WISCONSIN BANKERS ASSOCIATION

August 16, 2004

VIA EMAIL

Jennifer J. Johnson
Secretary, Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1203

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attention: RIN 3064-AC73

Becky Baker
Secretary, Board of National Credit Union
Administration
1775 Duke Street
Alexandria, VA 22314

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1-5
Washington, DC 20219
Attention: Docket No. 04-16

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: No. 2004-31

Re: Fair Credit Reporting Affiliate Marketing Regulations

Dear Ladies and Gentlemen:

The Wisconsin Bankers Association (WBA) is the largest financial institution trade association in Wisconsin, representing over 300 state and nationally chartered banks, savings and loan associations, and savings banks located in communities throughout the state. WBA appreciates the opportunity to comment on the federal banking regulatory agencies (Agencies) proposed regulations intended to implement Section 214 of the Fair and Accurate Credit Transactions Act of 2003 (FACT or FACT Act).

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Section 214 of the FACT Act adds a new section 624 to the Fair Credit Reporting Act (FCRA). This new section generally provides that, subject to certain exceptions, if a person shares transaction and experience information and other information about a consumer with an affiliate, the affiliate may not use that information to make a solicitation to the consumer about its products or services, unless the consumer is given a clear, conspicuous and concise notice and a reasonable opportunity to opt of such use and the consumer does not opt out.

The Agencies requests comment on all aspects of the rule and on certain specifically identified issues. WBA respectfully submits the following comments in response to that request.

The Definition of "Eligibility Information" Should Be Modified to Exclude A Consumer's Name and Address and Publicly Available Information.

Under the proposed rule, "eligibility information" is defined to mean any information the communication of which would be a consumer report if the exclusions from the definition of "consumer report" in section 603(d)(2)(A) if [FCRA] did not apply. Information that is excluded from section 603(d)(2)(A) definition of consumer report is: (1) information about the institution's own transactions and experiences with a consumer; (2) information about the institution's own transactions and experiences it shares among affiliates; (3) communication of "other information" (emphasis added) among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity before the time that the information is communicated, to direct that such information not be communicated among such persons.

WBA members understand what is meant by credit information and transaction and experience information, but do not have the same level of understanding regarding "other information," as described in the proposal. They have expressed serious concerns that other information could include a consumer's name and address and publicly available information. WBA likewise is concerned that name and address and publicly available information obtained from an institution's affiliate for the affiliate's use in making a solicitation to the consumer is restricted by the proposed rule. If information about a consumer is publicly available and such information is sought by an entity for the purposes of making a solicitation to that consumer, we see no justifiable reason to restrict the use of such information simply because it was obtained from the entity's affiliate. The entity could get the information from a variety of other sources due to its public nature. Thus, we do not believe the rule should cover an entity's use of a consumer's name and address and publicly available information merely because it was obtained from an affiliate. Therefore, we respectfully request that

the definition of "eligibility information" be modified to exclude a consumer's name and address and publicly available information.

"Constructive Sharing" Should Not Be Addressed in the Final Rule.

The Agencies specifically request comment on whether the proposed rule should apply "if affiliated companies seek to avoid providing notice and opt-out by engaging in the 'constructive sharing' of eligibility information to conduct marketing." As described by the Agencies, constructive sharing occurs when a financial institution uses its own information to make marketing solicitations to its own customers concerning an affiliate's products or services, and the customers' responses provide the affiliate with discernible eligibility information about these customers. The term constructive sharing is not used in section 624 or any other provision of the FCRA or the FACT Act.

Section 624 does not limit sharing. And, of equal importance, section 624 applies only to the use of information after it has been shared. In fact, section 624 applies only if the following five conditions are met: (1) An entity has received information from an affiliate; (2) this information would be a consumer report if the exceptions to the definition of consumer report in the FCRA for transaction and experience information and other information shared with affiliates did not apply; (3) the entity uses this information to make marketing solicitations to consumers; (4) the marketing solicitations are for the products or services of the entity receiving the information and making the solicitations; and (5) no exception under section 624 applies.

Furthermore, the proposal makes clear that section 624(a)(1) applies only when an institution uses eligibility information received from an affiliate to make a marketing solicitation concerning "*its* products or services", and no other exception applies. (Emphasis added). The word "its" is not ambiguous and clearly refers to the entity that makes the solicitations and not the affiliate communicating the eligibility information. If an entity is marketing the products and services of its affiliate, the entity would not be marketing its own products or services and the requirements of section 624 would not apply.

Moreover, the plain language of section 624 does not prohibit an entity from using its own information to solicit its own customers for the products or services of any third party, including an affiliate, regardless of which entity establishes the marketing criteria. Section 214(b)(1) of the FACT Act requires the Agencies to prescribe regulations to implement section 624 of the FCRA. The Agencies are authorized and directed to write rules to implement the notice and opt-out requirement. If the Agencies prescribe rules to limit conduct that is not addressed by section 624, such as by limiting the ability of an entity to market its affiliate's products or services to its own customers, those rules should not be viewed as implementing section 624 unless the language of section 624 was ambiguous. As discussed above, the language of section 624 is plain and not ambiguous. WBA believes that section 624 does not authorize the Agencies to

address constructive sharing. Thus, for all of the foregoing reasons, WBA strongly urges the Agencies to delete any reference or discussion of so-called "constructive sharing" from the final rule.

