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Communications Division
Office of the Comptroller of the Currency
250 E Street, SW
Washington, D.C. 20219
Docket No. 0020

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

Manager
Dissemination Branch
Information Management and Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, D.C. 20552
Docket No. 2000-8

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

Proposed FCRA regulation

Dear Ladies and Gentlemen,

The American Bankers Association ("ABA") appreciates the opportunity to submit comments to the proposed regulations implementing the provisions of the Fair Credit Reporting Act ("FCRA") that permit institutions to communicate consumer information to their affiliates (affiliate information sharing) without incurring the obligations of consumer reporting agencies. The OCC, Federal Reserve Board, FDIC, and OTS, ("Agencies") jointly published the proposal in the 20 October *Federal Register*.

The FCRA provisions authorize financial institutions to communicate among their affiliates: information as to transactions or experiences between the consumer and the person making the communication and "other" information provided that the institution has given notice to the consumer that the other

information may be communicated, the institution has provided the consumer an opportunity to "opt out," and the consumer has not opted out. The proposed regulations also implements certain related provisions.

Generally, ABA applauds the Agencies' efforts to provide guidance on FCRA requirements. We agree with many of the approaches the Agencies have taken, but we recommend a number of important changes and clarifications.

One of our greatest concerns is that the final regulations provide adequate time to allow financial institutions to and that the new regulation not be applied retroactively. Financial institutions should not be required to send opt out notices compliant with the final FCRA regulations to customers who received opt out notices prior to adoption of final.

ABA suggests that the final regulation specifically exclude from the definition of consumer report communications between joint users. Financial institutions have relied on this longstanding interpretation and developed business arrangements and structures that depend on the ability to share information among agents and affiliates that affect a broad range of related activities.

We also strongly recommend that the Agencies revise the proposed example which requires financial institutions to wait 30 days before they may share information with affiliates. In most cases, it is appropriate and beneficial to the customers to share information upon receipt of the application containing the opt out mechanism.

The Agencies should also delete from the final regulation any requirement that opt out notices to consumers and consumer's notices to opt in be in writing. The statute clearly does not require it and it is not convenient or beneficial to consumers or financial institutions.

The ABA brings together all elements of the banking community to represent the interests of this rapidly changing industry. Its membership – which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, and savings banks – makes ABA the largest banking trade association in the country.

Effective date.

The Agencies have not proposed an effective date for final regulations. ABA is very concerned that financial institutions have sufficient time to comply with the new FCRA regulation, particularly in light of the recently released Gramm-Leach-Bliley Act ("GLBA") privacy regulations (Regulation P) that require that privacy notices include a reference to the institutions' policy of sharing information with affiliates. Financial institutions are concerned about how the

effective date for the FCRA regulation notices will comport with the Regulation P disclosures which must be sent by 1 July 2001. Financial institutions will have expended much time and resources to devise and deliver the Regulation P disclosures and should not have to repeat the exercise of revising and redelivering FCRA disclosures.

The Agencies should make clear in the final regulation:

1) **There is no requirement that institutions that previously provided FCRA notice of opt-out and currently share "other information" with affiliates send an FCRA regulation notice to customers after adoption of the final FCRA regulations, e.g., on the basis that previous opt-out notices do not comply with the final FCRA regulations.** The FCRA amendments of 1996 made clear that financial institutions are permitted to share "other information" with affiliates provided the customer has had notice and opportunity to opt-out and has not done so.

   At that time, the statute did not authorize promulgation of regulations and financial institutions have in good faith complied with the statute's requirements. However, past and existing opt out notices and procedures may not comply with the final FCRA regulations. It would be unfair and unnecessarily costly to apply the final regulations retroactively. Were that to be the case, financial institutions would have to halt current sharing processes and revise and redeliver repetitive disclosures before resuming sharing – even though customers have already had effective notices and opportunity to opt-out. Customer confusion would abound. There is no reason to halt sharing of information and resend notices to customers who have previously received notice and opportunity to opt-out.

