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INDEPENDENT COMMUNITY
BANKERS *of* AMERICA

December 4, 2000

Communications Division
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219
Attention: Docket No. 00-20

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

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

Manager, Dissemination Branch
Information Management and Services Division
1700 G Street, NW
Washington, DC 20552
Attention: Docket No. 2000-81

Re: Fair Credit Reporting Regulations

Dear Sir or Madam:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to offer comments on the agencies' proposed rules to implement certain

[1] ICBA is the primary voice for the nation's community banks, representing 5,300 institutions at over 16,900 locations nationwide. Community banks are independently owned and operated and are characterized by attention to customer service, lower fees and small business, agricultural and consumer lending. ICBA's members hold more than $486 billion in insured deposits, $592 billion in assets and more than $355 billion in

provisions of the Fair Credit Reporting Act. The Gramm-Leach-Bliley Act (GLB) granted the federal banking agencies the authority to write regulations under the Fair Credit Reporting Act (FCRA)[2] which, among other things, governs information sharing between affiliates. Because the final privacy regulation also requires disclosures about information sharing covered by the FCRA, including the right to opt out, the four banking agencies have issued a proposal that would govern the notice and opt out provisions of the FCRA.[3] The proposal applies to any bank that wants to share consumer information with its affiliates, other than transaction or experience information, but does not wish to be considered a consumer reporting agency.

Before addressing the substantive issues raised by this proposal, the ICBA strongly urges the agencies to defer the effective date for this rule. This proposal would impact the development of bank privacy notices based on the privacy rules issued last May. Many community banks report that they are well on the way to completing their privacy notices, and some report already having the notice completed. Changing requirements at this late date by revising the FCRA disclosures and opt-out procedures would be unduly burdensome for community banks and may actually delay the production of their privacy notices. New requirements might necessitate that banks replace privacy notices that are about to be mailed or possibly send out revised privacy notices. And, if a bank has issued one privacy notice and then must produce a second notice to incorporate the FCRA revisions, there is a great potential for customer confusion. Compliance with the privacy regulation is already sufficiently challenging for many banks, especially community banks, and implementation of these provisions would complicate that process. Therefore, the ICBA strongly urges the agencies not to make these requirements effective until after next July when the first round of privacy notices are completed.

Background

Since the 1996 amendments to the FCRA, companies have been allowed to share information with their affiliates without being subject to the extensive rules and regulations that apply to consumer reporting agencies. A company may share transaction and experience information with its affiliates without restriction. However, to share "other" information, the company must first notify its customers that it plans to share the information and then allow them an opportunity to opt out.

While the FCRA establishes procedures for information sharing with affiliates, the GLB establishes a system of notice and opportunity to opt out before information may be shared with non-affiliated third parties. However, the GLB requirements for sharing

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loans for consumers, small businesses and farms. They employ over 239,000 citizens in the communities they serve.

[2] The FTC has primary authority for interpreting the FCRA, but prior to this, there were no regulations to provide guidance specifically designed for banks.

[3] The banking agencies are studying the remaining provisions of the FCRA and may issue additional regulatory proposals in the future.

information with non-affiliated third parties is more detailed than what is currently required under the FCRA for sharing information with affiliates. Because GLB addresses information sharing practices, it also requires financial institutions to include certain FCRA disclosures in their privacy notices. Previously, the only guidance on the FCRA notice and opt out requirements was the statutory language of the FCRA. This proposal is designed to provide additional guidance on the notice and opt out provisions for sharing information with affiliates, and the regulators have conformed these proposed FCRA requirements to the privacy rule requirements, especially with respect to the form of notice and the rules for opting out, to the extent possible.[4]

Definitions

Clear and Conspicuous. Any notices required by this proposal would be subject to a 'clear and conspicuous' standard, and a notice would be considered 'clear and conspicuous' if it is reasonably understandable and designed to call attention to the nature and significance of the information it contains.

The proposal does not specify any particular method for making a notice clear and conspicuous since not doing so presumably allows banks flexibility in how they will meet this requirement. However, the proposal offers examples of what would meet this standard, providing identical guidelines to those in the privacy rule. Examples of what would be considered "reasonably understandable" are clear and concise sentences; short explanatory sentences or bullet points; everyday words and active voice; no multiple negatives; and as little legal and technical jargon as possible. Similarly, the proposal offers examples of acceptable ways "designed to call attention" to the notice: plain-language header; easy to read type and typeface; wide margins and ample line spacing; boldface or italics for keywords; and distinctive features that set the notice off from other information contained in the same form, e.g., sidebars or shading.

For a Web site, the notice should be placed or linked from a page that consumers frequently access, should use text or visual clues to call attention to its significance, and other elements on the same page should not detract from the notice.

The ICBA believes that the proposed definition of "clear and conspicuous" is appropriate. As proposed, the definition allows flexibility and offers guidance without mandating particulars such as specific font sizes. The final rule should not require more specific detail on how the notice must be presented than what is included in the proposal. More detailed requirements would limit a bank's flexibility in communicating with its own customers.

