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Merrill Lynch

December 1, 2000

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

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th and C Streets, NW.
Washington, D.C. 20551

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

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

RE: Joint Notice of Proposed Rulemaking - Fair Credit Reporting Regulations

Ladies and Gentlemen:

Merrill Lynch & Co., Inc. ("Merrill Lynch") is pleased to comment on the proposed Fair Credit Reporting Regulations (the "Proposed Rule") implementing the affiliate information sharing provisions of the federal Fair Credit Reporting Act (the "FCRA")[1]. The Proposed Rule was published for comment jointly by the

[1] These comments are submitted on behalf of those subsidiary companies that are subject to regulation under the FCRA, including Merrill Lynch Bank USA, an FDIC-insured Utah industrial loan corporation, and Merrill Lynch Credit Corporation, a mortgage banking company.

Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("FRB"), the Office of Thrift Supervision ("OTS"), and the Federal Deposit Insurance Corporation ("FDIC") (collectively, the "Agencies").

Merrill Lynch is a diversified financial services company that offers clients a broad range of products and services through its many subsidiary companies, including the securities broker and dealer, Merrill Lynch, Pierce, Fenner & Smith Incorporated; Merrill Lynch Trust Company FSB, a federal savings bank; Merrill Lynch Bank & Trust Co.; Merrill Lynch Bank USA; and Merrill Lynch Credit Corporation.

Through the years, Merrill Lynch has worked very hard to establish a tradition of trust among its clients. Clients entrust Merrill Lynch not just with their assets but with information about themselves, their families, and their financial goals. Clients provide Merrill Lynch with this information secure in the knowledge that Merrill Lynch will maintain the confidence of that information. In recognition of this trust, Merrill Lynch has adopted and implemented stringent policies and procedures to safeguard the confidentiality of client information that Merrill Lynch possesses.

Oftentimes, a client expects Merrill Lynch to use this information not only to deliver the financial products and services the client has specifically requested but also to: (1) identify other products and services that may benefit the client, and (2) provide financial advice tailored to the client's particular circumstances. A client establishes a relationship with Merrill Lynch, in part, to access the full array of products and services available through the Merrill Lynch family of companies such as securities brokerage, wealth management, mortgage loans, insurance, and trust services. Our clients fully expect Merrill Lynch to share information among its related companies as needed in order to provide them with the full benefits of the Merrill Lynch relationship.

We believe it is important for the final rule crafted by the Agencies to strike the right balance among consumer privacy, consumer expectations, and business necessity.

One particularly important aspect of the Proposed Rule relates to the effective date of the final rule. Under the Gramm-Leach-Bliley Act ("GLBA"), if a financial institution provides an opt out notice under the FCRA, that notice must be included in the initial and annual privacy notices mandated by the GLBA privacy regulations. The Agencies recognize and anticipate that financial institutions will design their information sharing policies, procedures, and practices taking into account the requirements of both the GLBA privacy regulations and the final FCRA regulations.

In light of the new disclosures required by the Proposed Rule, we urge the Agencies to provide clear guidance on the final rule's effective date.

The Agencies recognize that many financial institutions are close to completing thier privacy notices as required by the GLBA privacy regulations. If the final FCRA rule is adopted with too short an implementation period, many financial institutions may be forced to make substantial changes to their compliance plans for the GLBA privacy regulations. This could, in some cases, require financial institutions that have implemented GLBA procedures to prepare and distribute additional privacy notices in order to comply with both the GLBA privacy regulations and the final FCRA rule.

The Agencies should consider making the final FCRA rule effective at the same time the initial privacy notice must be provided under the GLBA privacy regulations, that is, no later than July 1, 2001. For existing customers who must be provided with a GLBA privacy notice, financial institutions should not be required to change the initial notices provided to those customer's to reflect the final FCRA rule. For customers who establish relationships with financial institutions on or after July 1, 2001, the final FCRA rule should be effective on the earlier of July 1, 2002, or the date by which the first annual GLBA privacy notice must be provided for that relationship. This approach would minimize compliance costs and burdens for financial institutions.

