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America's Community Bankers®

December 4, 2000

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

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

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

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

Re: Fair Credit Reporting Regulations
65 FR 63120 (October 20, 2000)

Dear Sir or Madam:

America's Community Bankers (ACB) is pleased to comment on the federal banking agency's joint notice of proposed rulemaking[1] regarding the Fair Credit Reporting Act (FCRA)[2] pursuant to the privacy provisions of the Gramm-Leach-Bliley Act of 1999 (GLBA)[3]. America's Community Bankers represents the nation's community banks of all charter types and sizes. Our members pursue progressive, entrepreneurial and service oriented strategies in providing financial services to benefit their customers and communities.

[1] 65 Fed. Reg. 63120-63141 (Oct. 20, 2000).
[2] 15 U.S.C. § 1681.
[3] P.L. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

General

On October 20, 2000, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision (the Agencies) issued a proposal to implement certain provisions of the FCRA. The proposal seeks to establish a consistent approach for compliance with the disclosure and opt out requirements under both the FCRA and the GLBA.

ACB commends the Agencies for creating a proposal that conforms the requirements of two different laws into a set of generally consistent compliance requirements. ACB, however, has some concerns that creating an identical approach for the disclosure and processing of consumer information sharing preferences may create an unintended and unnecessary burden, without providing any additional privacy protections for consumers. There are a number of areas in the proposed regulations where greater clarification or changes are needed. Special attention should be focused on the potentially detrimental effect of the operational burdens on financial institutions, particularly small banks, working to comply with the GLBA privacy requirements by the July 1, 2001 deadline. ACB believes the Agencies can establish consistency between the GLBA privacy provisions and the FCRA, while recognizing key differences between the two laws.

The benefits of information sharing were clearly recognized by Congress when it passed the GLBA. Throughout the legislative process, amendments to impose opt out requirements on information sharing between affiliates were explicitly rejected. In developing the FCRA regulation, the Agencies should not thwart the intent of the Congress to preserve the benefits of information sharing. Instead, they should consider the outstanding record of community banks in protecting consumer information under current law, and avoid creating burdensome requirements on institutions that benefit neither the consumer, nor financial institutions.

Background

Under the FCRA, financial institutions are allowed to share with affiliates information used to determine the eligibility for credit—without being subject to the obligations of consumer reporting agencies—if they provide consumers with the opportunity to opt out of such information sharing. Title V of the GLBA requires that the Agencies prescribe regulations "as necessary"[4] to ensure compliance with the FCRA, and that such regulations be consistent with the GLBA privacy regulations. Title V also places restrictions on the sharing of certain information with nonaffiliated third parties, except under limited circumstances, unless the consumer is provided with the opportunity to opt out of such information sharing. The proposal seeks to minimize the compliance burden by establishing generally consistent GLBA and FCRA opt out requirements. Prior to passage of the GLBA, the Agencies did not have the authority to promulgate regulations affecting the FCRA.

[4] P.L. 106-102, 113 Stat. 1338, Title V, Sec. 506(a).

Effective Date of Regulations

Under the GLBA, financial institutions must provide initial privacy notices and any required opt out notices, including any disclosures made under the FCRA affiliate sharing provisions[5], prior to July 1, 2001[6]. Throughout the first half of 2001, community banks and other financial institutions will be engaged in an intense effort to comply with the notice and opt-out requirements of the GLBA. Because the GLBA does not require that FCRA regulations be in place by any specific date, it would be prudent for the Agencies to ensure that the implementation of the new FCRA regulations not interfere with these compliance efforts. ACB recommends that the effective date of the final rule be no earlier than July 1, 2002. This recommendation is based on several factors.

First, many community banks will need the extra time to modify forms and processes to support the proposed FCRA requirements. As proposed, the new FCRA opt out notices would be significantly more detailed than currently required. The development and replacement of forms, the redesign of systems, and the training of employees will involve significant costs and human resources.

Second, by having the proposed regulations take effect one year from the time of the GLBA privacy compliance date, community banks, other financial institutions and the Agencies will have one year for field testing the mechanics of the opt out processing requirements. This will give community banks the opportunity to develop and test systems in compliance with the GLBA privacy regulations, establish procedures and standards, and allow institutions to maintain a consistent annual privacy notice disclosure cycle. Additionally, the Agencies will have the opportunity to evaluate the effectiveness of the GLBA regulations and provide necessary clarification.

Finally, the agencies should consider that FCRA opt-out requirements are already in effect. Rather than creating a new set of protections for consumers, the proposal simply conforms the existing FCRA opt-out requirements to those of the GLBA. Therefore, the implementation of the proposed changes to the FCRA do not inhibit implementation of the GLBA privacy requirements. ACB urges the Agencies to take these factors into consideration when establishing a reasonable effective date for this proposed regulation.

Contents of Disclosures

The ACB recognizes the Agencies' interest in establishing consistent opt out requirements for both the GLBA privacy requirements and the FCRA. However, the type of information sharing relationships that trigger the opt out requirements of these two statutes differs significantly, and therefore the disclosure requirements should reflect these differences.

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[5] 65 Fed. Reg. 35162-35226 (June 1, 2000).
[6] 65 Fed. Reg. 35225, Sec. __.18(b)(1).

ACB believes that the disclosure requirements of the proposed regulation are overly exhaustive and should be minimized. Under the GLBA, information sharing restrictions are directed at nonaffiliated third parties. Because the opt out information in the GLBA is shared outside the organization, it is appropriate that a more detailed disclosure notice be provided. By contrast, the FCRA opt out requirements focus on information sharing within an organization where greater control exists over how information is used and disseminated. The FCRA reflects this situation by allowing institutions significant flexibility regarding the content of opt out disclosure statements. Establishing GLBA-like disclosure requirements for community banks subject to the FCRA could have the unintended consequences of discouraging more diversified community banks and their holding companies from creating consistent privacy notices across the organization. Because non-bank entities are not subject to these regulations, there would effectively be two different standards for bank and non-bank disclosure statements.

