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Re: Proposed FCRA Notice and Opt-Out Regulations

Thank you for this opportunity to comment on the proposed FCRA notice and opt-out regulations. My comments are made from the perspective of a bank holding company (First Tennessee National Corporation) staff attorney of 20-plus years experience with "consumer compliance" initiatives.

General Comments.

The general thrust of this comment letter is that the proposed regulations inappropriately resolve most decisionmaking opportunities in favor of treating the subject of affiliate-sharing of customer information as if such sharing were an issue of virtual life-or-death importance, which must be rigorously controlled at all costs. However, it is not such an issue. That is not to indicate that the subject is unimportant, but rather that the regulators should step back a bit and

try to view the matter from some more reasonable perspective. For example, on a scale of 1 to 100, how important do the regulators consider affiliate-sharing of consumer information practices to be, compared to other Federal "consumer protection" initiatives, such as TILA and Regulation Z. (This letter will circle back to that question later in the context of particular aspects of the current proposal.)

Since everyone who participated in drafting the proposed regulations or may comment on them is a consumer, and since financial institution employees frequently interact directly with a very broad range of consumer customers, we all can recognize that the subject of privacy is important to consumers, while still maintaining some perspective on the degree of such importance. The sub-sub-category of the privacy subject known as affiliate-sharing of information (usually among affiliates which are wholly owned directly or indirectly by the same organization) is not the type of privacy issue which consumers consider to be on a par with their concerns about disclosure of their deposit account balances and transactions and access codes, etc., or with their concerns about disclosure of any information whatsoever about them to the IRS, to other government agencies or units, or to bill collectors, etc. On the contrary, many consumers may not realize which business units are departments of the same legal entity vs. which business units are separate subsidiaries of multicorporate "family." The department/separate legal entity distinction often is a rather artificial distinction which, in practice, may be based on a particular corporate "family's" views concerning risks arising from multistate taxation laws or arising from apparently irrational regulatory distinctions to which certain lines of business or business entities have been subjected at the Federal or state level at some time in the corporate "family's" long existence.

Thus, some might think that the concept of treating the sharing of information among wholly-owned subsidiaries of a corporation differently than the sharing of information among various business units within the same corporation is an elevation of form over substance in the first place. However, since the FCRA makes that distinction, we all must observe it. But, that does not mean that the FCRA statutory opt-out procedure requirement for affiliate-sharing practices now should be subjected to the most excruciatingly detailed and rigorous regulatory requirements, as if this "form over substance" distinction had been elevated to a virtually life-or-death matter.

Please, review the entire proposal from that perspective since every aspect of the proposal which complicates the industry's task of compliance *will cost consumers more money*. The financial services industry is not a philanthropic business. Financial institutions must recover through revenues every single dollar of their expenses, plus profits sufficient to attract and retain the necessary capital to prosper. Regardless of how much some groups which claim to speak for consumer interests would prefer to ignore that basic fact of economic reality, it simply will not go away. Thus, please do not regard this as a plea for the convenience of the financial services industry, but rather as a plea for consumers who would not wish to see their cost of obtaining financial services rise to provide overly costly and rigorous privacy compliance procedures, computer programming, etc., which their level of concern about this particular privacy sub-sub-category known as "affiliate-sharing" could not justify.

Specific Comments

To turn from the general to the particular, let's consider the following specific aspects of the proposed regulation: (1) taming the "clear and conspicuous" standard beast; (2) overly broad definition of opt-out information; (3) delivery of opt-out notice; (4) manner of, and time for, consumer response and financial institution to opt-out information; (5) consent procedure for consumer approval of *specific* affiliate or other information-sharing situation, despite consumer's opt out from *general* information-sharing practice; and (6) discrimination.

(1)Taming the "clear and conspicuous" standard beast. Those who have had the experience of trying to draft consumer loan disclosures or other consumer documents to satisfy a "clear and conspicuous" standard probably realize that only the irrational "least sophisticated consumer" standard (which often is applied under the Fair Debt Collection Practices Procedures Act cases) poses more pitfalls. Having considered the proposed regulation's treatment of this subject in the form of Section ___.3(c), it appears that such a definition would pose about 14 specific pitfalls, in addition to whatever additional general theories a claimant or "his or her" attorney or other "advocate" might propound. Thus, instead of just brushing aside the general Regulation Z concept of "clear and conspicuous," as the supplementary information published with the proposed opt-out regulations does, let's give some serious consideration to the standard set by Regulation Z. Specifically, let's consider whether affiliate-sharing practices are less important to consumers, as important to consumers, or more important to consumers than disclosure of consumer credit terms mandated by Regulation Z. Surely, the regulators do not believe that affiliate-sharing practices are more important or even as important as Regulation Z disclosures.