Opt Out Information. Under the FCRA, banks may share transaction and experience information with their affiliates without providing customers a notice and opportunity to opt out. However, for other information, i.e., non-experience/non-

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[4] Worth noting is that the privacy rule requires a bank to comply with an opt out request "as soon as reasonably practicable" but the FCRA proposal would establish a 30-day requirement.

transaction information, a bank must provide a notice and opportunity to opt out before sharing the information. Instead of using the statutory term "other information," the proposal would define it as "opt out information." Since "opt out information" would be information that is neither experience nor transaction information, it becomes critical to define "transaction and experience" information. While it may generally be understood that transaction and experience information are the bank's own experiences with a consumer, such as transaction history and direct communications between the bank and the consumer, there are many gray areas where it is not clear whether something is the bank's own experience or "other" information.

The ICBA recommends that the final rule include a definition of "transaction and experience information." Information sharing, disclosures and the ability to opt out are based on transaction and experience information, and thus it is extremely important that a definition be included. At a minimum, a definition of "transaction and experience information" would provide more guidance on what constitutes "opt out information," perhaps using examples. Not defining this term on which so much else of this regulation depends offers the potential for confusion and for differing interpretations -- which in turn increases regulatory burden.

Moreover, the final rule should clarify that certain information, such as information shared to prevent fraud or information shared to carry out a customer transaction, is clearly covered by the definition of "transaction and experience" information.

Opt Out Notice

The opt out notice to a consumer, in addition to being clear and conspicuous, must describe the categories of information that may be shared, the categories of affiliates that the information might be shared with, the ability to opt out, and a reasonable means to opt out. The notice may include categories of information the bank does not currently share or categories of affiliates with which it does not currently share information but *may* want to share in the future.

Because medical information is such a sensitive subject, it may not be shared with affiliates unless it is explicitly covered in the opt out notice.[5] Medical information is not the type of information that community banks are likely to possess or share, but the ICBA does not object to including these provisions in this rule.

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[5] One of the major issues in discussions of privacy is the confidentiality of medical information. Because the Department of Health and Human Services has issued standards in this area, the bank regulators make it explicitly clear that nothing in this proposal supersedes regulations issued by the Department of Health and Human Services. Those regulations essentially require a consumer to affirmatively consent – opt in – to any sharing of medical information *before* it takes place.

Opting Out

Generally, the proposal would require a bank to allow a consumer thirty days to opt out once a notice has been sent before it may begin sharing information with affiliates. The ICBA believes it helpful to provide this kind of timeframe, both for banks and consumers.

The ICBA does not believe different standards should apply for different delivery mechanisms. Having one standard makes it easier to comply and reduces confusion, thereby helping to reduce burden. One standard also means that the timeframe does not become a factor in how notices are delivered. Thirty days is appropriate, since it offers consumers a window of opportunity but does not leave the opportunity open-ended. Thirty days also meshes nicely with many bank statement cycles.

Once a consumer has notified the bank of their decision to opt out, the proposal would allow the bank a "reasonable" time to implement the request.[6] The ICBA agrees that it is helpful to provide guidance on what constitutes a reasonable time for a bank to comply with a customer request to help alleviate potential confusion. And, the ICBA agrees that 30-days would be reasonable as well as consistent with the timeframe for a customer's response. However, the privacy rules provide that "a bank must comply with a consumer's opt out direction *as soon as practicable* after the bank receives it" (emphasis added),[7] and the two requirements should be identical. Therefore, the ICBA recommends that banks be allowed to comply with a customer request as soon as practicable rather than establishing a specific timeframe.

Other Comments

Use of Examples. The proposal includes examples in a number of areas, such as what constitutes "opt out information." The ICBA believes that it is helpful to include such examples. Such guidance is beneficial, especially for community banks with more limited resources. Examples help banks – and examiners -- understand what is acceptable and helps eliminate gray areas of interpretation.

Model Form. The proposal includes a model disclosure that banks can use to provide the FCRA opt out notice to their customers. The ICBA agrees that model forms are helpful in providing guidance for bank compliance.

Electronic Signature Legislation. One question raised by the agencies was whether the final rule should specifically address issues raised by the new electronic signature law passed by Congress last summer. Because banks are continually exploring new technologies and examining new methods of communicating with customers, explicitly addressing electronic disclosures is helpful. However, the ICBA believes that the proposal addresses the issue sufficiently.

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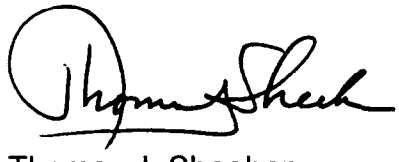
[6] One of the questions the proposal asks is whether 30 days is reasonable and whether the final rule should establish a timeframe for banks to implement a request to opt out.

[7] Privacy Rule, section __.7(e)

Effective Date. As noted above, because this regulation impacts the privacy notices that banks are well on the way to completing and because this rule could delay and increase the expense of those notices, the ICBA recommends that this regulation not take effect until after the first privacy notices have been mailed to customers. Banks have already established procedures to comply with the FCRA requirements which were established in 1996, and many banks incorporated their existing FCRA procedures into their privacy notices. If the agencies are going to impose new requirements at this late stage, those requirements should not disrupt dissemination of the first round of initial privacy notices. Rather, these new requirements should go into effect after July 1, so that banks can incorporate the revised FCRA procedures into their subsequent annual notices. The final rule should grandfather existing bank FCRA procedures and then explicitly provide a sufficient transition period for the changed FCRA requirements.

Thank you for the opportunity to comment.

Sincerely,



Thomas J. Sheehan
President