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Michael P. Smith
President

December 4, 2000

Jennifer J. Johnson
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 & Attention:
Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: Docket No. 2000-81

Re: Proposed FCRA Affiliate Sharing Regulations

Dear Sirs and Madams:

This letter is submitted in response to the request for comments from the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision (collectively, the "Agencies"), regarding their proposed rule implementing the affiliate sharing provisions of the Fair Credit Reporting Act (FCRA). The New York Bankers Association (NYBA) is comprised of community, regional and money center commercial banks in the State of New York, including approximately 55% state-chartered banks and 45% national banks, which in the aggregate have over 220,000 employees and assets in excess of $1 trillion.

At the outset, NYBA wishes to express its appreciation to the Agencies for their efforts to conform the proposed FCRA rule with the Agencies' final privacy regulations under the Gramm-Leach-Bliley Act (GLBA), where feasible. However, while we commend the Agencies for recognizing the need for conformity and therefore generally support the proposed rule, we believe that the final rule must also preserve the unique scope and structure of the FCRA. We therefore offer the following comments for your consideration:

As a general comment, we believe that the proposed rule sometimes does not adequately reflect the important differences between the FCRA and the GLBA and occasionally fails to incorporate important nuances within the FCRA statutory language and existing practice. For example, whereas the GLBA *mandates* the provision of notice with an opportunity to opt our prior to sharing information, under the FCRA, an institution can *elect* whether to provide such a notice or not (although it might run the risk of being deemed a consumer reporting agency if it chooses not to provide notice and if its activities otherwise would make it potentially subject to regulation under the FCRA). In drafting the final regulations, we urge the Agencies to make clear that notices are not required under the FCRA and that existing exceptions and exclusions to the FCRA under the statutory language (including but not limited to 15 U.S.C. Section 1681a(d)) and regulatory interpretations are preserved.

We also believe that the final rule should clarify that it deals with the form, content and method of delivery of opt out notices for those financial institutions that elect to provide notices, but that it is not designed to determine when an institution becomes a "consumer reporting agency" absent the provision of an opt out notice.

Timing of Effective Date

In light of the detailed new disclosures required under the Agencies' proposed FCRA rule, we believe it vital that the Agencies provide an adequate period of time to implement the final rule. Additionally, we would ask that the Agencies provide guidance to financial institutions on how the new requirements are to interact with the financial institutions' current endeavors to comply with the GLBA privacy regulations.

The Agencies' GLBA privacy regulations require the FCRA opt-out notice to be included in the GLBA privacy notice. Many financial institutions are already in the final stages of preparing these privacy notices. As the proposed FCRA rule would require significant changes to the current FCRA affiliate sharing opt-out notices which are now provided by financial institutions to their customers, a near-term implementation date for the final FCRA rule could force financial institutions to significantly alter their existing GLBA compliance plan and could require the costly and time-consuming revision and reprinting of millions of GLBA privacy notices. An inadequate implementation time period could, in extreme cases, leave some financial institutions unable to comply with the GLBA despite their best efforts - an outcome that would clearly not be in the best interests of consumers.

To avoid such interference with the implementation of the GLBA privacy provisions, we believe that the Agencies should make it clear that financial institutions are not required to meet the new FCRA affiliate sharing opt-out notice requirements until the first annual GLBA notices are required to be provided by financial institutions. Thus, for existing customers who must be provided

with a GLBA privacy notice before July 1, 2001, institutions should not be required to change the initial notices to be provided to those customers in order to reflect the Agencies' FCRA rule. Additionally, for new customers (those who establish relationships with financial institutions on or after July 1, 2001), we believe that the FCRA rule should be effective on the earlier of July 1, 2002 or the date by which the first annual notice must be provided for that relationship. This approach will enable financial institutions to comply with both the GLBA privacy notice requirements and the new FCRA notice provisions, in a manner that provides consumers with meaningful information in a timely manner, while minimizing the costs and burdens of compliance.