Nevertheless, the proposed regulations would apply a more stringent definition of "clear and conspicuous" to this less important subject in the sense that it would open the door to so many avenues of challenge as to whether any particular disclosure of an institution's privacy policy has satisfied all aspects of the proposed definition. Perhaps, the drafters of that definition would dispute that opinion, but then the question would become whether those drafters have had a good deal of practical experience in drafting documents to satisfy the standards included in that definition, subject to the specter of potential monetary liability as the penalty for an actual or arguable failure to do so. The Regulation Z Commentary understanding of "clear and conspicuous" should be substituted for the proposed definition of that term in the privacy opt-out regulation- specifically, the disclosures must be legible and in a "reasonably understandable form." And, with respect to the specific rules concerning website disclosures, please let's avoid adopting overly specific rules about website disclosures in this and other regulations. It is my understanding that financial institution websites have home pages, and surely placing the notice, or link to the notice, on the home page should always suffice as a default choice, even if some alternative location also might suffice in particular circumstances.

(2) Overly broad definition of opt-out information. The proposed regulation appears to impede the flow of information among affiliates with respect to a broader array of information

than the FCRA covers. It is difficult to understand the regulators' assumption of authority for that, much less their motivation . The concern is not primarily a marketing, etc., concern. Rather, it is primarily a concern about the confusion this departure from "somewhat-understood" FCRA concepts to a different and confusing standard for what is supposed to be an FCRA opt-out procedure. The fact that an affiliate opt-out notice procedure is to be incorporated in more general privacy policy regulations is no reason to change the FCRA understanding of the type of information such opt-out procedure covers and does not cover. The term "somewhat-understood" was selected since it is probable that only some attorneys have even that level of understanding, and few business folks are likely to attain it. So, the prospect of trying to educate a lot of business folks about these confusingly similar, but different, privacy vs. FCRA, vs. privacy/FCRA concepts when combined in an opt-out procedure is simply mind-boggling. As a practical matter, business folks cannot spend all of their time trying to juggle a never-ending series of angels balancing precariously on a variety of regulatory pinheads. Lawyers can do that, but business folks cannot. Thus, "How can I keep it simple?" should be the foremost thought in the mind of any person who is charged with drafting rules for business folks to follow, whether those rules be government regulations or internal financial institution rules. If the regulators hope to see a reasonable level of compliance with the new rules, they should avoid making the rules so complicated, overlapping, and/or inconsistent as to cause business folks to lose sight of the forest for the trees.

(3) Delivery of opt-out notice. Section ___.8 requires that the opt-out notice be delivered either in writing or electronically. If "electronically" has been, or will be, defined in the regulation to include "telephonically," that restriction might be sensible. Otherwise, that restriction is not sensible. As indicated in the general comments at the beginning of this letter, opt-out notices are not life-and-death matters. To put this matter in perspective, consider the following analogy: The dog is the big important thing (at least to a dog). The dog's tail is of some importance, but is far, far less than the dog. And, the flea on the tail of the dog is, relatively speaking, of very little important compared to the whole dog. In this analogy, the whole concept of privacy is the dog, and it includes many aspects, such as maintaining the confidentiality of confidential information in a manner reasonably commensurate with the factual circumstances; freedom from undue "intrusion" into one's seclusion or personal time or "space"; restrictions on appropriate of one's likeness or persona, etc. Applying this analogy to consumer concern about privacy, it is clear that only a of that whole privacy dog is confidentiality of information regarding a customer collected by a financial institution, and that would be similar to the tail of the dog (or his head, if you prefer). And, on that tail (or head, if you prefer) is the issue of information-sharing among affiliates (usually wholly-owned, directly or indirectly, by the same parent company). That last category is the flea on the tail (or head, if you prefer) of the privacy dog. It is for that third-tier issue that the regulators are proposing to require written, or at least "electronic," opt out notices.

