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December 21, 2000

Manager
Dissemination Branch
Information Management and Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Attention: Docket No. 2000-81

Dear Sir or Madam:

I am writing on behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents the interests of our nation's federal credit unions, in response to the interagency's request for comment on their proposed Fair Credit Reporting Act (FCRA) regulation. In light of the fact that this rulemaking contains certain "credit union-specific" provisions and other provisions that apply to financial institutions generally, NAFCU has written under separate cover to address the "credit union-specific" portions of NCUA's regulation. This letter will address the generally applicable portions of the interagency regulation.

Section 706.7 - Use of Examples in the Proposed Rule

The agencies have asked for comments on whether the use of examples in the regulation is appropriate and useful. NAFCU believes examples help credit unions comply with the regulation and supports the use of examples as a result. NAFCU understands the concern that changes in technology or practice may necessitate revisions to the regulation; however, NAFCU believes changes to the regulation affecting the examples would be minimal and that the usefulness of the examples outweighs the potential burden of future amendments to the regulation. NAFCU also supports the language indicating that the examples are not exclusive and the safe harbor provision noting that compliance with the example or sample notice constitutes compliance with the regulation.[1]

[1] 65 Fed. Reg. 64,173 (2000).

Section 706.8 - Definitions

Clear and Conspicuous

The proposed rule requires that a financial institution's disclosures be "clear and conspicuous" and provides examples of methods that will meet that requirement. NAFCU commends the agencies for not mandating any particular means for making a notice clear and conspicuous but instead providing flexibility for financial institutions to determine how to best meet this requirement.

Transactions or Experiences Information

The proposed definition of "consumer report" closely parallels the definition of this term in the FCRA and excludes within the definition "any report containing information as to transactions or experiences between the consumer and the person making the report."[2] NAFCU suggests the agencies provide additional guidance on what constitutes "transactions or experiences" information by defining the term and/or including examples within the regulation. For example, the Federal Trade Commission, in a staff option letter to Cohoes Savings Bank, gives the following illustrations of "transaction or experience" information:

- the length of time the customer has held a credit card issued by the Bank;
- the number of times the customer has been late in making a payment on such credit card;
- the average monthly balance in the customer's savings account; and
- a list of the Bank's customers who have savings account balances of $10,000 or more.[3]

NAFCU believes the addition of these or similar examples will aid in the understanding of what information is exempt from the definitions of both "consumer report" and "opt out information."

Sections 706.10 and 706.15 - Timeframe for Compliance with an Opt Out

The proposed rule requires financial institutions to comply with an opt-out direction from a consumer "as soon as reasonably practicable" after the financial institution receives it. NAFCU supports this language and does not believe the agencies should mandate any specific timeframe, i.e. 30 days, for compliance with this requirement. This is in keeping with the structure of the privacy regulation, which also requires financial institutions to comply as soon as reasonably practical. NAFCU agrees with the reasoning of the agencies with respect to the privacy disclosures that a more general rule is appropriate given the wide range of practices throughout the industry. Due

[2] 65 Fed. Reg. 64,173 (2000).
[3] *See* Letter from Thomas E. Kane to Michael R. Novak (September 9, 1998) (Attachment 1).

to the ability of some financial institutions to better embrace advances in technology than others, a uniform standard would not be appropriate.

Based on this response, NAFCU also believes the agencies should not require financial institutions to disclose in their FCRA notices how long a consumer has to respond to the opt out notice before the institution may begin disclosing information to affiliates. This will allow for flexibility in financial institution practices, while also maintaining consistency with the privacy disclosure requirements.

Sections 706.11 and 706.13 – Delivery of Notices by Electronic Means

The agencies have proposed examples of a reasonable time period for opting out and reasonable delivery of notices that require the consumer to acknowledge receipt of notices delivered by electronic means. The intent of the Electronic Signatures Act, which went into effect on October 1, 2000, was to facilitate e-commerce while including a consent requirement to protect consumers who do not wish to receive electronic communications. However, the law does not require consumers who have consented to receive disclosures electronically to acknowledge receipt of the disclosure. NAFCU supports the agencies' efforts to address electronic delivery of disclosures but believes the agencies should take further steps to facilitate advances in technology for financial institutions. Requiring acknowledgement of receipt places an administrative burden on financial institutions and inhibits the usefulness of electronic means of disclosure.

