would bring the scope of the phrase into sharper focus. Finally, the Agencies should define the word "disposal" to exclude the transfer for value or sale of records or media containing such records. The WBA appreciates the opportunity to comment on the proposed rule issued by the Agencies and generally supports the proposed amendments to the Guidelines, subject to the noted changes.

Sincerely,



Kurt R. Bauer
Executive Vice President/CEO

Appendix A

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(n) (1) *Nonpublic personal information* means—

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- (i) personally identifiable financial information; and
- (ii) any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.

(2) *Nonpublic personal information* does not include—

- (i) publicly available information, except as included on a list described in paragraph (n)(1)(ii) of this section; or
- (ii) any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any personally identifiable financial information that is not publicly available.

(3) *Examples of lists.*

- (i) Nonpublic personal information includes any list of individuals' names and street addresses that is derived in whole or in part using personally identifiable financial information that is not publicly available, such as account numbers.
- (ii) Nonpublic personal information does not include any list of individuals' names and addresses that contains only publicly available information, is not derived in whole or in part using personally identifiable financial information that is not publicly available, and is not disclosed in a manner that indicates that any of the individuals on the list is a consumer of a financial institution.

(o) (1) *Personally identifiable financial information* means any information—

- (i) a consumer provides to you to obtain a financial product or service from you;
- (ii) about a consumer resulting from any transaction involving a financial product or service between you and a consumer; or
- (iii) you otherwise obtain about a consumer in connection with providing a financial product or service to that consumer.

(2) *Examples.*

(i) *Information included.* Personally identifiable financial information includes—

- (A) information a consumer provides to you on an application to obtain a loan, credit card, or other financial product or service;
- (B) account-balance information, payment history, overdraft history, and credit or debit card purchase information;
- (C) the fact that an individual is or has been one of your customers or has obtained a financial product or service from you;
- (D) any information about your consumer if it is disclosed in a manner that indicates that the individual is or has been your consumer;
- (E) any information that a consumer provides to you or that you or your agent otherwise obtain in connection with collecting on a loan or servicing a loan;
- (F) any information you collect through an Internet "cookie" (an information-collecting device from a web server); and
- (G) information from a consumer report.

(ii) *Information not included.* Personally identifiable financial information does not include—

- (A) a list of names and addresses of customers of an entity that is not a financial institution; and
- (B) information that does not identify a consumer, such as aggregate information or blind data that does not con-

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Regulation P § 216.3

tain personal identifiers such as account numbers, names, or addresses.

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Appendix B

895.505 Disposal of records containing personal information. (1) DEFINITIONS. In this section:

- (a) "Credit card" has the meaning given in s. 421.301 (15).
- (am) "Dispose" does not include a sale of a record or the transfer of a record for value.
- (b) "Financial institution" means any bank, savings bank, savings and loan association or credit union that is authorized to do business under state or federal laws relating to financial institutions, any issuer of a credit card or any investment company.
- (c) "Investment company" has the meaning given in s. 180.0103 (11e).
- (d) "Medical business" means any organization or enterprise operated for profit or not for profit, including a sole proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation, limited liability company or association, that possesses information, other than personnel records, relating to a person's physical or mental health, medical history or medical treatment.
- (e) "Personal information" means any of the following:
1. Personally identifiable data about an individual's medical condition, if the data are not generally considered to be public knowledge.
 2. Personally identifiable data that contain an individual's account or customer number, account balance, balance owing, credit balance or credit limit, if the data relate to an individual's account or transaction with a financial institution.
 3. Personally identifiable data provided by an individual to a financial institution upon opening an account or applying for a loan or credit.
 4. Personally identifiable data about an individual's federal, state or local tax returns.
- (f) "Personally identifiable" means capable of being associated with a particular individual through one or more identifiers or other information or circumstances.
- (g) "Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics.
- (h) "Tax preparation business" means any organization or enterprise operated for profit, including a sole proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation, limited liability company or association, that for a fee prepares an individual's federal, state or local tax returns or counsels an individual regarding the individual's federal, state or local tax returns.
- (2) **DISPOSAL OF RECORDS CONTAINING PERSONAL INFORMATION.** A financial institution, medical business or tax preparation business may not dispose of a record containing personal information unless the financial institution, medical business, tax preparation business or other person under contract with the financial institution, medical business or tax preparation business does any of the following:
- (a) Shreds the record before the disposal of the record.
 - (b) Erases the personal information contained in the record before the disposal of the record.
 - (c) Modifies the record to make the personal information unreadable before the disposal of the record.

(d) Takes actions that it reasonably believes will ensure that no unauthorized person will have access to the personal information contained in the record for the period between the record's disposal and the record's destruction.

(3) **CIVIL LIABILITY; DISPOSAL AND USE.** (a) A financial institution, medical business or tax preparation business is liable to a person whose personal information is disposed of in violation of sub. (2) for the amount of damages resulting from the violation.

(b) Any person who, for any purpose, uses personal information contained in a record that was disposed of by a financial institution, medical business or tax preparation business is liable to an individual who is the subject of the information and to the financial institution, medical business or tax preparation business that disposed of the record for the amount of damages resulting from the person's use of the information. This paragraph does not apply to a person who uses personal information with the authorization or consent of the individual who is the subject of the information.

(4) **PENALTIES; DISPOSAL AND USE.** (a) A financial institution, medical business or tax preparation business that violates sub. (2) may be required to forfeit not more than \$1,000. Acts arising out of the same incident or occurrence shall be a single violation.

(b) Any person who possesses a record that was disposed of by a financial institution, medical business or tax preparation business and who intends to use, for any purpose, personal information contained in the record may be fined not more than \$1,000 or imprisoned for not more than 90 days or both. This paragraph does not apply to a person who possesses a record with the authorization or consent of the individual whose personal information is contained in the record.

History: 1999 a. 9.

Disposing Medical, Financial Records. Frankl. Wis. Law Dec. 1999.