How could that appropriate when one considers the fact that Regulation Z permits a consumer to request issuance of a credit card orally, "telephonically", etc., and incur thousands of dollars of debt, agree to changing interest rates and fees, etc., while the proposed privacy regulations may insist that the consumer be provided with a written, or at least "electronic," affiliate-sharing opt-out notice with respect to the same account? Unless the proposed regulations clearly authorize

telephonic notices, that combination is simply not going to work from a practical perspective. And, surely there are few people who would take the position that this particular flea on the tail of the privacy dog is more important than the Regulation Z prohibition against issuance of credit cards without a request from the consumer.

(4) Manner of, and time for, consumer and financial institution response to opt-out information. For most large financial institutions, the methods which they would be permitted to use under Section 226.7 for receiving opt-out communications from consumers probably would be adequate since establishing a toll-free number through which to channel all opt-out communications may be the most efficient and reliable procedure for administrative and compliance purposes. (I do not know whether that would be the case for all small financial institutions.) However, Section 226.7(d) casts doubt on whether an institution is authorized to adopt a specific approved method as the *sole* method since that provision indicates that the specific means must be "reasonable" for that consumer. Such doubts could result in legal arguments as to whether it was reasonable for an institution to require these communications to be made via toll-free telephone number if the consumer happens not to subscribe to home telephone service. Presumably, that is not what the regulators contemplate as an unreasonable procedure, but the waves of so-called "consumer protection" litigation which have resulted from even more precise regulatory drafting efforts regarding other regulations suggest how easy it is for "advocates" to identify or create a supposed compliance requirement to surprise even the most diligent financial institutions. Thus, it would be best to either delete from Section 222.7(d) the words "so long as that means is reasonable for that consumer" altogether, or else substitute verbiage which precisely targets the actual problem, if any, which was contemplated by the drafters.

From an operational standpoint, one of the most objectionable (impractical, inefficient, etc.) aspects of the proposed regulations concerns the timing issue addressed in Section 222.6, and perhaps the interplay of that provision with Section 222.10. The concern with this proposal is the costs and difficulty of trying to blend that 30-day requirement (or any timing requirement) into computer systems which were not designed to address any such issue. It is not a question of whether the "waiting period" is 30 days or 15 days or 5 days, etc. Any number of days would present a problem of either trying to continue to operate with computer systems which are not tuned to absolute compliance on this subject, or else spending a lot of resources to try to revise those systems to include a "waiting period," whatever that period might turn out to be.

The "waiting period" concept just does not work from an operational perspective unless thousands of organizations waste a whole of resources to make it work. This problem is not limited just to small or medium-sized organizations. Representatives of some of even the largest financial institutions have identified the same operational/computer program, etc., problem. Computer programs can be modified, theoretically, to achieve whatever results the combination of regulations, customer service, marketing, etc., may require. However, it would be a costly and time-consuming process to try to reprogram systems to blend the "waiting period" into a variety of information-gathering and retention and analysis systems which were never designed to include such an artificial distinction. If consumers understood the costs which they absorb in fees for products and services in order for providers to achieve the last little ½% of someone's

view as to needed "consumer protection" regulations, it seems extremely unlikely that consumers willingly would choose to reach for such levels of absolutism. Rather, they might wisely choose, instead, to place the burden of achieving that last ½% on the few consumers who consider it to be an important subject justifying a lot of extra expenses and/or inconvenience for others to achieve.

In other words, instead of mandating unnecessarily high compliance expenses and rigidity of business practices for *all* consumers in the form of a "waiting period," the regulations could permit institutions to choose no days' "waiting period" when they offer toll-free and/or online "click" capabilities for consumers who choose to opt out to be able to immediately register their opt-out response. For consumers who wish to opt out, but who do not view the matter with such urgency, they could choose to register their opt-out response by toll-free telephone number (or online click) at such time as they are sufficiently motivated to do so. That regulatory approach would allow consumers to be fully "protected" from even the mere possibility of affiliate-sharing within 30 days after they are afforded the opportunity to conveniently register their opt-out response, while at the same time not mandating that the overwhelming majority of consumers be forced to shoulder high expenses for reprogramming to comply with a "waiting period" of whatever duration.

