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Via Overnight Mail

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

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

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

Manager, Dissemination Branch
Information Management &
Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: Docket No. 2000-81

Re: Proposed FCRA Affiliate Information-Sharing Regulations

Dear Sirs and Madams:

This letter is submitted by and on behalf of The Chase Manhattan Bank and its affiliates, including Chase Manhattan Bank USA, N.A, Chase Manhattan Mortgage Corporation, Chase Investment Services Corp., Chase Manhattan Automotive Finance Corporation, and Chase Insurance Agency, Inc. (collectively, "Chase"), in response to the request for comment from the Federal Reserve Board ("FRB"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC") and the Office of Thrift Supervision ("OTS") (collectively, "Agencies") on their proposed rule implementing the affiliate information-sharing provisions of the Fair Credit Reporting Act ("FCRA") published on October 20, 2000.

Chase appreciates the opportunity to comment on this very important matter. Chase's comments in this letter address a number of issues raised in the proposed FCRA regulations, including those on which the Agencies solicited comments.

Background

The FCRA sets standards for the collection, communication, and use of information bearing on a consumer's credit standing, character, reputation, personal characteristics, or mode of living. To avoid the obligations imposed on consumer reporting agencies by the FCRA, many financial institutions avoid making any communications of consumer information that could constitute a "consumer report" and cause an institution to be considered a "consumer reporting agency.'' If financial institutions engage in certain information sharing with affiliates and do not want to incur the extensive obligations applicable to credit reporting agencies (credit bureaus) under the FCRA, they are required to disclose those information-sharing practices to consumers and to provide consumers with an opportunity to opt-out of such information sharing.

Under the existing statutory language of the FCRA, financial institutions have latitude to determine the content, form and how to provide affiliate information-sharing disclosures and opt-out notices. The proposed FCRA rule would govern financial institutions' practices for sharing certain information with affiliates and would reduce the latitude that financial institutions have currently under the FCRA.

General Comments

The concerns we have about ways in which the proposed rule may supersede the current FCRA are discussed in the section-by-section comments below. These general comments essentially relate to the coordination of the proposed FCRA rule with other privacy rules recently adopted by the Agencies.

We commend the Agencies for their efforts to harmonize the proposed FCRA rule with the privacy provisions of the Gramm-Leach-Bliley Act ("GLB Act") and with the Agencies' final privacy rules under the GLB Act, which are commonly referred to as Regulation P ("Reg P"). We appreciate that the Agencies recognize the need to minimize burdens on financial institutions. This can be accomplished by making the FCRA rule consistent with Reg P, where it is appropriate to do so, but the Agencies should not superimpose Reg P requirements on the proposed FCRA rule where there is no statutory basis under the FCRA for doing so. We believe that this approach will ultimately benefit consumers, too, by maintaining the simplicity of FCRA notices.

The proposed FCRA rule includes requirements regarding the format, content and delivery of the FCRA opt-out notice that are generally consistent (except as discussed in the section-by-section comments below) with the corresponding provisions of Reg P. The Agencies have indicated in the proposed rule that they anticipate that financial institutions will design their information-sharing policies and practices taking into account both Reg P and the final FCRA rule.

Reg P requires that initial and annual privacy notices from a financial institution include the FCRA disclosures that the financial institution provides regarding an individual's ability to opt out of information sharing by the financial institution with its affiliates. We request that the Agencies provide sufficient flexibility and adequate lead-time to enable financial institutions to appropriately coordinate the format, content and delivery of disclosures to customers under both Reg P and the final FCRA rule.

The proposed FCRA rule, if adopted, would require significant changes to the opt-out notices currently provided to new customers. There is little reason for any of the significant changes (see section-by-section comments below) and in particular there is no sound policy reason to require implementation of significant changes in a short time period. In order to minimize compliance costs and burdens, the final FCRA rule's effective date should provide sufficient time for institutions to modify their existing notices and computer systems.

We are also concerned about any requirement to send additional notices to customers in order to comply with the final FCRA rule, although this issue is not addressed directly by the proposed FCRA Rule. Not only would such notices be costly for us, but consumers would be confused about receiving similar notices in rapid succession.

Also, requiring financial institutions to deal with these changes in the near term will impede compliance efforts relating to providing Reg P privacy notices to existing and new customers before July 1, 2000. The final FCRA rule should not prevent institutions from using Reg P-related forms they are only now beginning to print or program into their computer systems.

To address these concerns, we have two suggestions. First, although the effective date of the FCRA rule was not discussed in the proposal, we suggest that the effective date be no earlier than 12 months from the publication of the final FCRA rule or July 1, 2002, whichever is later. Second, the Agencies should clarify that the new FCRA rule will apply prospectively and only to new accounts -- that is, those established after the effective date. Presumably, until that time a financial institution will have complied with the statute as to any then existing accounts, including providing, where appropriate, an opportunity to opt out. There should be no requirement to provide a further opt-out notice to customers on these existing accounts and this holds true especially with respect to individuals who are former customers.

