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DBA
Delaware Bankers Association

THE DELAWARE BANKERS ASSOCIATION

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December 4, 2000

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th and C Streets, NW
Washington, D.C. 20551
Docket No. R-1082

Communications Division
Office of the Comptroller of the Currency
250 E Street, SW
Washington, D.C. 20219
Docket No. 0020

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments/OES
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Manager
Dissemination Branch
Information Management and Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, D.C. 20552
Docket No. 2000-8

2000 DEC -1 P 2:22

RE: PROPOSED FCRA REGULATION

The Delaware Bankers Association appreciates the opportunity to submit comments to the proposed regulations implementing the provisions of the Fair Credit Reporting Act ("FCRA") that permit institutions to communicate consumer information to their affiliates (affiliate information sharing) without incurring the obligations of consumer reporting agencies. The Federal Reserve Board, OCC, FDIC, and OTS, ("Agencies") jointly published the proposal in the October 20, 2000 *Federal Register*.

The Delaware Bankers Association is a not-for-profit, private trade association that represents thirty-eight (38) dues and tax paying financial institutions chartered to do banking business in the State of Delaware.

Combined, these institutions maintain assets of over $140 billion in the State. Accordingly, we are filing this formal response on their collective behalf and we appreciate the opportunity to comment on this important matter.

OVERVIEW

The proposal relates to the FCRA provisions that authorize financial institutions to communicate among their affiliates:

- Information as to transactions or experiences between the consumer and the person making the communication;
- "Other" information provided that the institution has given notice to the consumer that the other information may be communicated; and,
- The institution has provided the consumer an opportunity to "opt out," and the consumer has not opted out.

The proposed regulations also implements certain related provisions.

Generally, DBA applauds the Agencies' proposed regulation and believes that it will clarify FCRA requirements. **However, we are most concerned that the final regulations provide adequate time to comply with the final regulation and that the new regulation not be applied retroactively.** Financial institutions should not be required to send opt out notices compliant with the final FCRA regulations to customers who received opt out notices, based on good faith interpretation of the statute, prior to adoption of final regulations. **We also strongly recommend that the Agencies revise the proposed example that gives customers 30 days to opt out before the financial institution may share information.** In most cases, it is appropriate and beneficial to the customers to share information upon receipt of the application containing the opt out mechanism.

EFFECTIVE DATE

The Agencies have not proposed an effective date for final regulations. The DBA is very concerned that financial institutions have sufficient time to comply with the new FCRA regulation, particularly in light of the recently released privacy regulations (Regulation P) that require that privacy notices include a reference to institutions' policy related to sharing information with affiliates. Financial institutions are concerned about how the effective date for the FCRA regulation notices will comport with the Regulation P disclosures that must be sent by July1, 2001. Financial institutions will have expended much time and resources to devise and deliver the Regulation P disclosures and should not have to repeat the exercise of revising and redelivering disclosures.

Specifically, the Agencies should make the following clear in the final regulation:

1) **There is no requirement that institutions that previously provided notice of opt-out and currently share "other information" with affiliates send an FCRA regulation notice to customers after adoption of the final FCRA regulations, i.e., on the basis that previous opt-out notices do not comply with the final FCRA regulations.** The FCRA amendments of 1996 made clear that financial institutions are permitted to share "other information" with affiliates provided the customer has had notice and opportunity to opt-out and has not done so. The statute did not authorize promulgation of regulations and financial institutions have in good faith complied with the statute's requirements. However, past and existing opt-out notices and procedures may not comply with the final FCRA regulations. **It would be unfair and unnecessarily costly to apply the final regulations retroactively.** Financial institutions would have to halt current sharing processes and revise and redeliver repetitive disclosures before resuming sharing – even though customers have already had effective notices and opportunity to opt-out. There is no reason to halt sharing of information and resend notices to customers who have previously received notice and opportunity to opt-out.

