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December 4, 2000

VIA E-MAIL

Robert E. Feldman, Executive Secretary
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Re: Comments to Joint Notice of Proposed Rulemaking
Fair Credit Reporting Regulations

Ladies and Gentlemen:

We are writing on behalf of the New Hampshire Bankers Association to submit comments on the proposed Fair Credit Reporting Regulations. The focus of these proposed regulations is the sharing of information among affiliates. You have indicated

that you intend to address other issues to reconcile provisions from the Fair Credit Reporting Act ("FCRA") and Title V of the Gramm-Leach-Bliley Act ("GLBA") through subsequent rulemaking activity. Our comments deal with both the proposed regulations and the other issues you may address.

FCRA draws a distinction between so-called "experience or transactional information" and "other information." "Experience or transactional information" is excluded from the definition of "consumer report." As a consequence, a person is not restricted under FCRA from sharing "experience or transactional information" with any other person, including an affiliate. "Other information" is included within the definition of "consumer report;" however, in the case of affiliated companies, "other information" is excluded from such definition if a company seeking to share such information with affiliates gives notice of its intention to its consumers, gives them a reasonable opportunity to "opt out" from the sharing of such information and the consumer does not "opt out".

Title V of GLBA does not draw a distinction between "experience or transactional information" and "other information." Instead, it prohibits a financial institution from sharing of "nonpublic personal information" with other persons unless it gives notice of its intention to share such information to its consumers, provides them with a reasonable opportunity to "opt out" from the sharing of such information and they do not "opt out", or the sharing of such information falls into certain excepted categories. See Section 502 of Title V of GLBA. The excepted categories are set forth in Sections 13, 14 and 15 of the Privacy Regulations issued by the bank regulatory agencies.

In enacting GLBA, Congress made clear that except for several technical amendments, nothing in Title V of GLBA is to be construed to modify, limit, or supersede the operation of FCRA, and in particular, no inference is to be drawn from Title V regarding whether information is "transaction or experience information" under FCRA. See Section 506 of Title V of GLBA. As a matter of statutory construction, it must be assumed that when Congress enacted GLBA, it believed that the provisions of both GLBA and FCRA were compatible. It empowered the bank regulatory agencies to prescribe regulations to carry out the provisions of both acts to reflect this compatibility.

The co-existence of FCRA and Title V of GLBA raises questions as to what types of information may be shared with affiliates and nonaffiliated third parties consistent with the provisions of both schemes. The uncertainty engendered by these questions requires clarification by the bank regulatory agencies. Examples of these questions are as follows:

1. If a financial institution enters into a joint marketing agreement with another financial institution and shares "other information" with that institution for permitted purposes under Section 13 of the Privacy Regulations, would such shared "other information" become a consumer report and therefor cause the financial

institution communicating the information to be deemed a consumer reporting agency? Would the result be different if the agreement was with an affiliate?

2. If a financial institution enters into a service agreement with a nonaffiliated third party to examine the financial institution's records to determine whether it is in compliance with banking regulations and shares "other information" with that party for a permitted purpose under Section 13 of the Privacy Regulations, would such shared "other information" become a consumer report and therefor cause the financial institution communicating the information to be deemed a consumer reporting agency?

3. If a financial institution uses an affiliate to effect a transaction which has been authorized by a consumer and "other information" is shared with the affiliate for a permitted purpose under Section 14 of the Privacy Regulations, would FCRA require that the institution give an "opt out" notice to the consumer and a reasonable opportunity to "opt out" before such information may be shared? Alternatively, would the financial institution have to obtain the consumer's written consent?

4. If the third example were varied to involve a nonaffiliated third party, rather than an affiliate, would the shared "other information" become a consumer report and therefor cause the financial institution to be deemed a consumer reporting agency?

5. If a financial institution enters into an agreement with a certified public accountant to audit the financial institution's financial records and to prepare its financial statements and shares "other information" with that party for a permitted purpose under Section 15 of the Privacy Regulations, would such shared "other information" become a consumer report and therefor cause the financial institution communicating the information to be deemed a consumer reporting agency?