NAFCU acknowledges that the agencies may be attempting to address the situation in which a financial institution has posted a notice on its web site and the consumer is not aware the notice has been posted. Section 706.13 on delivery of opt out notices includes as an example of the posting of a notice on a web site and acknowledgement of receipt by the consumer. However, a credit union may send a notice via other electronic means, such as email, in which case the consumer should reasonably be expected to receive notice without having to acknowledge receipt. Therefore, at a minimum, NAFCU suggests the agencies modify the electronic means example in section 706.11 as follows in order to reflect the specific situation in which a notice is posted on a web site:

"*By electronic means.* You post the notice on your electronic site, and you provide at least 30 days after the date that the consumer acknowledges receipt of the electronic notice."

Appendix A to Subpart B – Sample Notice

NAFCU supports the inclusion of a sample opt out notice and believes this will assist financial institutions in compliance with the regulation. However, NAFCU suggests changes to two categories, which may be confusing to financial institutions

and/or consumers. The examples of categories of opt out information in Section 706.10 of the proposed regulation include "open lines of credit with others" and "employment history with others." However, the sample notice has omitted the term "with others" from these examples. Given that information on open lines of credit or employment with the financial institution is not considered "opt out information," NAFCU suggests these examples be modified in the sample notice as follows:

- information we obtain to verify representations made by you, such as *[provide illustrative examples, such as "your open lines of credit **with others**"]*;

- information we obtain from a person regarding an employment, credit, or other relationship with you, such as *[provide illustrative examples, such as "your employment history **with others**"]*.[4]

NAFCU would like to thank you for this opportunity to share our views on the proposed fair credit reporting act regulation. Should you have any questions or require additional information please call me or Gwen Baker, NAFCU's Director of Regulatory Affairs, at (703) 522-4770 or (800) 336-4644 ext. 266.

Sincerely,

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Fred R. Becker, Jr.
President and CEO

[4] 65 Fed. Reg. 64,176 (2000) (emphasis added).

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Credit Practices
~
Thomas E. Kane
Attorney

September 9, 1998

Michael R. Novak
Vice President & Director of Retail Banking
Cohoes Savings Bank
Cohoes, New York 12047

Re: Section 603(d) of the Fair Credit Reporting Act

Dear Mr. Novak:

This responds to your request for a staff opinion concerning whether the Fair Credit Reporting Act ("FCRA") permits your bank ("the Bank") to share information about the Bank's customers with investment representatives ("IRs"). Based on your letter and our telephone conversation, it is my understanding that the relevant facts are as follows. From their desks in the Bank's lobbies, the IRs sell securities and insurance products created by a number of different entities. These entities have authorized a broker/dealer corporation ("the Broker"), which is not an affiliate of the Bank, to sell the products. The Broker leases the space in the Bank's locations where the IRs have their desks. The IRs sign agreements with the Broker. The Broker holds the IRs' securities and insurance licenses and is responsible for ensuring that the IRs comply with applicable securities and insurance laws.

The IRs' salaries and benefits are paid by a wholly-owned subsidiary of the Bank ("the Subsidiary"). As president of the Subsidiary (in addition to your role as vice president of the Bank), you interview the candidates for IR positions and decide which of them will be hired. The IRs sign contracts with the Bank in which they agree to comply with the Bank's personnel rules and the Bank's rules regarding access to Bank records. On a day-to-day basis, the IRs are supervised by Bank employees. When IRs sell securities and insurance products, the Subsidiary receives a large portion of the commission.

Currently, Bank employees search through the Bank's customer databases, select customers who might be good candidates for the IRs' products, contact those customers, and ask them if they would like an IR to contact them. If the customer agrees to such a contact, the Bank employee passes the customer's name and contact information to the IR. The Bank wishes to adopt a different procedure for sharing information with the IRs. In that regard, you ask the following question:

If the Bank sufficiently discloses to its customers that it plans to share customer information with its affiliates, is the Bank permitted to share the information with the IRs so the IRs can

contact the customer directly?