2) **So long as a financial institution's FCRA regulation disclosure and FCRA reference in its Regulation P notice are consistent, even if the FCRA regulation disclosures is more detailed, disclosure of the FCRA regulation does not represent a change in terms that triggers a change in term notice under Regulation P.** If the FCRA regulation disclosure is consistent the Regulation P notice, it is not a change in term, just because it provides more detail. **In addition, it would serve no useful purpose to resend FCRA notices that have already been sent, both pursuant to FCRA (prior to final regulation) and Regulation P.**

   If the final FCRA regulation and Regulation P had been finalized simultaneously or within sufficiently close proximity to be able to incorporate final FCRA regulation notices into the Regulation P notice, the Regulation P notice could have contained the FCRA regulation notice. However, at this point, many financial institutions, anticipating the July 1, 2000 Regulation P deadline, have already devised and printed their Regulation P notices. **To treat the FCRA regulation notice as a change in term would require devising and sending notices not once, but twice.** We do not believe that this is necessary or beneficial to consumers and imposes unnecessary costs.

3) **Regardless of the effective date of the FCRA regulation, financial institutions have the option to either 1) incorporate the FCRA regulation disclosures in the Regulation P as a substitute for the FCRA reference required by Regulation P or 2) provide the FCRA regulation notice separately.** Allowing incorporation into the Regulation P notice will allow

financial institutions to streamline the Regulation P and FCRA regulation disclosures to ease compliance and promote customer and staff understanding of the notice. Permitting separate disclosures will permit institutions to use up existing stock of Regulation P notices.

4) **Allow at least one year from the date of adoption of final regulations for *mandatory compliance.*** Financial institutions have just finalized Regulation P disclosures, at great cost and effort, and need time to devise the FCRA regulation disclosures. Financial institutions must also revise procedures for opting-out and related matters and educate employees about the new procedures.

JURISDICTION

The Federal Reserve Board's proposal provides that its proposed regulation covers Federal Reserve Board member banks, branches, and agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, and organizations operating under Section 25 of the Federal Reserve Act. However, Section 621(e)(1) of FCRA provides that the Board also has authority to prescribe regulations "with respect to bank-holding companies and affiliates (other than depository institutions and consumer reporting agencies) of such holding companies." **We recommend that the final regulation mirror the statute. This will promote uniformity in the rules and facilitate compliance among financial institutions with affiliates and subsidiaries.**

DEFINITION OF AFFILIATES

The FCRA provisions apply to affiliates that the proposal defines as "related or affiliated by common ownership or affiliated by corporate control or common corporate control, with another company." Control of a company means ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, control in any manner over the election of a majority of the directors, trustees, or general partners.

Generally, we agree with the proposed definition. However, we recommend that the final regulation clarify that operating subsidiaries are not affiliates for purposes of FCRA regulations, and "other information" may be shared with the operating subsidiary without the opt-out notice and opportunity.

FORM AND CONTENTS OF OPT OUT NOTICE

Under the proposal, the opt out notice must be clear and conspicuous which the proposal defines as "reasonably understandable and designed to call attention to the nature and significance of the information it contains." The Agencies offer examples of "reasonably understandable" notices that:

- Present the information in the notice in clear and concise sentences, paragraphs, and sections;
- Use short, explanatory sentences or bullet lists; and,
- Use "everyday words."

Examples of "designed to call attention to" include the use of:

- Plain-language heading;
- Easy to read typeface and type size; and,
- Boldface or italics for key words.

We believe that the proposed examples provide useful guidance and recommend their adoption. We do not foresee any difficulty with compliance with this proposed. There has not been much dispute or lack of clarity with regard to the meaning of "clear and conspicuous" under other regulations and we expect that the proposed guidance will be well understood. **However, we do not believe that it should be more detailed as that could reduce flexibility and make institutions more vulnerable to noncompliance.**

In addition, the opt out notice must accurately explain:

- The categories of opt out information
- The categories of affiliates
- The consumer's ability to opt-out; and,
- A reasonable means for the consumer to opt out.