6. If a financial institution retains legal counsel to represent it in litigation involving a consumer and shares "other information" with the lawyer for a permitted purpose under Section 15 of the Privacy Regulations, would such shared "other information" become a consumer report and therefor cause the financial institution communicating the information to be deemed a consumer reporting agency?

In each of these examples, is the sharing of "other information" limited only to "permissible purposes" set forth in Section 604 of FCRA?

The common thread in all of these examples is that the financial institution could be treated as a consumer reporting agency under FCRA if it shares "other information" with affiliates and nonaffiliated third parties in the very manner contemplated and permitted by Sections 13, 14 and 15 of the Privacy Regulations and fails to provide the "opt out" notice and a reasonable opportunity for a consumer to do so or fails to obtain the consumer's written consent. In such case, the financial institution would become subject to all of the requirements of FCRA, including, without limitation, the restrictions

relating to permissible purposes for sharing "other information." Additionally, the various exceptions in Section 13, 14 and 15 of the Privacy Regulations do not directly correspond to the permissible purposes set forth in Section 604 of FCRA. It is unclear whether the sharing of "other information" as permitted under Sections 13, 14 and 15 of the Privacy Regulations would violate Section 604 of FCRA.

The New Hampshire Bankers Association believes if financial institutions were deemed to be consumer reporting agencies under FCRA if they share "other information" pursuant to Sections 13, 14 and 15 of the Privacy Regulations and as consumer reporting agencies are subject to all of the requirements of FCRA, such a result would be an unintended consequence of the enactment of these regulatory schemes. The characterization of a financial institution as a consumer reporting agency under these circumstances would render impractical or useless the sharing of all "nonpublic personal information" permitted under GLBA. The Association believes that the proper way to regard these transactions is that a financial institution that shares "other information" with affiliates or nonaffiliated third parties as permitted by Sections 13, 14 and 15 of the Privacy Regulation is not a consumer reporting agency.

A "consumer reporting agency" is defined in FCRA as "any person which, for monetary fees, dues or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or "other information" on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." Section 603(f) of FCRA. In order to be classified as a consumer reporting agency, a person must first engage in the practice of regularly assembling or evaluating consumer credit information or "other information" for the purpose of furnishing consumer reports to third parties and then receive monetary compensation or other benefits as part of a nonprofit cooperative arrangement for doing so. See Commentary of the Federal Trade Commission, 16 CFR Section 603. If a financial institution assembles or evaluates consumer credit information or "other information" for its own purposes and shares such information with affiliates or nonaffiliated third parties for any of the purposes allowed by Sections 13, 14 or 15 of the Privacy Regulations, the Association believes that such activities should be construed as being outside of those activities contemplated by the definition of "consumer reporting agency".

Prior to the enactment of GLBA, financial institutions have engaged in these types of "outside" activities to protect their own interests, or to fulfill their obligations to consumers, shareholders, regulators or any other persons having an interest in the financial institution, such as litigants, without being deemed consumer reporting agencies under FCRA. The key to understanding these exceptions to the definition seems to be whether the information is assembled or evaluated by a person for its own purposes or whether the information is assembled or evaluated for the purpose of

sharing that information with other persons for their purposes. In the former instance, a person is not a consumer reporting agency; in the latter it is.

The Federal Trade Commission (FTC), as the agency charged with responsibility for administering the FCRA, had previously issued certain commentary and opinions which lend support for this interpretation. See, e.g., 16 CFR, Part 600. For example, It had excepted persons who furnish isolated reports or jointly use information from the definition of a consumer reporting agency and had found that the use of agents to perform a task is a permissible purpose. Persons who assemble or evaluate "other information" for their own purposes have relied on these distinctions when they have shared such information with third parties. The mere enactment of GLBA should not invalidate this historic reliance and create a conflict where none existed before.