2) **So long as a financial institution's FCRA regulation disclosure and FCRA reference in its Regulation P notice are consistent, even if the FCRA regulation disclosures is more detailed, providing FCRA regulation notices does not represent a change in term that triggers a change in term notice under Regulation P.** If the FCRA regulation disclosure is consistent the Regulation P notice, it is not a change in term just because it provides more detail. In addition, it would serve no useful purpose to resend FCRA notices that have already been sent, both pursuant to FCRA (prior to final regulation) and Regulation P.

If the final FCRA regulation and Regulation P had been finalized simultaneously or within sufficiently close proximity to be able to incorporate final FCRA regulation notices into the Regulation P notice, the Regulation P notice could have contained the FCRA regulation notice. However, at this point, many financial institutions, anticipating the 1 July 2001 Regulation P deadline, have already devised and printed their Regulation P notices. To treat the FCRA regulation notice as a change in term would require devising and sending notices not once, but twice. We do not believe that this is necessary or beneficial to consumers and imposes huge, unnecessary costs.

3) **Regardless of the effective date of the FCRA regulation, financial institutions have the option to either 1) incorporate the FCRA regulation disclosures in the Regulation P as a substitute for the FCRA reference required by Regulation P or 2) provide the FCRA regulation notice separately.** Allowing incorporation into the Regulation P notice will allow financial institutions to streamline the Regulation P and FCRA regulation disclosures to ease compliance and promote customer and staff understanding of the notice. Permitting separate disclosures will permit institutions to use up existing stock of Regulation P notices.

4) **Allow at least one year from the date of adoption of final regulations for mandatory compliance.** Financial institutions are just now finalizing Regulation P disclosures, at great cost and effort, and need time to devise the FCRA regulation disclosures. Financial institutions must also revise procedures for opting-out and related matters and educate employees about the new procedures.

Jurisdiction.

The Federal Reserve Board's proposal provides that its proposed regulation covers Federal Reserve Board member banks, branches, and agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, and organizations operating under Section 25 of the Federal Reserve Act. However, Section 621(e)(1) of FCRA provides that the Board also has authority to prescribe regulations "with respect to bank-holding companies and affiliates (other than depository institutions and consumer reporting agencies) of such holding companies." We recommend that the final regulation mirror the statute. This will promote uniformity in the rules and facilitate compliance among financial institutions with affiliates and subsidiaries.

Definition of affiliates.

The FCRA provisions apply to affiliates which the proposal defines as "related or affiliated by common ownership or affiliated by corporate control or common corporate control, with another company." Control of a company means ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, control in any manner over the election of a majority of the directors, trustees, or general partners.

Definition of consumer report.

The proposal defines consumer report and excludes certain reports and communications. We strongly recommend that the Agencies include in the list of exclusions communications between joint users. The Federal Trade Commission ("FTC") in its Commentary and subsequent letters has sanctioned the joint-user exclusion (FTC Comment 603(f)-8). Joint users, according to the FTC include, for example, "Entities that share consumer reports with others that are jointly involved in decisions for which there are permissible purposes to obtain the report." Moreover, the FTC has recognized that an agent and principal may share a consumer report without becoming a consumer reporting agency. (Comment 604(3)(E) – 6(A).

Relying on this interpretation, financial institutions have developed business arrangements and structures that depend on the ability to share information among agents and affiliates that affect a range of related activities. For example, reports and information are shared with:

- underwriting affiliates
- consolidated operations and data processors
- account servicing affiliates
- fraud control agencies and affiliates
- collection agencies, and
- financial institutions participating in a single loan.

As the FTC has recognized, such arrangements promote efficiency and lower costs for the institutions and their customers. In many cases, it is simply cheaper and more efficient to use affiliates and agents focused on a particular service.

Moreover, sharing information with affiliates and agencies involved in the same transaction do not present the same privacy concerns as does sharing information with entities not involved in the transactions. Clearly, consumers expect that certain information will be shared as appropriate in order to process the transaction or administer the account.