Furthermore, while Regulation Z presumes 12-point font is "clear and conspicuous" for certain disclosures on credit card applications and solicitations, there is no font requirement for the FCRA regulation disclosures. **Accordingly, we recommended that such font specificity be included in the regulation.**

The proposal also provides that financial institutions may allow a consumer to select certain opt-out information or certain affiliates, with respect to which the consumer wishes to opt out. We appreciate the flexibility of this proposed provision.

Under the proposal, a financial institution satisfies the requirement to categorize the opt out information if it lists the categories, e.g., information from a consumer's application or credit report, and provides a few examples, such as "income, credit score or credit history with others, employment history, and marital status." The final regulation should link, as the proposed models do, the category with the example. For example, application information and income should be grouped together. Otherwise, the regulation may suggest that income information is derived from credit reports, which is generally not the case. We also recommend that the Agencies make clear that the list of examples is not exhaustive and that financial institutions are not required to list all the types of information shared.

The final regulation should clarify that information shared which is not "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, etc., is not a consumer report pursuant to the definition of consumer report under Section 603(d) of FCRA. Accordingly, such information is not subject to FCRA or its opt-out provisions.

Including information not used or expected to be used to establish a consumer's eligibility for a product or service could impede appropriate sharing of information and subject financial institutions to liability for good faith and appropriate use of information. Suppose, for example, a person presents a check drawn on subsidiary A to be cashed by subsidiary B and subsidiary B accesses the account at subsidiary A to determine whether there are sufficient funds. The account identifies the owner as Mrs. John Doe, suggesting marital status. If subsidiary B is not using this incidental information to determine eligibility for an account or other product, the information is not a consumer report under FCRA.

For similar reasons, the reference to marital status should be deleted. Information on marital status generally cannot be used to determine a person's eligibility for credit and is rarely if ever a consideration for elegibility for other products. Accordingly, it should not be assumed to be part of a consumer report.

REASONABLE OPPORTUNITY TO OPT OUT

Financial institutions must provide customers a "reasonable opportunity" to opt out. Under the proposal, a financial institution provides a reasonable opportunity to opt out if it provides a "reasonable period of time following the delivery of the opt out notice." The Agencies offer as examples: 30 days from the date an institution hand-delivers, mails, or provides electronically the opt notice. The Agencies have requested comment on whether different times should be noted in the example.

We are pleased that the Agencies have asked whether a different time should be noted in the example because we believe that the proposed 30 day period example is not appropriate or necessary in most cases and will eliminate many of the benefits of sharing information, both for the consumer and the financial institution. We suggest that the regulation note that the "reasonable period" may vary depending on the method of opt-out and individual circumstances and include additional examples that allow financial institutions in some instances to share information upon receipt of an application containing the opt out mechanism.

For example, if an application permits customers to opt out by checking a box or clicking on the computer, the institution should be able to share information upon receipt of the application. This should apply whether the application is made in person or not, whether by electronic or paper application. This is the time consumers are most likely

to review and consider the matter; additional time will not alter their choice. In addition, sharing information at the time of application, especially if in-person, is the best time to identify the customer's likely interest and eligibility for other products offered by subsidiaries and affiliates, enhancing the customer's experience and making the market more efficient. Requiring financial institutions to wait 30 days before sharing will take away the major benefits and efficiencies of sharing. Thirty days might be appropriate in these cases if consumers had to write their own letter to opt-out. However, the proposal does not permit this.

A longer period may be appropriate if a special form must be mailed, to allow time for delivery. We believe 20 days is sufficient to permit customers to review and have notices delivered, either by mail or phone.

We suggest that the final regulation provide the following examples:

- If an application allows a customer to check a box or click on a computer screen in order to opt-out, a reasonable time to opt out is upon the financial institution's receipt of the application.