The Notice Provision in the Final Rule Should Be Flexible Rather Than Placing The Burden On A Particular Entity.

The proposed rule would require that if a financial institution communicates eligibility information to an affiliate, the affiliate may not use this information to make solicitations to a consumer, unless the financial institution first provides the consumer notice and an opportunity to opt out, and the consumer does not opt.

WBA believes that the final rule should not impose such a notice obligation specifically on the financial institution that *shares* eligibility information with another affiliate. Instead, we believe that the proper approach is to provide flexibility in the rule such that the focus is placed upon the consumer receiving the notice at the appropriate time rather than specifically placing the burden on a particular entity to provide the notice. This does not mean that the responsibility to provide the notice is diminished or eliminated. It simply means that the institution and its affiliates determine and coordinate who will shoulder the responsibility in a given situation. In fact, the Agencies correctly point out in the preamble that the FCRA does not specify which entity must provide the opt-out notice. Therefore, WBA urges the Agencies to adopt a flexible rule which permits an institution and its affiliates to determine who will provide the notice to the consumer.

The Final Rule Should Not Define "Clear and Conspicuous."

The proposed rule would require a financial institution that shares eligibility information with an affiliate to provide a consumer "a clear and conspicuous notice" that the consumer's information may be communicated to, and used by, an affiliate to make marketing solicitations to the consumer. The proposal defines "clear and conspicuous" as "reasonably understandable and designed to call attention to the nature and significance of the information presented." WBA wishes to remind the Agencies of their recent withdrawal of proposed rules which attempted to define this term for disclosures provided pursuant to Regulations DD, B, E, M and Z. In fact, WBA submitted comments on that proposal stating that defining the term would be an exceedingly subjective endeavor which would invite costly litigation and would impose expensive and undue regulatory burden. WBA believes that these concerns are equally applicable to the proposed rule at hand, and strongly encourages the Agencies to eliminate in the final rule any attempt to define clear and conspicuous.

The Final Rule Should Extend the Compliance Date By Six Months.

The Supplementary Information indicates that the mandatory compliance date will be included in the final rules. The Agencies specifically request comment on whether the

mandatory compliance date "should be different from the effective date of the final regulations." To this WBA emphatically replies "yes."

Section 214(b)(4)(B) of the FACT Act provides that the regulations will become effective within six months after being issued in final form. WBA believes that the final rule should provide at least an additional six months for compliance for new accounts, *i.e.*, financial institutions would be given at least twelve months to comply with the notice and opt-out requirement after the rule is issued in final form. This additional compliance time would assist financial institutions that must make significant changes to programs, practices and procedures in order to comply with the final rule. Financial institutions cannot design comprehensive compliance programs before the rules are issued in final form due to uncertainty surrounding the final language of the rules. It is not simply a question of designing the notice based on existing programs and practices. Financial institutions will have to reprogram their systems and redesign their privacy notices before the notices may be sent.

In addition, the compliance deadline should take into account annual GLBA privacy notice obligations of financial institutions, and allow a gradual "roll-out" of the new FCRA opt-out notices so that they may be incorporated into the GLBA notices and schedule. WBA believes that many institutions may coordinate and consolidate the affiliate marketing notice with their annual GLBA privacy notice, as permitted by the FACT Act, and section 624. However, as a practical matter, the transition dates in section 624 are inadequate. Many GLBA notices are mailed after March of each year. Further, to the extent that the proposed rule is finalized later than the September date contemplated by the FACT Act, even more GLBA mailings for 2005 will have been provided. Accordingly, WBA believes that the Agencies should allow those financial institutions that will consolidate the affiliate marketing notice with the GLBA notice for existing customers to begin to comply with the final rule at the time that those institutions provide their next GLBA notice following the mandatory compliance date or December 31, 2005, whichever is earlier. This "roll-out" would allow many financial institutions to coordinate and consolidate the affiliate marketing notice with their "next" GLBA privacy notice, if the institutions so choose, consistent with the statutory directive that the affiliate marketing notice be "coordinated and consolidated with any other notice required to be issued under any other provision of law." In addition, this "roll-out" would also benefit consumers who would receive both the affiliate marketing notice and the GLBA privacy notice together and, therefore, could make all of their privacy choices at the same time. For these reasons, WBA vehemently urges the Agencies to extend the mandatory compliance date by six months.

The Final Rule Should Not Contain Examples.

The proposed rule provides numerous examples under various subsections. WBA is certain the Agencies' intended to provide examples for instructive purposes; however, we are very concerned that the examples will invite costly litigation by plaintiff's

attorneys who would argue that an institution has failed to meet a standard purportedly established by a particular example if such example is not applied to similar facts and circumstances. WBA believes the limited benefits afforded these examples in the proposal does not outweigh the risk of costly litigation and, therefore, encourages the Agencies to remove all examples from the final rule.

Conclusion.

WBA recognizes the complexity of section 214 of the FACT Act and the requisite effort put forth by the Agencies to provide a proposed rule that implements it. We appreciate the opportunity to comment on this important topic, and trust that our comments will be carefully considered when finalizing the rule.

Sincerely,

Kurt R. Bauer
Executive Vice President/CEO