Purpose and Scope (Section .1)

We would urge that the FRB clarify that its FCRA rule applies to bank holding companies and their affiliates. The FRB should also make clear that its version of the new FCRA affiliate sharing rule and any other FCRA rules it adopts, apply to bank holding companies and their nonbank affiliates, and that those entities are subject solely to those FRB FCRA rules, as contemplated by the statute. This will ensure that bank holding companies and their affiliates are able to rely on the FRB's FCRA rules, and will help to ensure that all institutions within the same corporate family are governed by identical rules. This will not only minimize the burden on such affiliated companies, but will also help to avoid customer confusion by allowing institutions, if they so choose, to provide a single notice for affiliated companies.

Examples (Section .2)

We believe that the Agencies' use of examples should be retained in the final FCRA rule. Illustrative examples provide helpful guidance to financial institutions on how to comply with the FCRA obligations. We believe that examples, rather than commentaries and questions or answers, provide the most clarity on compliance when implementing the FCRA rule. Additionally, we believe that the Agencies should retain in the final FCRA rule the statement that the examples are not intended to be exhaustive, and should retain the statement that compliance with an example or use of the sample notice, to the extent applicable, constitutes compliance with the requirements of the rule.

Definitions (Section .3)

A. **Clear and Conspicuous.** The definition of the term "clear and conspicuous" is generally consistent with the standard used in the GLBA regulations, and we commend the Agencies for the provision of examples which provide a helpful guideline for financial institutions. We note, however, that there are some differences between the privacy rule and the FCRA examples provided by the Agencies. For example, a strict reading of Section ___.3(c)(2)(ii)(E) regarding forms that combine the FCRA notice with other information, could be taken to mean that the FCRA notice must

be more conspicuous than the GLBA disclosures. Since the GLBA regulation contains a similar requirement, it would be impossible to apply this standard to both sets of information. Also, the proposed rule provides examples for the notice on a web page. Although the Agencies have: (a) tracked the example for notice on a web site used in the GLBA; and (b) included an example that requires financial institutions to place either the notice, or a link that connects directly to the notice, on a page that consumers access often, further clarification is needed. Specifically, as the page or pages that consumers access often may change over time, the Agencies should make clear that this notice may be provided on the financial institution's home page, on a page where customer transactions occur, or on any other page where frequent customer access can reasonably be expected.

B. **Opt Out Information.** The proposed rule introduces a new concept - "opt-out information" - which is defined, in part, as information that bears on creditworthiness and that is not transaction or experience information. We believe that more clarification is needed as to what falls under the umbrella of "opt-out information", perhaps through the use of additional examples. We also believe that the scope of the definition should be narrowed, because, as currently drafted, the proposed rule would grant an "opt-out" right for more types of information and "sharing" than provided under the FCRA.

As drafted, the rule appears to expand the type of information covered beyond what is defined as a "consumer report" under the FCRA. However, only information that otherwise constitutes a consumer report under the FCRA should be subject to notice and opt-out requirements. We therefore urge the Agencies to expressly state in their final rule that only information that is "communicated" by a consumer reporting agency and that otherwise meets the definition of a consumer report is covered by the opt-out notice. For example, institutions may share application or other information with affiliates without providing an opt-out notice when the affiliate is acting as an agent or service provider to process or evaluate information on the affiliate's behalf. Here, the sharing of information would not constitute the sharing of a consumer report because there has been no communication of information by a consumer reporting agency. Moreover, if an institution shares information with its affiliate for a permissible purpose under the statute and does not share that information with third parties, that information does not come within the statutory definition of a "consumer report."