In light of this background, it is reasonable to assume that Congress was aware of the types of activities that did not cause a person to become a consumer reporting agency and in effect codified them into law by creating the exceptions in Section 502 of Title V of GLBA. Any other interpretation of Title V of GLBA that creates violations of FCRA by complying with clear GLBA exceptions can only render compliance with GLBA, difficult as it already is, almost impossible and undermine the significance of such exceptions. Moreover, since GLBA's enactment, the FTC has issued its own regulations interpreting Title V. See 6 CFR Part 313. While it reiterates the language in Section 506(c) of GLBA relating to the continued viability of FCRA, not once in its privacy regulations, or comments thereto, does it suggest that the sharing of "nonpublic personal information" as permitted by GLBA is qualified by the "other information" restrictions of FCRA. See 65 FR No. 101, Page 33646 et seq.

Of the six examples, only the type of activity described in Example One could possibly classify a financial institution as a consumer reporting agency. It is not uncommon for a financial institution to engage in joint marketing arrangements with other financial institutions for the purpose of offering products and services to its consumers that are beyond those offered by it and to derive some monetary benefit from such arrangement. However, even in this instance, the financial institution is sharing information regarding its own consumers and seeks to offer additional products and services to enhance its own relationship with them. Title V of GLBA requires that the financial institution provide notice of such sharing arrangements to its consumers and obtain written agreements that the information will be used only for the purposes for which it was furnished. Thus, this information will be furnished with the knowledge of the consumers and its use will be narrowly restricted. Furthermore, the sharing will be among financial institutions who are independently subject to the privacy requirements of GLBA.

Moreover, there doesn't appear to be any logical reason why affiliates and nonaffiliated third parties should be treated differently under GLBA and FCRA. Prior to the enactment of GLBA, the FTC had issued opinions that restricted the sharing of

"other information" among affiliated parties for joint marketing purposes. That distinction was logical before GLBA became law because of FCRA's explicit "opt out" provisions relating to affiliates. The FTC's subsequent commentary to its GLBA privacy regulations notes in several places that GLBA's disclosure requirements are broader than those of FCRA and requires compliance with GLBA's provisions in recognition of the fact that the two schemes must be read in conjunction. In particular, the FTC embraces GLBA's broader disclosure requirements relating to the "opt out" for affiliate sharing. See id. at 33662 and 33663. It observes in that regard that "Congress intended for disclosures to provide more information about affiliate sharing than what may be required under FCRA. That history underscores the Congressional intent of ensuring that individuals are given the opportunity to make informed decisions by reviewing the privacy policies and practices of financial institutions." Id. at 33663.

The FTC clearly seems to be comfortable in reading GLBA and FCRA together. Since the FTC has not limited the sharing of "nonpublic personal information" by FCRA "other information" requirements, it may be assumed that a financial institution need only disclose its practices for sharing "other information" for purposes of Section 13 of the Privacy Regulations in order to comply with GLBA and FCRA. In this manner, the financial institution's consumers are informed of its practices and the information may not be used by an affiliate or nonaffiliated third party for purposes other than those permitted under Section 13.

Both affiliates and nonaffiliated third parties would be subject to the reuse limitations of Section 13 of the Privacy Regulations and would be prevented from using the information for any other purpose. If the information were provided to either of them by the financial institution for any purpose beyond those permitted under Sections 13, then the additional requirements of FCRA would come into play, with the "opt out" procedures for affiliates and the restrictions on permissible purposes for nonaffiliated third parties, among others. Accordingly, in this example, assuming that the "other information" shared under the Section 13 exception is for the benefit of the financial institution, the financial institution has fulfilled its notice and contractual obligations under Section 13, and the use of the information is restricted to the purpose for which it is furnished, the requirements of both legislative schemes appear to be satisfied, and the financial institution should not be deemed a consumer reporting agency.

In general, a careful review of the model language adopted as part of the Privacy Regulations suggests that you concur with this view. The model language describes information collected by a financial institution to include "other information" and sanctions the sharing of such information in circumstances permitted under Sections 13, 14 and 15. The New Hampshire Bankers Association respectfully requests you remove any doubt and make clear that if "other information" is shared as permitted under Sections 13, 14 and 15, a financial institution will not be classified as a consumer

reporting agency that must comply with FCRA, including, without limitation, its limited permissible purposes for sharing "other information," as a result.

Respectfully Submitted,

Gallagher, Callahan & Gartrell, P.A.

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cc: Gerald H. Little, President
New Hampshire Bankers Association