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Board Docket No. R-1082
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December 4, 2000

COMMENTS OF THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES ON PROPOSED FAIR CREDIT REPORTING ACT REGULATIONS

The National Association of Mutual Insurance Companies ("NAMIC") respectfully submits to the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision (collectively, "the Agencies") these comments on the proposed Fair Credit Reporting Act ("FCRA") regulations published in the Federal Register on October 20, 2000.[1]

NAMIC is a full-service national trade association with more than 1,200 member companies that underwrite 39 percent ($118 billion) of the property/casualty insurance premiums in the United States. NAMIC's membership includes four of the eight largest property/casualty carriers, every size regional and national property/casualty insurer and hundreds of farm mutual insurance companies. NAMIC recently established a federal savings and loan association, and thus is directly subject to the regulations of the Office of Thrift Supervision. Many of NAMIC's member companies also are individually subject to one or more of the Agencies' jurisdiction. Both because of these direct regulatory relationships and because the Agencies' FCRA regulations presumably will guide enforcement of the FCRA by the Federal Trade Commission ("FTC"), NAMIC and its members have a significant stake in the outcome of the Agencies' FCRA rulemaking.

Our comments focus on (1) those aspects of the proposed regulations that we believe should be clarified or otherwise amended and (2) the particular issues on which the Agencies have specifically solicited comments. Our proposed amendments are designed to provide what we believe is necessary to ensure appropriate reconciliation of the FCRA regulations, the regulations implementing the Gramm-Leach-Bliley Act of 1999 ("GLBA"), other functional regulator rules and the medical information privacy standards soon to be promulgated by the Department of Health and Human Services ("HHS"). In particular, our comments are aimed at facilitating financial institutions' development of appropriate privacy policies and ensuring that the FCRA affiliate information-sharing restrictions are both meaningful for consumers and practicable for integrated financial institutions operating in the context of financial modernization.

All references herein to "FR" are to the Federal Register version of the proposed FCRA regulations. All references to "the Preamble" are to the Agencies' introductory commentary published with the joint notice of the proposed rulemaking. References to specific proposed regulations are to the proposed sections of chapter 12 of the Code of Federal Regulations, as referenced in the Preamble.

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[1] Fair Credit Reporting Regulations, 65 Fed. Reg. 63,120 (proposed Oct. 20, 2000) (to be codified at 12 C.F.R. Parts 41, 222, 334 and 571).

A. Implementation Date

The Agencies have stated in the Preamble that, in light of the requirement in the GLBA that a financial institution include its FCRA opt out notice in certain notices mandated by the GLBA privacy regulations, including annual notices to customers, "the Agencies anticipate that financial institutions will design their information-sharing policies and practices taking into account both the privacy regulations and the regulations implementing the FCRA.[2] We agree with the Agencies that a coordinated approach to privacy protection, taking into account not only the GLBA regulations and the FCRA rules, but also the anticipated HHS privacy regulations, will be critical for financial institutions. However, we do not believe it is reasonable to assume that financial institutions can effectively ensure compliance with the FCRA regulations in providing the initial privacy notices required by the GLBA regulations, which require compliance by July 1, 2001. To meet the GLBA regulations' compliance deadline, financial institutions necessarily are readying their initial GLBA privacy notices now, including provisions in those notices regarding consumers' opt out rights under the FCRA. Given the timing of the Agencies' current FCRA rulemaking, it is simply not practicable to anticipate that financial institutions will be able to take account of the final FCRA regulations in their initial GLBA privacy notices. Some NAMIC member companies, for example, will be sending initial GLBA privacy notices to more than 37 million customers; to accomplish this within the GLBA compliance timeframe, they must finalize the notices very early in 2001. We assume it will take the Agencies at least two months following the close of the FCRA rulemaking comment period to produce and publish the final FCRA regulations. Accordingly, we strongly urge that the Agencies' postpone the date for compliance with the FCRA regulations until the first annual notice date for the GLBA privacy notices, or, alternatively, at least 12 months following publication of the final FCRA regulations.