Similarly, the final rule should clarify that the joint user exception under existing FCRA law continues to be fully applicable under the final rule. Specifically, the Federal Trade Commission has stated that joint users acting pursuant to a single consumer request may jointly use a single body of information provided by the consumer without providing an opt out opportunity and without the danger of becoming a consumer reporting agency. For example, if a lender forwards a consumer report to another affiliated creditor for use in considering a consumer's loan application at the consumer's request, the lender does not become a consumer reporting agency by virtue of that action. In short, the final rule should be amended to recognize that there are many common business practices where information may be shared without use of the opt-out notice, and without an institution consequently being viewed as a consumer reporting agency.

We also urge the Agencies to incorporate into the final FCRA rule other circumstances where an affiliate can have access to information of another affiliate without constituting the transfer of consumer reports and without being subject to the notice and opt-out requirements. For example, the final FCRA rule should allow financial institutions to provide information to an affiliate when a consumer provides consent. Similarly, it is desirable from both a consumer and an institutional perspective to permit the immediate sharing of information for fraud control purposes and to exempt information shared for this purpose from the scope of "opt out information". Such information sharing is in the best interests of consumers and protects them from the possibility of identity theft and repeated fraudulent transactions under their names.

Finally, we urge that section ___.3(k)(3), which covers transaction and experience information, be expanded to cover the other exclusions from the definition of a consumer report set forth in section 603(d)(2) of the FCRA. (See discussion above.)

Communications of Opt Out Information to Affiliates (Section .4)

The proposed rule should be amended to clarify that it is not exclusive - in other words, under certain circumstances, an institution may share information (other than transaction and experience information) with its affiliates absent the provision of notice and an opt out opportunity without running the risk of being deemed a "consumer reporting agency" under the FCRA.

Contents of Opt-Out Notice (Section .5)

The Agencies have requested comment on whether financial institutions should be required to disclose how long a consumer has to respond to an opt-out notice before the institution may begin disclosing information about that consumer to its affiliates. We believe that the Agencies should not require financial institutions to disclose how long a consumer has to respond to an opt-out notice because it is not required by the FCRA and in fact can be confusing to consumers. Indeed, even though consumers have an ongoing right to opt out, a statement saying that consumers have "X" days to respond, could lead them to believe that their right to opt out exists only during that time period. Moreover, the inclusion of such a time period would be inconsistent with the opt-out notice provided in the GLBA privacy regulations.

Proposed section ___.5(b) makes clear that an institution's notice can also state that the institution reserves the right to communicate certain types of information in the future. The Agencies should retain this provision, as it is consistent with the GLBA privacy regulations and provides financial institutions with the flexibility they need to take into account future practices. We encourage the Agencies to also retain the partial opt-out in section ___.5(c). This partial opt-out allows institutions to provide consumers with a menu of options, enabling them to tailor opt-out notices to individual customer preferences.

Proposed section ____.5(d)(2) provides examples of categories of opt-out information and includes four types of information that is covered. We believe that only two categories of opt-out information should be included in the final rule: (1) the categories of opt-out information that the financial institution may share; and (2) the categories of affiliates to whom the financial institution disclosed opt-out information. The disclosure of any additional information is unnecessary and may complicate the overall FCRA disclosure and the privacy policy notices in which it will be included.

We also note that the reference to marital status in the examples can be problematic, insofar as information on marital status cannot be used to determine a person's eligibility for credit, and so should not be assumed to be part of a consumer report. We therefore suggest the deletion of this reference. Finally, we suggest that the Agencies note that the list of examples is not exhaustive and that financial institutions are not required to include them all.

Reasonable Opportunity to Opt Out (Section .6)

The proposed FCRA rule indicates that 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 for a consumer to opt out. The Agencies then provide examples of reasonable time frames in which to opt out. We believe that the Agencies should provide fewer, rather than more examples in the final rule, as the numerous examples currently provided may be interpreted as an exhaustive list for what is an appropriate period of time for consumers to opt out.