Section-By-Section Comments

Section -.2 Examples. The proposed FCRA rule provides that the examples used in the rule and in the sample notice are not the exclusive means of compliance with the rule; however, compliance with them constitutes compliance with the rule. We support these provisions and believe that including examples in the regulation is appropriate and useful. In general, we believe the examples are adequate and the Agencies need not now issue interagency staff commentaries or questions and answers.

Section - .3 Definitions. Many of the definitions in the proposed FCRA rule track the statutory language of the FCRA or the provisions of Reg P. We strongly take issue with one definition, however. The proposed rule uses the new term "opt out information," but the definition is broader than the term "consumer report." A definition of "opt out information" that is broader than that of "credit report" (as illustrated in the sample notice of Appendix A to the proposed FCRA rule) creates confusion, runs counter to the purposes of the FCRA and may exceed the Agencies' rulemaking authority.

"Opt out information" may be shared with affiliates and will not be considered to be a "consumer report" if the financial institution complies with the notice and opt-out requirements. If the information is not a consumer report, however, whether it is "opt out information" is irrelevant. Such information can be shared by a person with an affiliate (or with any other person) without the person sharing it being considered a credit reporting agency, regardless of whether notice and opt out is provided. We suggest, therefore, that the definition of "opt out information" should be revised to be consistent with that of "consumer report." Such a revision is consistent with the FCRA and will preserve the ability to share information that is not a credit report while still ensuring that consumer reports may be shared freely with affiliates, only if the consumer has received notice and does not opt out.

Section - .4 Communication of Opt Out Information to Affiliates. Opt out information may be communicated among affiliates without the communication being a consumer report if: (i) the institution provides an opt-out notice; (ii) the institution gives the consumer a reasonable opportunity and means, before the time that it communicates the information, to opt out; and (iii) the consumer has not opted out. (Emphasis Added) The statute does not require that the opportunity be "reasonable" or that a "reasonable means" be provided. The proposed FCRA rule would impose these new requirements, which are elaborated on in sections -.6 and -.7 of the proposed rule and on which we have specific comments below.

The general requirements of section-.4 specify conditions for sharing opt out information that are similar to the Reg P requirements, and their inclusion in the final FCRA rule is objectionable because the FCRA requires less. Convenience to our customers would appear to dictate that financial institutions, including us, would want to provide similar opt-out alternatives under both Reg P and FCRA, but we would prefer to do so voluntarily instead of under requirements of the final FCRA rule.

Section - 5 Contents of Opt Out Notice. The proposed rule provides that an opt-out notice must be clear and conspicuous, and must accurately explain: (i) the categories of opt out information about the consumer that the institution communicates; (ii) the categories of affiliates to which the institution communicates the information; (iii) the consumer's ability to opt out; and (iv) the means to do so.

The requirement to disclose categories of information and affiliates goes beyond the FCRA requirement of disclosing that information may be shared among affiliates. Our preference is to have the greater latitude provided by the statute in making these disclosures. However, to the extent that these requirements remain in the rule, providing that they are similar to the Reg P requirements is the preferable approach.

The Agencies invite comment on whether financial institutions should also have to disclose in their FCRA notices (a) how long a consumer has to respond to the opt-out notice before the institution may begin disclosing information about that consumer to its affiliates and (b) the fact that a consumer can opt out at any time. The answer is no, even though disclosing the consumer's right to opt out at any time is something we might do and, standing alone, is not a particularly objectionable requirement. These disclosures are not required by Reg P and should not be required by the final FCRA rule. (Note: this section deals with disclosure, but we take issue with the substantive requirement of a 30-day waiting period, too, as discussed in section-.6, below.)

The benefits of these additional disclosures would not outweigh the burdens. Taken together these disclosures would be confusing to customers. For example, requiring the disclosures to state that a consumer has 30 days to respond would tend to negate the concept that the consumer can respond at any time. Customer confusion would result in numerous and burdensome inquiries that financial institutions would be required to handle.

Furthermore, financial institutions should not have 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 about the consumer to its affiliates. Moreover, any requirement that a financial institution specify the date on which it may start sharing information would be difficult to determine for each customer. Assuming the final FCRA rule were to include a 30-day waiting requirement and were to include a requirement for the disclosure of that to consumers, both of which we oppose, the Agencies should clarify the disclosure requirement. We suggest that it could be satisfied by a simple and general statement in the notice that information may be shared 30 days after the date the customer first received the FCRA notice.