Merrill Lynch has addressed the Agencies' specific requests for comment and also offers additional comments on several other aspects of the Proposed Rule.

Specific Requests for Comment

The following sets forth the Agencies' specific request for comment (in italics) as it appears in the October 20, 2000 *Federal Register* followed by Merrill Lynch's response to the specific request for comment.

Section __.2 Examples

> *The Agencies solicit comment on whether to include additional or different examples, and, more fundamentally, on whether including examples in the regulations is appropriate and useful. Instead of addressing specific fact situations through such examples, the Agencies could periodically issue interagency staff commentaries or questions and answers.*
>
> The use of examples is appropriate and useful. Examples offer practical guidance on how compliance may be achieved. We urge the Agencies to retain examples in the final rule.
>
> The use of staff commentaries and questions and answers has proven

helpful in the past, especially with regard to the FRB's Regulations B, E, and Z. We would favor issuance of staff commentaries as a supplement but not to the exclusion of the examples as set forth in the Proposed Rule.

Section __.3 Definitions

The Agencies request comment on whether institutions have any particular concerns about compliance with FCRA's clear and conspicuous standard when FCRA opt out notices are included with the GLBA privacy provision notices.

The clear and conspicuous standard set forth in the Proposed Rule is substantially the same as that set forth in the GLBA privacy regulations and we generally support that standard. There is, however, one aspect that should be clarified. With respect to notice provided on a web page, the final rule should allow the notice to be included on an institution's home page, as an alternative to requiring that the notice appear on any other page that consumers often access such as a page where transactions are conducted. Including information on the home page is consistent with the method by which many financial institutions currently provide notices of important legal information to consumers. This manner of disclosure is generally familiar to consumers and is likely to be less burdensome to the institution to implement than a requirement that it appear on multiple pages.

Section __.5 Contents of Opt Out Notice

The Agencies invite comment on whether financial institutions should also 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 that consumer to its affiliates, as well as the fact that a consumer can opt out at any time.

We believe it is important for the consumer to understand that he or she can exercise the opt out right at any time. Accordingly, the institution's notice should clearly disclose that fact to the consumer. It would only serve to confuse a consumer if the notice also disclosed a time limit within which the consumer needed to respond to the opt out notice.

The Agencies seek comment on whether the benefits of the additional disclosures would outweigh the burdens, and, if so, whether the regulation should require the disclosures to state that a financial institution will wait 30 days in every instance before sharing consumer information with affiliates (see proposed section __.6, below, for additional discussion on reasonable opportunity to opt out).

In our view the consumer derives no benefit from this disclosure. As noted above, the notice should unambiguously state that the consumer can exercise the opt out right at any time. In fact, confusion on the consumer's part may be generated to the extent that the consumer mistakenly believes the opt out right has been waived if not exercised during the waiting period. We also note that neither the FCRA nor the GLBA privacy regulations require disclosure of a waiting period. This would be impractical (or at least very complicated) as a business matter to implement. We urge deletion of this provision in the final rule.

The agencies solicit comment on the extent to which the categories in (d)(2) can be treated as consistent with similar categories in the privacy regulations (such as disclosures of information from consumer reporting agencies) in order to reduce compliance burden and consumer confusion.

As a general matter, consistency between the final rule and the GLBA privacy regulations is desirable. This will benefit consumers and regulated institutions by reducing consumer confusion and easing the associated compliance burden for the regulated institution. The categories in (d)(2) may fairly be described as subsets of the categories enumerated in __.6(c)(2) of the GLBA privacy regulations, accordingly, the categories do not appear to be inconsistent.

Section __.6 Reasonable Opportunity to Opt Out

Comment is requested on whether there are other situations that would suggest a different reasonable period of time that the Agencies should note by example.

The 30-day time frame used in the examples should be retained. Thirty days is a reasonable period of time for the consumer. It is also consistent with the time frame established by the GLBA privacy regulations.

Further, the definition of a "reasonable period of time" that is ultimately adopted should be the same notwithstanding the manner by which the opt out is exercised. For example, a 30-day period should apply to an opt out exercisable electronically, by telephone, and in writing. A single definition of a reasonable period of time would be administratively less burdensome for the financial institution to implement and monitor and less confusing for the consumer than a definition that varies based on the method by which the opt out right is exercised.