Finally, Section __.5, *Contents of Opt Out Notices*, suggests that an institution describe both its current and future information sharing practices in the FCRA opt out notice. This is inconsistent with the GLBA regulations. Under the GLBA privacy regulations, information regarding future disclosures is suggested to be included in the general privacy notice[7]. ACB believes that this inconsistency should be removed, and that institutions should be provided the discretion to include information on future communications in the general privacy disclosure statement as provided for under the GLBA regulations.

Waiting Period for Affiliate Information Sharing

In the preamble to the proposed rule, the Agencies ask whether Section __.5 should require FCRA notices to "state that a financial institution will wait 30 days in every instance before sharing consumer information." ACB would oppose such a requirement for two reasons. First, the requirement is inconsistent with the definition of a "reasonable opportunity to opt out" in both Section __.6 of the proposed rule and Title V of the GLBA; neither of which require a waiting period **in every instance** before sharing consumer information. Second, this mandate would be totally unworkable in practice, because it would require institutions to give consumers an opportunity to opt out each time the institution decides to share opt-out information. If implemented, this waiting period would strip away any benefits of information sharing across community bank organizations and would effectively mark the end of such information sharing relationships. Because the proposed rule does not limit a consumer's window of opportunity to opt out, we do not see what additional protections would be afforded by this suggested waiting period requirement. ACB strongly discourages the Agencies from including this requirement in the final rule.

[7] 65 Fed. Reg. 35221, Sec. __.6(e).

Definition of "Opt Out Information"

The proposal states that consumer application information is an example of a category of opt out information[8]. For years there has been some ambiguity as to whether or not information from a consumer's application is subject to FCRA opt out. For some diversified community banks, it has been an accepted business practice that application information—received in connection with a transaction—is shared across the organizations to cross-market products and services, and provide customers with improved services such as consolidated statements and "one-stop" customer support lines.

ACB believes that the intent of the FCRA is to protect information used to determine a consumer's eligibility for credit, and not **all** information provided by the consumer. Restricting the sharing of consumer application information among affiliates could significantly undermine the cross-marketing efforts of diversified community banks struggling to compete with unregulated non-bank competitors. For example, community banks with insurance affiliates should not be restricted from sharing the names and addresses of loan applicants in order to offer insurance products that may be valuable to them. Such information sharing is significantly different than the sharing of consumer report information explicitly protected under the FCRA.

The preamble to the proposal makes the argument that the legislative history of the 1996 amendments[9] supports the position that consumer applications should be treated in the same manner as consumer reports. ACB respectfully contends that this represents a misreading of Congressional intent. The quote used to support the argument comes from a Senate report on a section of the legislation that was substantively changed prior to passage. The bill, as passed by the Senate Banking Committee[10], contained an additional consumer report exclusion[11], removed prior to passage, which would have effectively allowed the sharing of application information for commercial purposes. ACB asks that information from a consumer's application be removed from the list of information categories that comprise opt out information.

Additionally, with respect to the definition of "opt out information" in Section __.3(k) of the proposed rule, ACB requests the Agencies to provide additional guidance with respect to what constitutes "transactions or experiences" under Section __.3(k)(3). For example, guidance could highlight whether information, such as payment history, purchase transactions, and account transfers constitute "transaction and experience" information.

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[8] __.5(d)(2)(i).
[9] Pub. L. No. 104-208.
[10] S.650, 104th Cong., 1st Sess. (1995).
[11] "(D) any report furnished for use in connection with a transaction that is primarily for a commercial purpose, regardless of the purpose for which the information in the report was originally collected or is otherwise used; or...."

Definition of "Affiliate"

ACB is concerned that the definition of "affiliate" in the proposed rule is redundant. The proposal combines the language used to describe an affiliate under the FCRA's definition of consumer report, with the definition used in the GLBA privacy regulations. The FCRA does not specifically define the term "affiliate." To avoid any confusion over what entities are covered under the term affiliate, we recommend that the Agencies adopt the simpler definition used in Section __.3(a) of the final rule for "Privacy of Consumer Financial Information."

Additional Examples / Interagency Staff Commentary

The Agencies specifically requested comment on whether additional examples and periodic interagency staff commentary would be helpful. ACB commends the Agencies for having provided numerous examples in both the final rule for "Privacy of Consumer Financial Information" and the proposed rule for "Interagency Guidelines Establishing Standards for Safeguarding Customer Information." The use of examples in these rules has significantly assisted our member institutions in better understanding the regulations or guidelines. ACB strongly encourages the use of additional examples and interagency staff commentary as a means to provide institutions with guidance in complying with this rule.

Number of Days for Opt Out Compliance

The Agencies asked if the final rule should specify a fixed number of days for complying with the opt-out requirement. Because the ability to implement an opt-out direction may vary from institution to institution, ACB discourages the establishment of a rigid time frame. Instead, the Agencies should adopt the "as soon as reasonably practicable" standard used in Section __.7(e) of the final rule for "Privacy of Consumer Financial Information."

Conclusion

ACB appreciates the opportunity to comment on this important matter and supports the Agencies in their efforts to draft workable regulations to implement the requirements of the GLBA. We stand ready to work with the agencies to implement the final regulations. If you have any questions, please contact me at (202) 857-3121 or Rob Drozdowski at (202) 857-3148.

Sincerely,

Charlotte M. Bahin

Charlotte M. Bahin
Director of Regulatory Affairs
Senior Regulatory Counsel