Elimination or anticipation of elimination of this important exemption will affect millions of transactions, accounts, and customers and create an enormous upheaval in the industry. It is not clear how financial institutions would be able to continue many existing beneficial arrangements.

Finally, Congress has had ample opportunity to adopt a different view: when it amended the FCRA in 1996 and again in 1999. It declined to do so.

For these reasons, we suggest that the agencies affirm in the final regulation that the joint user exemption continues to apply.

Form and contents of opt out notice:

Under the proposal, the opt out notice must be clear and conspicuous which the proposal defines as "reasonably understandable and designed to call attention to the nature and significance of the information it contains." The Agencies offer examples of "reasonably understandable" notices:

- presents the information in the notice in clear and concise sentences, paragraphs, and sections;
- uses short explanatory sentences or bullet lists; and
- uses "everyday words."

Examples of "designed to call attention to" include:

- uses plain-language heading;
- uses easy to read typeface and type size; and
- uses boldface or italics for key words.

In addition, the proposal states that the opt out notice must accurately explain:

- The categories of opt out information
- The categories of affiliates
- The consumer's ability to opt-out; and
- A reasonable means for the consumer to opt out.

The Agencies have endeavored to make the FCRA regulation notice consistent with those of Regulation P and as a general matter, we encourage and applaud consistent regulations. However, there are occasions when varying a rule is appropriate and justified. In this case, we do not believe that the FCRA regulation should necessarily parallel the Regulation P. First, the detail of the proposal is not supported by the statute. Second, it is not necessary in the context of affiliate sharing of information.

Under FCRA, communication of information among affiliates is excluded from the definition of consumer report if:

> It is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity . . . to direct that such information not be communicated among such persons.

In contrast, GLBA is much more detailed about the information to be included in the notice. It mandates inclusion of the categories of persons to whom information is or may be disclosed and the categories of information that are collected by the institution as well as the policies and practices with respect to disclosing information to nonaffiliated third parties.

Congress had the opportunity when it passed GLBA to amend FCRA to mirror the privacy provisions related to sharing information with unaffiliated entities, but declined to do so.

Moreover, it is not necessary or beneficial to provide the proposed detail. The privacy regulation concerns sharing of information with unaffiliated third parties. FCRA and the proposal address sharing information with related affiliates and subsidiaries. We believe a different standard should apply based on this distinction.

Within the holding company, there is far more control and interest in managing and restricting how and with whom customer information is shared, much as there is within departments of a single company. The affiliate and subsidiary structure simply reflect a modern construction of departments within a single company. They have been structured as a holding company, for example, for a variety of legal and business reasons.

In addition, we believe that a simpler disclosure without the proposed detail will be more useful. Consumers are more likely to read a simpler, more understandable disclosure.

If the Agencies adopt the detailed requirements, the proposal is generally acceptable. There has not been much dispute or lack of clarity with regard to the meaning of "clear and conspicuous" under other regulations and we expect that the proposed guidance will be well understood. We do not believe that it should be more detailed as that could reduce flexibility and make institutions more vulnerable to noncompliance.

The proposal provides that financial institutions may allow a consumer to select certain opt-out information or certain affiliates, with respect to which the consumer wishes to opt out. We appreciate the flexibility of this proposed provision.

Under the proposal, a financial institution satisfies the requirement to categorize the opt out information if it lists the categories, e.g., information from a consumer's application or credit report, and provides a few examples, such as "income, credit score or credit history with others, employment history, and marital status."

The final regulation should make reference to the proposal's definition of consumer report so that it is clear that information shared which is not "used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establish the consumer's eligibility for" credit etc., is not a consumer report. Accordingly, such information is not subject to FCRA or its opt-out provisions.