The FCRA prohibits the furnishing of "consumer reports" to any individual or entity that does not meet a permissible purpose to obtain such a report under Section 604 of the statute. Because the IRs meet none of the permissible purposes listed under Section 604, they may not obtain the Bank's customer information if such information meets the definition of "consumer report," found in Section 603(d). During our telephone conversation, you described two types of information that the Bank wishes to share with the IRs. The first type includes lists of customers such as all those who have savings account balances of $10,000 or more ("customer lists"). The second type includes information, obtained by the Bank from customer loan applications, regarding the customer's transaction with entities other than the Bank ("application information").

Both the customer lists and the application information meet the general definition of "consumer report" set out Section 603(d)(1), *i.e.*, the information bears on the customers' "credit worthiness, credit standing, [or] credit capacity" and is "used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . credit or insurance." The next issue, then, is whether the two types of information are excluded from the definition of "consumer report" under Section 603(d)(2), the relevant portions of which read as follows:

> The term "consumer report" does not include . . . any (i) report containing information solely as to transactions or experiences between the consumer and the person making the report;
>
> (ii) communication of that information among persons related by common ownership or by corporate control; or (iii) communication of other information among persons related by common ownership or 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 initially communicated, to direct that such information not be communicated among such persons

Customer Lists

Section 603(d)(2)(A)(i) refers to "information solely as to transactions or experiences between the consumer and the person making the report." Such "transaction or experience" information includes the length of time the customer has held a credit card issued by the Bank, the number of times the customer has been late in making a payment on such a credit card, and the average monthly balance in the customer's savings account. A list of the Bank's customers who have savings account balances of $10,000 or more also would constitute "transaction or experience" information and would therefore be excluded from the definition of "consumer report" under Section 603(d)(2)(A)(i). Thus, the Bank would not violate the FCRA if it shared such information with the IRs or any other entity that requested the information.

Application Information

Based on our telephone conversation, it appears that the second type of information that the

Bank wishes to share with the IRs, application information, would include lists of the customer's assets and liabilities with entities other than the Bank, and lists of the names of companies from whom the customer has purchased insurance and securities. This information could not be the Bank's "transaction or experience" information because it includes only the customer's transactions with entities other than the Bank. Because this second type of information is not "transaction or experience" information, it is not excluded from the definition of "consumer report" under Sections 603(d)(2)(A)(i) or (ii).

The next issue is whether such information may be excluded from the definition under Section 603(d)(2)(A)(iii), the "affiliate-sharing" exclusion. Under that section, as long as the Bank provides the proper disclosures and the consumer has not objected to the communication, it is permitted to "communicate" any customer information to the IRs -- and the customer information is excluded from the definition of "consumer report"-- if the IRs are "persons related by common ownership or by corporate control," i.e., "affiliates." The Subsidiary itself is an affiliate of the Bank, of course. We believe that the IRs are affiliates as well because they are employees of the Subsidiary. This conclusion is based on the following facts that we understand to be true: (1) the Subsidiary pays the IRs' salaries and benefits; (2) the IRs are supervised primarily by Bank employees; (3) the Subsidiary receives a large portion of the commissions that consumers pay for the insurance and securities products; and (4) the IRs would be obtaining the Bank's information only to select which consumers to contact about the insurance and securities products, rather than to forward the information to the Broker or the entities that created the insurance and securities products. (On this fourth point, we note that neither the Broker nor the other entities are "affiliates" of the Bank.) Because we conclude that the IRs are employees of a Bank affiliate, the Bank may communicate to the IRs all information obtained from customer loan applications regarding the customer's transactions with entities other than the Bank, as long as the Section 603(d)(2)(A)(iii) disclosure requirements are met. As noted above, that subsection requires that it be "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 initially communicated, to direct that such information not be communicated among such persons."

The views set forth in this informal staff opinion are those of the staff and are not binding on the Commission. Please recognize that Section 621(e) of the FCRA authorizes the Board of Governors of the Federal Reserve System to issue interpretations of the FCRA, to the extent that the statute applies to banks and other financial institutions enumerated in that section.

Sincerely,

Thomas E. Kane