B. Definition of Consumer Report (Section __.3(g))

1. *Credit Header-type Identifiers*

Proposed Section __.3(g)(2)(i) excludes from the definition of "consumer report" "[a]ny report containing information solely as to transactions or experiences between the consumer and the person making the report." Neither the FCRA nor the proposed regulations explicitly state that such "transaction or experience" information includes identifying data, such as a consumer's name, address or Social Security number, that is used solely for purposes of identifying the consumer. However, the FTC has determined that such information is not within the scope of a "consumer report" because it does not bear on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.[3] Particularly in light of

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[2] FR 63,121.

[3] See In re Trans Union Corp., FTC Docket No. 9255, 2000 WL 257766 (FTC Feb. 10, 2000) at *22 ("we find that the 'bearing on' limitation, set forth in Section 603(d) excludes from the FCRA's definition of consumer report certain predominantly identifying information").

recently heightened attention to consumer privacy issues, we believe that it would be helpful both to consumers and financial institutions for the FCRA regulations to expressly state that mere "identifier" information is not "consumer report" information. Accordingly, we propose that Section __.3(g)(2)(i) be amended to read (new proposed language is in italics):

> (i) Any report containing information solely as to transactions or experiences between the consumer and the person making the report, *including any identifying information, such as name, address, Social Security number or other personal characteristic, that is used or expected to be used solely for the purposes of identifying the consumer.*

2. *Joint Users*

As currently interpreted by the FTC, the FCRA permits sharing of consumer report information among affiliates without the provision of an opt out notice when those affiliates are "joint users" of the information for permissible purposes authorized by the consumer to whom the information pertains. See FTC Staff Opinion Letter re "Joint users" - FCRA §§ 603(f) and 604(a)(3)(A)" (Nov. 20, 1998) (letter from Helen G. Foster, Esq. to Linda J. Throne). We believe this interpretation of the FCRA should be codified in the Agencies' FCRA regulations, in order to prevent confusion regarding the application of the regulations to "joint users." To accomplish this, we propose inserting an additional exclusion to the definition of "consumer report" in proposed Section __.3(g). Specifically, we propose inserting after paragraph (ii) of Section __.3(g)(2) ("Exclusions") a new paragraph (iii), to read as follows:

> (iii) Any communication of opt out information among affiliates, either directly or indirectly through an independent contractor agent or broker representing those affiliates, if those affiliates are jointly involved in uses of the information for permissible purposes under section 604 of the Act (15 U.S.C. 1681(b)) and the consumer initiated those joint uses by the affiliates prior to the communication.

The currently paragraphs (iii) through (vi) in proposed Section __.3(g)(2) would follow, renumbered (iv) through (vii).

C. Communication of Opt Out Information to Affiliates (Section _.4)

Proposed Section _.4 lists three circumstances under which, collectively, a financial institution's communications of opt out information about a consumer is not a consumer report. We believe it is important to include an additional circumstance, apparently contemplated by the Agencies but not expressly stated in the proposed regulations, which is the communication of such information based on a consumer's consent. Such an exception to the opt out notice requirement is included in the Agencies' GLBA regulations,[4] and confirming its existence by express reference in the FCRA regulations as well would provide meaningful consistency.[5] Accordingly, we propose adding, as a new paragraph of Section _.4, an exception independent of the existing three-condition exception, to be followed by the existing subsections of that Section. Specifically, we propose substituting subsection (a) of proposed Section _.4 with the following:

> (a) The consumer has consented, in a written authorization at the time of application for a product or service of a financial institution, to the sharing of opt out information among the financial institution's affiliates, or

The existing subsections of proposed Section _.4 would follow, and be redesignated accordingly.

D. Categories of Opt Out Information (Section _.5)

The Agencies have requested comment on the extent to which the categories of information listed in proposed Section _.5(d)(2) can be treated as consistent with similar categories in the GLBA privacy regulations in order to reduce compliance burdens and consumer confusion.[6] We believe that the first two categories listed in proposed Section _.5(d)(2) (information (i) from a consumer's application or (ii) from a consumer's credit report) can be treated as consistent with the GLBA privacy regulations' categories. We do not believe, however, that the second two categories listed in proposed Section _.5(d)(2) (information (iii) obtained by verifying representations made by a consumer or (iv) provided by another person regarding its employment, credit, or other relationship with a consumer) can be so treated. We find these categories obscure and we believe that their addition to the list of categories of information already required to be included in an institution's privacy notice would be both confusing to consumers and burdensome (as well as confusing) for financial institutions. Further, we believe that, if

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[4] 12 C.F.R. §§ 40.15(a)(1), 216.15(a)(1), 332.15(a)(1) & 573.15(a)(1).