Suppose, for example, a person presents a check drawn on subsidiary A to be cashed by subsidiary B and subsidiary B accesses the account at subsidiary A to determine whether there are sufficient funds. The account identifies the owner as Mrs. John Doe, suggesting marital status. If subsidiary B is not using this incidental information to determine eligibility for an account or other product, the information is not a consumer report under FCRA.

For similar reasons, the reference to marital status should be deleted. Information on marital status generally cannot be used to determine a person's eligibility for credit and is rarely if ever a consideration for eligibility for other noncredit products. Accordingly, it should not be assumed to be part of a consumer report.

Reasonable opportunity to opt out.

Financial institutions must provide customers a "reasonable opportunity" to opt out. Under the proposal, a financial institution provides a reasonable opportunity to opt out if it provides a "reasonable period of time following the delivery of the opt out notice." The Agencies offer as examples: 30 days from the date an institution hand-delivers, mails, or provides electronically the opt notice. The Agencies have requested comment on whether different times should be noted in the example.

We are pleased that the Agencies have asked whether a different time should be noted in the example because we believe that the proposed 30 day period example is neither appropriate nor necessary in most cases. We suggest that the regulation note that the "reasonable period" may vary depending on the method of opt-out and individual circumstances and include additional examples that allow financial institutions in some instances to share information upon receipt of an application containing

For example, if an application permits customers to opt out by checking a box or clicking on the computer, the institution should be able to share

information upon receipt of the application. This should apply whether the application is made in person or not, whether by electronic or paper application. This is the time consumers are most likely to review and consider the matter: additional time will not alter their choice. In addition, sharing information at the time of application, especially if in-person, is the best time to identify the customer's likely interest and eligibility for other products offered by subsidiaries, enhancing the customer's experience and making the market more efficient.

A longer period, 20 days, may be appropriate if the application is made in person and the consumer opts out by calling a toll-free number because it may be more awkward to do so at the time of application. Similarly, if a special form must be mailed, additional time may be needed for the form to arrive by mail.

We suggest that the final regulation provide the following examples:

- If an application allows a customer to check a box or click on a computer in order to opt-out, a reasonable time to opt out is upon the financial institution's receipt of the application.

- If a customer may opt out by calling a toll-free number, a reasonable period to opt out may depend on the particular circumstances. If the application is made in person, 20 days is a reasonable time to opt out. However, if the application is not made in person, a reasonable time to opt out is upon the financial institution's receipt of the application.

- If the consumer opts out by mailing a reply form, a reasonable time is 20 days following delivery of the opt-out notice.

Reasonable means of opting out.

The proposal requires financial institutions to provide a "reasonably convenient" method to opt out. Examples offered include designating check-off boxes in a prominent position, including a reply form with the opt-out notice, providing an electronic means to opt out, if the consumer agrees to the electronic delivery of information, and providing a toll-free telephone number. Methods that are *not* reasonably convenient include requiring consumers to write their own letter and referring in a revised notice to a check-off box that was included with a previous notice.

We agree with the four proposed options. The final regulation should clarify that financial institutions need only provide one option.

Delivery of opt out notices.

The proposal states that opt out notices must be delivered in a fashion so that each consumer can reasonably be expected to receive actual written notice.

Oral notice is insufficient. The opt out notice must be in a form that can be retained or obtained at a later time.

We strongly disagree that oral notice is insufficient or that the notice must be in a form that can be retained. First, the statute includes no such requirement, even though the statute requires written notice for other purposes. For example, section 604(a)((2) requires written instruction from the consumer before a consumer reporting agency may furnish a consumer report (notwithstanding another permissible purpose). Section 604(b) (2)(A) requires certain disclosures related to obtaining a consumer report for employment purposes be in writing. If Congress had intended to require written delivery of opt out notices, it would have specifically included such language.

Second, other regulations permit oral disclosures. For example, Section 226.5a(d) of Regulation Z (Truth in Lending Act) permits credit card application and solicitation disclosures to be provided orally.

Third, consumers are allowed to opt out orally. There is no apparent justification for a separate standard for receiving the notice.