If, by chance, the regulators are reluctant to accept the notion that the cost and complexity of reprogramming application and marketing, etc., computer systems to comply with a "waiting period" are as problematic as suggested, consider the following example (which, by the way, is not exactly hypothetical). Assume that a corporate "family" of legal entities which are wholly-owned by the same parent corporation has spent a lot of time and resources developing a computerized data base to integrate various pieces of customer information derived from transactions with customers. That system may not distinguish in a rigorous way between consumer and non-consumer information. That system may not distinguish at all among the business units and/or legal entities from which bits and pieces of information came into the centralized data base. The data base "thinks" that it knows who a particular consumer is, by name, social security number, etc., but it does not know whether information about the consumer's age or income level, etc., originally was derived from some business unit within the same legal entity or from some transaction the consumer conducted with an affiliate or for some demographic information purchased from a third party, etc.

In that kind of operating environment, which is not unusual, at least among a corporate "family" of companies owned by a single parent company, it would be very difficult to reprogram all of the computer systems which in some way or other feed data to that central database, and then reprogram the central database so that it could identify which information already collected was collected by exactly which unit/affiliate, as well as having to identify the collecting unit of such information on an on-going basis, and then find a way to block viewing of it by employee/users based on whether they are in one business unit/affiliate or another (or are dual employees, etc.) and based on the precise purpose for which they wish to view the information in each particular case. This "waiting period" concept will not fit within that kind of operational environment, except by blocking all employee viewing of information for that period after, for example, any account is opened or loan is made, etc. Unfortunately, that would mean that employees of the company with which the consumer has elected to conduct a transaction already would be blocked

from viewing their own customer's information for the "waiting period," just to be certain that they are not viewing any information derived from some other affiliate transaction, all of which is housed in the centralized data base. If the risk of not having a "waiting period" were that the consumer's life or health would be threatened, or that "he or she" might lose the money in "his or her" account, etc., maybe adoption of regulations which stretch to achieve this last milliliter of "consumer protection" regulation by including a "waiting period" would be justifiable. However, in reality, the risk of not having a "waiting period" is the spot on the flea on the tail of the privacy dog, particularly for consumers who are permitted to opt out via toll-free telephone call or online "click."

(5) Consent procedure for consumer approval of specific affiliate or other information-sharing situation, despite consumer's opt out from general information-sharing practice. Some consumers who exercise their affiliate opt-out right in response to the general privacy notice may do so primarily because they do not wish to be inundated with telemarketing campaigns. However, that does not necessarily mean that a time never will arise when those same consumers may wish to have their information shared with an affiliate in order to be considered for some particular type of service or product which may be available from an affiliate. Obviously, the consumers and financial institutions should be free to operate on a specific consent basis for affiliate-sharing of information in a particular context in which the consumer has made the decision that "he or she" wishes it to be shared. The only question is whether the benefits assumed to be derived from requiring that such consent be obtained in written form outweigh the inconvenience or inflexibility of imposing such a requirement.

To put that question in perspective, let's return to the TILA/Regulation Z credit card unsolicited issuance rule. The consumer can orally request that a credit card be issued. How could it be more important to require written evidence of the consumer's request, consent, etc., to affiliate-sharing of information in a particular factual context than it is to require written evidence of the consumer's request, consent, etc., for issuance of a credit card? It simply could not be. Therefore, the only reasonable conclusion every time such a comparison is made is that the regulators have proposed to go far overboard in assuming that the consumer benefits of each aspect of the proposed regulations outweigh the related costs, inconvenience, and needless rigidity those regulations will create. If those adverse consequences would be suffered only by financial institutions, perhaps that would not be a concern of the regulators, although it is difficult to understand why the regulators appear to have no such concerns. However, those adverse consequences ultimately will be suffered by consumers.

(6) Discrimination. Section ___.12 concerning credit discrimination has to the potential to be a "sleeper" issue which may become problematic as a variety of pricing, marketing and, operational fact patterns emerge over the following years on an institution-by-institution basis. The proposed discrimination provision could require analysis of very fact-intensive situations in a virtually infinite combination of particular factual circumstances. So, let's evaluate each part of the nondiscrimination provision. First, the heading of the provision is titled "prohibition against discrimination." However, this provision is not about discrimination in general on the basis of "opt out" elections. Rather, it concerns credit discrimination. Thus, the heading should be

modified to match the content of the provision.