[5] We also note that where a consumer has affirmatively consented to affiliate information-sharing, not only would it be an unwarranted expense for each affiliate to have to request separate consumer reports on the same consumer, but also such multiple requests may be adversely treated by credit scoring models to the detriment of the consumer.

[6] FR 63,123.

any categories of opt out information are to be identified in the FCRA regulations (we note that the FCRA itself does not identify any such categories), they should be those reflected in the legislative history of the FCRA, see Preamble, FR 63123, and therefore be limited to the first two categories listed in proposed Section _.5(d)(2).

E. Reasonable Opportunity to Opt Out (Section _.6)

1. *Proposed 30-day waiting period*

The Agencies have sought comment on whether the proposed time period of 30 days is the appropriate time period to require financial institutions to provide, before sharing opt out information with affiliates following the delivery of the opt out notice, for the consumer to opt out.[7] We do not believe 30 days is uniformly a reasonable period of time for this purpose. For example, if an institution provides an opt out notice electronically, a consumer should be able to maximize the benefits associated with having information shared among the institution's affiliates by providing an immediate response declining the offer to opt out.

To address these considerations, we propose that Section _.6(3) be amended to read as follows (proposed new language is in italics):

> (3) By electronic means. A financial institution notifies the consumer electronically, and it provides at least 30 days after the date that the consumer acknowledges receipt of the electronic notice *or, if the notice is included in an electronic application for a product or service of the institution that the consumer may complete electronically, it provides at least until it receives the consumer's electronic message containing the completed application.*

2. *Continuing opportunity to opt out*

Proposed Section _.6(c) provides: "A consumer may opt out at any time." We believe it is important to clarify that a consumer's right to opt out, if exercised, prohibits an institution that is not a consumer reporting agency from sharing with its affiliates opt out information subsequent to receipt of the consumer's opt out direction (and during any preceding "reasonable period of time" the consumer has to provide such direction after delivery of the related opt out notice). For example, a consumer may have previously declined opt outs offered by a particular financial institution, but, upon receiving a new opt out notice from the institution subsequent to adoption of the FCRA regulations, might choose to opt out. It is important that the consumer understand that the opt out will apply only to future information sharing, consistent with proposed Section _.10 ("Time by which opt out must be honored"). Accordingly, to make clear that the regulations do not impose any requirement to retrieve or otherwise take action with respect to information

[7] See FR 63,123.

about a consumer that was shared with affiliates prior to the receipt of the same consumer's opt out instruction, we proposed that Section _.6(c) be amended to state (new proposed language is italicized):

> (c) Continuing opportunity to opt out. A consumer may opt out at any time *with respect to sharing among a financial institution and its affiliates of opt out information not previously shared among the affiliates prior to receipt of the opt out notice.*

F. Time By Which Opt Out Must Be Honored (Section _.10)

The Agencies have sought comment on whether the regulations should specify a fixed number of days that would be deemed a "reasonably practicable" period of time for complying with a consumer's opt out direction.[8] We do not believe the regulations should contain any such specified time period, but rather should retain the Agencies' proposed statement that the institution "must comply with the opt out as soon as reasonably practicable" after the institution receives it. There will be a number of factors influencing what constitutes a "reasonably practicable" period of time in this context, depending on the facts and circumstances surrounding the institution, including its technological capabilities, complexity, etc., that would make the specification of a particular compliance deadline inappropriate. We therefore recommend that the Agencies retain the flexibility provided by the current wording of proposed Section _.10.

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We appreciate the opportunity to comment on the proposed regulations. If you have any questions regarding our comments, please contact Michael Mierzewski or Nancy Perkins of Arnold & Porter by phone at (202) 942-5995 or (202) 942-5065, respectively, by fax at (202) 942-5999, or by e-mail to mierzmi@aporter.com or perkina@aporter.com.

[8] FR 63,124.