We note also, that each example provides for a 30-day time period, regardless of the method of delivery of the notice. We do not believe that this 30 day requirement is appropriate, insofar as the reasonableness of a time frame will vary depending upon the method used for the delivery of the opt-out notice. For example, the time period for notice provided by electronic means or in person should be far less than 30 days.

We further believe that a rigid 30-day waiting period could have the anti-consumer effect of denying consumers information sharing that they may desire at the time when that information may be most valuable to them. For example, a consumer who applies for a home mortgage from an institution may want to receive timely information from the institution's insurance affiliate regarding homeowner's insurance, and the value of that information may be time-dependent. If the affiliate is required to wait 30 days to send the information, the consumer may need to provide application details again to the recommended insurer and may also need to submit to a second pull of a credit report.

A mandatory 30 day waiting period would also impose heavy and unnecessary compliance burdens and expenses on institutions subject to the FCRA. For while most institutions already have in place systems that can register a consumer's choice to opt out, they would be forced to implement new systems capable of tracking rolling and temporary opt outs for each consumer in order to assure that so sharing takes place during the 30 day waiting period that starts on the date an application or

disclosure was provided to each individual consumer. The implementing of such a complex tracking system would require a massive overhaul of institutions' computer databases and systems, and would require institutions to capture new and cumbersome information.

In lieu of an automatic 30 day waiting period, we propose the following:

- *Disclosures in Conjunction with Applications:* If a consumer: (A) submits application data (whether in person, by mail, or electronically), (B) is provided notice and an opportunity to opt out within or in conjunction with the application, and (C) in submitting the application data, chooses not to opt out, there is no reason to require the institution to wait 30 days to implement that consumer's choice. The presumption should be that if the consumer chooses not to opt out at the time of applying for the product or service, he is choosing to allow the institution to share his information, and that the institution can share that information immediately upon receipt of the application. Permitting immediate sharing of the consumer's choice to not opt out will not deprive the consumer of the ability to later change his mind; he can opt out at any time. In this way, the appropriate balance is struck between facilitating information sharing that may benefit the consumer and providing the consumer ample and ongoing opportunities to opt out.

- *Electronic Communications*: As drafted, the proposed rule could be read to require burdensome customer acknowledgments -- either by U.S. mail or e-mail -- of receipt of electronic communications. Thus, the proposed rule could be read to require a customer who wants the immediate benefit of information sharing among affiliates to send a mailed or e-mailed form with sensitive data such as her account number(s) and tax ID number. The potential harm and added burden to consumers would well outweigh any potential benefit to the customer from such a requirement. Moreover such a requirement is inconsistent with the opt-out rules adopted by the Agencies in the GLBA privacy regulations. Also, consumer financial protection laws and regulations that require delivery of information (such as Regulations B, E and Z) do not require acknowledgments from the consumers to meet the requirement for the delivery of notices or disclosures under those regulations.

If, however, the final rule does require some customer acknowledgment, it should be sufficient for the customer to use a "click-stream" response to a properly worded inquiry regarding receipt. The use of click-stream customer acknowledgments is common practice under the E-Sign legislation and should be equally permitted under the FCRA. This is also more secure and less likely to introduce errors.

- *Telephone Disclosures*: See discussion below of Section .8.

Reasonable Means of Opting Out (Section .7)

The Agencies should maintain the examples regarding reasonably convenient methods of opting out in their final rule. It is also essential that the Agencies retain the provision in section___.7(d) permitting a financial institution to require each consumer to opt-out through a specific means, as long as that means is reasonable for that consumer. This approach is consistent with other consumer notice laws, including the GLBA privacy regulations, and provides an effective and efficient means for financial institutions to receive and implement consumer opt-out requests. The final rule, should, however, be amended to make clear that it is not suggesting that an individualized determination must be made for each consumer, but rather that financial institutions are able to adopt an opt-out policy that applies to all similarly situated consumers.