<u>Section -.6 Reasonable Opportunity to Opt Out</u>. The proposed rule provides that a financial institution provides a reasonable opportunity to opt out if, before disclosing information about the consumer, it provides a reasonable period of time for the consumer to opt out following the time that notice is delivered. For example, a reasonable period of time when notices are provided in person, by mail, or by electronic means is deemed to be 30 days from delivery, mailing or electronic acknowledgement of receipt of the notice, respectively.

Although this provision is similar to one in Reg P, it is problematic. Waiting 30 days in order to share is unduly restrictive for both financial institutions and consumers. For example, an application for a loan should be able to include an opt-out notice and permit the applicant to opt out on the application form. There is no reason why this should not be interpreted as a reasonable opportunity to opt out. If the applicant does not opt out on the application, opt out information should be permitted to be shared promptly with affiliates so that they may determine the applicant's eligibility for other products and extend appropriate offers in a timely manner. There is no logical reason why consumers who are interested in learning about products for which they may qualify should be forced to wait 30 days.

A blanket 30-day waiting period would also impose an unnecessary compliance burden and expense on institutions. They would need to enhance their systems to capture the date disclosure was provided and track opt outs for each for a 30-day period starting on the date disclosure was provided to ensure no sharing occurred during that period.

Furthermore, we believe the Agencies should not include the 30-day requirement in each of the examples. What is a "reasonable" time period should depend on all the facts and circumstances and the method used for the delivery of the opt-out notice. Also, we believe there ought to be no waiting period after notice is provided in person or by electronic means and, if the Agencies impose one, it should be far shorter than 30 days.

We strongly urge the Agencies to specifically affirm a "consent" exception in the final FCRA rule. There is no sufficient reason not to do so. Where an individual consents, Reg P permits sharing of nonpublic personal information with non-affiliates without any disclosure beyond the fact that the financial institution shares it as permitted by law.

We propose that where an individual specifically consents to information sharing and that consent has not been revoked, a financial institution should not be required to wait for the consumer to opt out (following the time that notice is delivered) before sharing opt out information about the consumer. If, however, the individual subsequently revokes consent, by opting out or otherwise, and after the financial institution has an opportunity to act, the financial institution should obviously be obligated to discontinue such information sharing.

In addition, the final rule should clarify that any existing interpretations of the FCRA that permit affiliates and other parties to share information that might otherwise be deemed to be a consumer report are not intended to be rescinded. For example, nothing should prevent a financial institution from sharing information with an affiliate or other party who performs services for the financial institution or within the "joint user" exception in the FTC's Commentary on the FCRA.

<u>Section -.7 Reasonable Means of Opting Out.</u> The proposed FCRA rule states that an institution provides a reasonable means of opting out if it provides a reasonably convenient method to the consumer to opt out. Examples of reasonable means of opting out (toll-free number, reply form, etc.) and unreasonable means (requiring that consumers write their own letters, etc.) are set out. We support this provision, which is similar to one in Reg P and which allows a financial institution to specify the particular method the consumer must use to effectively opt out. The Agencies should clarify, however, that a financial institution is free to specify a reasonable means for all consumers or different reasonable means for different groups of consumers.

<u>Section -.8 Delivery of Opt Out Notices</u>. We support the proposed rule that an institution must deliver an opt-out notice so that each consumer can reasonably be expected to receive actual notice, but actual notice is not required. For instance, if an institution mails

a printed copy of its notice to the last known mailing address of an existing customer, the institution will have met its obligation even if the customer has changed addresses and never receives the notice.

The proposed rule provides that oral notice alone does not comply with the notice requirement. Notices must be given in writing or, if the consumer agrees, electronically. We disagree with the Agencies' treatment of oral notices and believe that oral notices should be permitted inasmuch as there is no specific requirement in the statute for written notice and the final FCRA rule should retain that flexibility

In a telephone solicitation to gain new customers, there is no effective way to give the notice if it is not given orally. Furthermore, we believe that specific oral consent to sharing information with affiliates ought to be a sufficient basis for such sharing. If the Agencies determine that there is a need to ensure consumers understand the consent or otherwise need additional protection, which we do not believe to be the case, those objectives could be satisfied. For example, the Agencies could develop suggested consent language, include a requirement that the consent be tape-recorded or require that some other safeguard be met. One alternative is for oral notice to be subsequently confirmed in writing as permitted by Reg P.

The proposed FCRA rule provides that an institution may provide a single opt-out notice to joint accountholders. The notice must indicate whether the institution will consider an opt out by a joint accountholder as an opt out by all of the associated accountholders, or whether each accountholder may opt out separately. These joint account provisions are substantially similar to those in Regulation P, but not identical. We suggest that the provisions be made the same to ensure that a financial institution that has procedures that comply with Reg P will be in compliance with the final FCRA rule when it applies those procedures to joint account notices and opt outs relating to information sharing with affiliates.