Finally, providing written notice is often not convenient or beneficial to consumers. Consumers initiating an application by telephone or responding to a telephone offer lose the opportunity to benefit from the immediate sharing of information. For these reasons, we strongly recommend deletion of the requirement that the opt out notice be provided in writing.

We appreciate the proposed provision that actual notice is not required. Requiring actual notice would be impractical and impossible to prove.

Time by which opt out must be honored.

Under the proposal, if a bank provides a consumer with an opt out notice and the consumer opts out, the bank must comply "as soon as reasonably practicable" after receipt of the notice. Opt out remains effective until revoked by the consumer in writing, as long as the consumer continues to have a relationship with the bank. If the relationship ends, the opt out will continue to apply to this information. However, a new notice and opportunity to opt out must be provided if the consumer establishes a new relationship with the bank.

We agree with this proposed provision. A specific time is not necessary. Generally, institutions will promptly cease sharing information upon receipt of notice, but there may be limited occasions when it may take additional time.

The Agencies should also clarify that the opt out notice does not affect information that has already been shared with an affiliate. It should make clear that under these circumstances, the customer's institution is not required to

retrieve information already shared with an affiliate and halt action based on the sharing of the information. For example, the customer's institution should not have to advise an affiliate to pull a solicitation to a customer who has just opted out even if the solicitation has not yet been mailed. It can be months between the time information has been shared and the time of any action using that information. Once information has been shared, it is not possible for the customer's institution to navigate the various channels of affiliates' to identify each and every place the information may be used and retrieve customers' names.

Duration of opt out.

The proposal provides that an opt out remains effective until revoked by the consumer in writing or electronically, as long as the consumer continues to have a relationship with the bank. We strongly recommend deletion of the requirement that revocation of the opt out be in writing.

As discussed in the section related to delivery of the opt out notice, the statute includes no such requirement, even though the statute requires written notice for other purposes. If Congress had intended to require written delivery of opt in notices, it would have specifically included such language.

Second, consumers are allowed to opt out orally. There is no apparent rationale for requiring that they opt in in writing.

Finally, providing written notice is often not convenient or beneficial to consumers. Consumers wanting the immediate benefits of sharing should not be delayed or encumbered by a requirement that they wait for the form to be sent then returned. By then, the need or opportunity may have passed.

Prohibition against discrimination.

The proposal provides that banks cannot discriminate against applicants who opt out. It provides examples: denying credit to an applicant who opts out; varying the terms of the credit by providing less favorable pricing terms to an applicant who opts out; or applying more stringent credit underwriting standards to the applicant who opts out.

The final regulation should make clear that financial institutions can make available on preferred terms products *other than the specific one being applied for at that time* to a person who does not opt out. The ability to share information with affiliates has unquestionable cost efficiencies e.g., savings on the cost of duplicate credit reports, cost of duplicate gathering of information, that the consumer should benefit from. Indeed, most consumers have come to expect tangible benefits for allowing information to be shared. Accordingly, the regulation should make clear that an applicant who opts out is not entitled to get

an offer or any special terms on other products, whether offered by the institution or its affiliates.

Conclusion

ABA appreciates the opportunity to submit our comments on this important proposal related to the FCRA provisions that authorize institutions to communicate among their affiliates. We generally support the proposal, but submit a number of important suggestions. ABA strongly recommends that the Agencies allow a sufficient time to allow financial institutions to devise notices and establish other procedures to comply with the regulation. In addition, the Agencies should make clear that the FCRA regulation provisions are not retroactive and that financial institutions are not required to provide FCRA regulation notices to customers who previously received opt-out notices prior to the regulation.

We also recommend that the regulation confirm that joint users are exempt from FCRA and that it allow financial institutions to share information earlier than proposed. The Agencies should also delete any requirement that financial institutions' opt out notices and customers' opt in notices be in writing. We would be pleased to provide any additional information.

Sincerely,

Nessa Eileen Feddis