Delivery of Opt-Out Notices (Section .8)

The proposed FCRA rules explains that oral notice of the consumer's right to opt out does not comply with the opt out notice requirement. The Agencies should not require written notice in the final rule, as the FCRA does not have a writing requirement for affiliate sharing, and such a requirement in the final rule would thus make the rule inconsistent with the FCRA itself.

The proposed FCRA rule also explains that a financial institution must provide the notice so that it can be retained or obtained by the consumer for use at a later time. If the Agencies require a written notice, they should make it clear that a financial institution has the option to provide the opt out notice by either (i) giving it in a form that a customer can retain, or (ii) allowing the customer to
obtain another copy of the institution's then current opt-out notice at a later time. If an institution provides a paper copy of a notice that can be retained by the consumer, the institution should not also be required to provide an additional copy at a later time. This is especially so, as the notice must be provided annually as part of the GLBA privacy notice.

The proposed rule also permits institutions to provide a joint opt-out notice with one or more affiliates that are identified in the notice, as long as the notice is accurate with respect to each entity. The Agencies should retain the joint opt-out in the final rule, as use of a joint notice, where appropriate, provides cost savings and efficiencies. This flexibility also enables financial institutions to structure their FCRA notices in a way that best meets the needs of their customers.

Time by Which Opt Out Must be Honored (Section .10)

The proposed rule explains that when a financial institution provides a consumer with an opt-out notice and the consumer opts out, the institution must comply as soon as reasonably practicable after receipt of the consumer's opt-out. The Agencies have asked for comments as to whether a fixed number of days should be established that would be deemed to be a reasonable period of time

for complying with a consumer's opt out directive. We believe that the Agencies should not set such a fixed number of days, as what constitutes a reasonably practicable time period may vary. Variations may be caused by the technology used by a particular institution or by the delivery method of the opt out notices. The time period should therefore be flexible to enable institutions of all sizes to determine reasonable procedures for their institutions. Moreover, establishment of a fixed time period would make the final FCRA rule inconsistent with the GLBA privacy regulations.

Duration of Opt Out (Section .11)

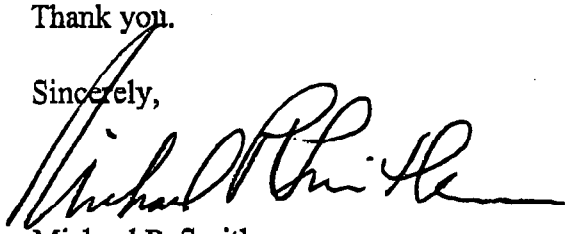
The proposed FCRA rule provides that an opt out continues to apply until revoked by the consumer in writing, or if the consumer agrees, electronically, as long as the customer's relationship continues with the institution. We do not believe that the ability of a customer to revoke an opt out should be limited solely to written or electronic means. Use of an oral revocation method is convenient to consumers and financial institutions alike and thus, should be permissible under the final rule. Moreover, failure to permit oral revocation would make the final Rule inconsistent with the FCRA itself.

Prohibition Against Discrimination (Section .12)

The proposed regulation provides that financial institutions cannot discriminate against applicants who opt out. The final regulation should make clear that financial institutions can, nevertheless, provide additional benefits on preferred terms to consumers who do not opt out, without being concerned that such offerings violate Regulation B or the Equal Credit Opportunity Act (ECOA). When sharing consumer information with affiliates, financial institutions are able to achieve and pass on to customers resultant cost savings and efficiencies. The final rule should make clear that passing on such cost savings (and thus having different pricing terms) to those consumers who do not opt out, is not violative of the ECOA or Regulation B. Alternatively, the Agencies may wish to remove this provision from the regulation and postpone consideration of the ideas it contains, until a rulemaking more focused on the ECOA is proposed.

NYBA appreciates the opportunity to comment on this important subject. If you have any questions, please do not hesitate to call me or Roberta Kotkin, General Counsel, at (212) 297-1684. Thank you.

Sincerely,



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