- If the consumer opts-out by mailing a reply form, a reasonable time is twenty days following delivery of the opt-out notice.

REASONABLE MEANS OF OPTING OUT

The proposal requires financial institutions to provide a "reasonably convenient" method to opt out. Examples offered include designating check-off boxes in a prominent position, including a reply form with the opt-out notice, providing an electronic means to opt out, if the consumer agrees to the electronic delivery of information, and providing a toll-free telephone number. **Methods that are *not* reasonably convenient include requiring consumers to write their own letter and referring in a revised notice to a check-off box that was included with a previous notice.**

We agree with the four proposed options. The final regulation should clarify that financial institutions need only provide one option.

DELIVERY OF OPT OUT NOTICES

The proposal states that opt out notices must be delivered in a fashion so that each consumer can reasonably be expected to receive actual written notice. Oral notice is insufficient. The opt out notice must be in a form that can be retained or obtained at a later time.

We agree with this proposed provision and appreciate that actual notice is not required because it would be impractical and impossible to prove.

TIME BY WHICH OPT OUT MUST BE HONORED AND DURATION OF OPT OUT

Under the proposal, if a bank provides a consumer with an opt out notice and the consumer opts out, the bank must comply "as soon as reasonably practicable" after receipt of the notice. Opt out remains effective until revoked by the consumer in writing, as long as the consumer continues to have a relationship with the bank. If the relationship ends, the opt out will continue to apply to this information. However, a new notice and opportunity to opt out must be provided if the consumer establishes a new relationship with the bank.

We agree with this proposed provision. A specific time is not necessary. Generally, institutions will promptly cease sharing information upon notice, but there may be limited occasions when it may take additional time.

The Agencies should also clarify that the opt-out notice does not affect information that has already been shared with an affiliate. It should make clear that under these circumstances, the customer's institution is not required to retrieve information already shared with an affiliate and halt action based on the sharing of the information. For example, the customer's institution should not have to advise an affiliate to pull a solicitation to a customer who has just opted-out even if the solicitation has not yet been mailed. It can be months between the time information has been shared and the time of any action using that information. Once information has been shared, as a practical matter, it is not possible for the customer's institution to navigate the various channels of affiliates' to identify each and every place the information may be used and retrieve customers' names.

PROHIBITION AGAINST DISCRIMINATION

The proposal provides that banks cannot discriminate against applicants who opt out. It provides examples: denying credit to an applicant who opts out; varying the terms of the credit by providing less favorable pricing terms to an applicant who opts out; or applying more stringent credit underwriting standards to the applicant who opts out.

We agree that the financial institutions should not be able to deny an applicant an account or provide less favorable terms on that account on the basis that the applicant has opted out. **However, the final regulation should make clear that financial institutions can make available on preferred terms products *other than the specific one being applied for at that time* to the person who does not opt out.**

The ability to share information with affiliates has unquestionable cost efficiencies, e.g., savings on the cost of duplicate credit reports, cost of gathering information that the consumer should benefit from. The regulation should make clear that an applicant who

opts out is not entitled to get an offer or any special terms on other products, whether offered by the institution or its affiliates.

CONCLUSION

DBA appreciates the opportunity to submit our comments on this important proposal related to the FCRA provisions that authorize institutions to communicate among their affiliates. We generally support the proposal; however, we strongly recommend that the Agencies allow sufficient time to allow financial institutions to devise notices and establish other procedures to comply with the regulation. In addition, the Agencies should make clear that the FCRA regulation provisions are not retroactive and that financial institutions are not required to provide FCRA regulation notices to customers who previously received opt-out notices prior to the regulation. Finally, we strongly recommend that the Agencies include examples that permit financial institutions to share information upon receipt of an application containing the opt-out mechanism, such as a box to check.

As always, we would be pleased to provide any additional information. You may contact me at 302-678-8600.

Very truly yours,

David G. Bakerian

David G. Bakerian
Executive Vice President