<u>Section -.10 Time by Which Opt Out Must be Honored</u>. The proposed rule states that where an institution provides a consumer with an opt-out notice, and the consumer opts out, the institution must comply as soon as reasonably practicable after receiving the consumer's direction. The Agencies solicit comment on whether they should establish a fixed number of days (for example, 30 days) that would be deemed a "reasonably practicable" period of time for complying with a consumer's opt-out direction.

We oppose a fixed number of days for financial institutions to comply with consumer opt-out requests. What constitutes a reasonably practicable time period will vary based upon numerous combinations of facts and circumstances. For example, the procedures and technological sophistication of the financial institution, the delivery method of the opt-out notices and the means by which the opt out was communicated by the consumer to the financial institution. The time period in the final FCRA rule should be flexible for honoring customer opt-outs. Reg P does not have a fixed time period and we believe the final FCRA rule should be consistent.

We would support a provision, however, that would create a "safe harbor" under which a financial institution that complied with a consumer's opt-out direction within 30 days would be deemed to have complied within a "reasonably practicable" period of time. Such a "safe harbor" would be advantageous, however, only if the final rule provides that no negative inference could be drawn from any failure to meet the specified timeframe.

Section-.11 Duration of Opt Out. The proposed rule provides that an opt out continues to apply to the information and affiliates described in the applicable opt-out notice until revoked by the consumer in writing, or if the customer agrees, electronically, as long as the customer's relationship with the institution continues. We believe the ability of a customer to revoke an opt out should not be limited by the Agencies to written or electronic notice. The FCRA does not have any such requirement. Customers should be allowed to orally revoke their opt outs because that may be more convenient and speedy both for consumers and financial institutions. If the Agencies determine that there is a need for additional protection for oral revocation, which we think is unnecessary, the Agencies could develop safeguards to be met for oral revocation along the lines we suggested above (see section-.8) for oral consent.

Section -.12 Prohibition Against Discrimination. The proposed FCRA rule prohibits a financial institution from discriminating against a consumer who is an applicant for credit if the consumer chooses to opt out from information sharing with affiliates. This provision is characterized by the Agencies as a restatement of current law, which prohibits discrimination regarding any aspect of a credit transaction based on, among other bases, the applicant's exercise of a right under the Consumer Credit Protection Act, including the FCRA. We believe that any such restatement of the law under the Equal Credit Opportunity Act and Regulation B is more appropriately included in rulemaking under Regulation B rather than in the proposed FCRA rule.

In the event that this provision remains in the final FCRA rule, we seek clarification from the Agencies on the extent of the prohibition. The Agencies should make clear that there should be no finding of discrimination where equal treatment is not possible due to the applicant's opt out. For example, financial institutions should be able to charge consumers who opt out of sharing for duplicative credit reports that would need to be obtained when they apply to an affiliate. We submit that financial institutions also should be able to reward customers whose information we are able to fully utilize to support efficiencies in offering our products and services. For example, we should be able to offer these customers special pricing or special packages of products and services. We seek confirmation from the Agencies that those offerings should not be considered in violation of the Equal Credit Opportunity Act and Regulation B.

Sample Notice. We appreciate the Agencies' additional guidance in providing a sample notice appended to the proposed FCRA rule. Sample notices can be helpful and we urge the Agencies to incorporate a sample notice into the final FCRA rule. We have several concerns, however, with respect to the sample notice currently included in the proposed FCRA rule. First, the sample notice is quite lengthy and we do not believe that a notice of such length can be justified based on the plain statutory language of the FCRA. We believe the Agencies' sample notice in the final FCRA rule should be shortened substantially. Second, we believe that the complexity of the notice creates significant potential for consumer confusion. Third, the sample notice would be difficult to integrate with the sample clauses set forth under Reg P.

These concerns can be easily addressed if the final FCRA rule includes a sample notice based on the actual language of the FCRA. Such a notice could simply and concisely provide that information sharing with affiliates will occur and how to opt out of such sharing. In our comments above, we request the Agencies to minimize imposing any burdens in the final FCRA rule that are not required by the statutory language of the FCRA. By doing so, the Agencies will minimize the amount of detail presented to consumers and make it more likely that they will be able to focus on the key information-sharing messages that the statute intends that they receive.

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We appreciate the opportunity to provide comments to the Agencies on this important subject. If we can provide any further assistance, or if the Agencies have any questions regarding the above, please feel free to call me at (212) 552 – 6153.

Very truly yours,

Alan M. Weinberg, VP