Second, subsection (a) states that discrimination cannot occur "if" the consumer opts out. "If" is not the correct word to express the concept. "Because" or "on the basis of," etc., would convey the concept more precisely.

Third, moving on to more important problems with Section ___.12, it is noteworthy that the three examples provided in Subsection (b) are not stated as *exclusive* examples or events. If they are not intended as exclusive examples or events, they appear to be of little use in guiding financial institutions or in minimizing the likelihood of litigation concerning what constitutes discrimination or nondiscrimination. Either the examples should be deleted entirely or else stated to be the exclusive examples or events. After all, if the regulators encounter some troublesome new practices which they wish to prohibit under this regulation, that is something they can address in the regulatory amendment process after they have sufficient experience with the subject to regulate in precise terms on the matter.

Fourth, even if some version of Subsection (b) were to be retained and clarified to be the exclusive examples or events of discrimination prohibited by this regulation, those examples appear to be worded too broadly, already. Subsection (b)(1) prohibits denial of credit because the applicant opts out, which seems like a clear statement of the operative rule. However, Subsections (b)(2) and (3) wander off into more complicated territory. Subsection (2) prohibits varying the terms of credit adversely to an applicant who opts out. Presumably, the purpose of that subsection is to prevent creditors from avoiding the prohibition in Subsection (1)(a) by adding a surcharge to regular pricing for applicants who opt out. If a surcharge were sufficiently high, that might make exercise of the opt-out right impractical, even though not absolutely prohibited. Thus, the underlying concept of Subsection (b)(2) has some validity. Unfortunately, the concept just does not lend itself to any simple or reliable interpretation or implementation scheme.

For example, perhaps a "family" of companies owned by a single parent company wishes to implement interaffiliate relationship pricing packages. Assuming for the moment that such features or packages are appropriately designed to comply with the somewhat liberalized Bank Holding Company Act anti-tying rules, why should concerns about the possible interpretation and application of Section ___.12(b) stymie institutions from offering, and consumers from enjoying, those benefits? While proposed Subsection (b)(2) may not absolutely prohibit such benefits as a theoretical matter, the important point is that it would make it more difficult operationally to implement such packages while still attempting to achieve compliance with that subsection. More specifically, please consider how customer service employees or marketing planners can determine which consumers qualify for those relationship pricing benefits if such employees cannot have free access to data base information concerning the consumer's relationships and transactions with the "family" of companies to which the pricing plan relates? Even worse would be the surely unintended consequence of impeding implementation of relationship pricing plans on an intra-single entity basis. For example, if the corporate "family" decides it needs to block employees from viewing some or most information in a centralized data base (since the system does not track the source of each piece of information on the basis of

potential affiliate source), employees will not be able to practice effective relationship pricing even on an intra-single entity basis, much less on an interaffiliate basis.

The same objections apply to Subsection (b)(3). Thus, the most sensible conclusion to draw is that it is far too early in the life of regulations which restrict affiliate-sharing information practices for the regulators to enact such a detailed rule which almost certainly will prove to be problematic to implement. Subsections (b)(2) and (3), as well as any revised verbiage which the regulators might consider substituting for those concepts, should be adopted only after the industry, the consumers, and the regulators gain substantial experience with the implementation and operation of the affiliate-sharing information practices which develop under the new regulation. If the regulators then detect a substantial need for more detailed rules to avoid abuses, that is something regulators are quite accustomed to dealing with through adoption of regulatory amendments from time to time.

Conclusion. To summarize the above comments in a couple of sentences, the proposed regulations are an example of regulatory "overkill" in which any goal of reasonably affording further privacy to financial records by giving consumers an affiliate-sharing information opt-out right has been overshadowed by unnecessarily costly and restrictive detailed regulatory requirements. When considering what is good for consumers, please test each aspect of the proposed rule against the simple truth that is not the financial institution industry which ultimately is going to "pay" for any unnecessary costs and restrictions - it is consumers.

Thank you for this opportunity to comment on the proposed regulations.

Very truly yours,

Sharon Royal
Attorney