Section __.10 Time by Which Opt Out Must be Honored

Comment is solicited on whether the Agencies 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 believe that 30 days is a reasonably practicable period of time and encourage the Agencies to retain this time period.

It would be helpful if the Agencies included language in this section to clarify that a consumer's exercise of the opt out right operates to bar the sharing of opt out information by the institution on a prospective basis only. The regulation should not be interpreted to require the institution to take any action with respect to opt out information that was shared with affiliates before the consumer elected to opt out.

Comments on Additional Items

The following are Merrill Lynch's comments on other aspects of the Proposed Rule.

Section ___.1(b)(2) Purpose and Scope

This section should indicate whether subsidiaries of the covered institutions are also subject to the regulation and, if so, whether it is appropriate for information to be shared more broadly between the subsidiary and the parent (and vice versa) than between the parent and other affiliates. Other sections (e.g., Section 334.3(m) of the FDIC's regulation) may also need to be revised accordingly.

Section ___.3(k) Definitions

The definition of "opt out information" should be revised. Under the FCRA, information that is not a "consumer report" (as defined by the FCRA) may be shared by affiliated entities even if it is not transaction or experience information. The proposed definition of opt out information does not exclude this very broad category of information and causes the proposed rule to be more restrictive than the FCRA. Accordingly, the definition of opt out information should be revised to read as follows:

(k) *Opt out information* means information that:

(1) Bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living; and
(2) Is used or expected to be used or collected in whole or in part to serve as a factor in establishing the consumer's eligibility for credit or another purpose listed in section 604 of the FCRA (15 U.S.C. 1681b).

We also urge the Agencies to include specific examples of what is and what is not opt out information. Such guidance is helpful in the GLBA privacy regulations.

Section ___.5(d)(2) Contents of Opt Out Notice

We believe that the categories of information should be further refined. The proposed rule identifies information from a consumer's application as a category of opt out information. It is unclear whether the reference to an application is to a credit application, deposit application, an application for another type of product or service, or an application for any product or service available from the financial institution.

We also note that the information captured on a consumer's application will vary depending on the nature of the product or service desired. The type of information will also vary from institution to institution. Furthermore, some of the information provided by the consumer on an application will not rise to the level of being a consumer report as defined by the FCRA.

As proposed, a consumer's name, address, and social security number might be viewed as opt out information because it is information from a consumer's application notwithstanding the fact that none of these data elements, either taken individually or when aggregated, have any bearing on a "consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living".

This basic identifying information and information regarding experiences with the consumer should be eligible for sharing by the institution with its affiliates for legitimate business and regulatory purposes, including consolidated credit risk management reporting.

It would be very helpful if additional examples of opt out information were included in section ___.5(d)(3). It would likewise be helpful to include an additional paragraph setting forth examples of information that would not be considered to be opt out information. Examples should include name, address, and social security number as well as public record information.

Section __.7 Reasonable Means of Opting Out

Paragraph (d) allows a financial institution to specify the means by which the consumer may exercise the opt out right as long as the means is reasonable "for that consumer". As drafted, paragraph (d) could be construed as requiring the financial institution to make a case-by-case determination of whether a consumer's opt out was effective or not in a

situation where the consumer's attempted exercise of the opt out was by a means other than as specified by the financial institution. We believe that such a construction is unintended by the Agencies.

We also suggest adding language to paragraph (d) to clarify that the consumer's opt out will not be effective if exercised by some means other than as specified by the financial institution (assuming the means so specified is reasonable.)

In view of the above, we offer the following changes to paragraph (d):

> (d) You may require each consumer to opt out through a specific means, as long as that means is reasonable [for that consumer]. A consumer's opt out will not be effective if the consumer uses a means other than what you specified as long as the means that you specified was reasonable.

Again, we thank the Agencies for the opportunity to comment. If you have any questions or would like to discuss this letter or any aspects of the Proposed Rule, please contact Eric Billings at (801) 526-6830 or the undersigned at (212) 670-0225.

Sincerely,

Kenneth S. Spirer