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THE FINANCIAL SERVICES ROUNDTABLE

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December 4, 2000

2000 DEC -5 A 9:01

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

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

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

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

Re: Fair Credit Reporting Regulations

Dear Chairman Tanoue, Director Seidman, Chairman Greenspan, and Comptroller Hawke:

The Financial Services Roundtable[1] appreciates the opportunity to comment to the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision (collectively, "the

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[1]The Financial Services Roundtable is a national association whose membership is reserved for 100 companies selected from the nation's 150 largest integrated financial services firms. The member companies of the Roundtable engage in a wide range of financial activities, including banking, securities, insurance, and other financial service activities. The mission of the Roundtable is to unify the leadership of large, integrated financial service companies in pursuit of three primary objectives:

1. To be the premier forum in which leaders of the United States financial services industry determine and influence the most critical public policy issues that shape a vibrant, competitive marketplace and a growing national economy;

2. To promote the interests of member companies in federal legislative, regulatory, and judicial forums; and

3. To effectively communicate the benefits of competitive and integrated financial services to the American public.

The Roundtable is a CEO-driven association that advocates the interests of integrated financial institutions primarily in the Congress, the federal agencies, and federal courts.

agencies") on the joint notice of proposed rulemaking on the Fair Credit Reporting Act ("FCRA") Regulations. The Roundtable appreciates the efforts of the agencies to make the proposed rules uniform among the agencies and to ensure that the content requirements for an FCRA opt out notice are consistent with the privacy notice required by the Gramm-Leach-Bliley Act ("GLBA"). Both of these objectives will ease the compliance burden on affected institutions and benefit American consumers.

First, as noted in The Financial Services Roundtable's letter to the agencies, dated November 15, 2000, the Roundtable feels strongly that the FCRA regulations as proposed would complicate and delay our member companies' compliance with the distribution of the initial privacy notices required by GLBA. The Roundtable thus respectfully reiterates its recommendation that the proposed FCRA regulations go into effect at the same time that financial institutions send out their first annual GLBA privacy notice or distribute a revised privacy notice for reasons unrelated to FCRA. If a Bank has sent out a notice prior to the date the final FCRA regulations are issued, then the FCRA disclosure should be required in the next annual notice after the effective date. Alternatively, the agencies could make the proposal effective in 12 to 18 months. Under either alternative, the agencies should clarify that the new FCRA notice requirements do not apply retroactively. Such a clarification would permit institutions to proceed with the distribution of their initial GLBA privacy notices. It also would eliminate any uncertainty over the application of the new FCRA regulations to prior FCRA notices.

In addition to our concerns with the effective date, The Financial Services Roundtable has the following comments on the substance of the proposed FCRA regulations.

Reasonable Opportunity to Opt Out (Proposed §__.6)

The Financial Services Roundtable supports the concept that an institution should provide its customers with a reasonable time within which to elect to opt out prior to the commencement of information sharing. However, the Roundtable strongly objects to the proposed mandatory 30-day waiting period before information may be shared with affiliates. Such a bright line waiting period would inhibit our member companies' abilities to satisfy their customers' needs in a timely fashion. It would have the anti-consumer effect of denying consumers information 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 that institution's insurance affiliate regarding homeowner's insurance, and the value of that information may well 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.

In addition, forcing a rigid 30-day waiting period would impose enormous and undue burdens on systems operations. It is extremely difficult for institutions to track when a customer receives the notice for purposes of calculating the 30-day period. Virtually no financial institution has a tracking system currently in place, and the implementation of such a complex tracking system would be extremely onerous and expensive. It would require a massive overhaul of institutions' computer databases and systems and would require institutions to capture new and cumbersome information.

Moreover, imposing a 30-day waiting period would directly contradict the understanding that industry leaders had with Congress when both GLBA and the 1996 FCRA amendments were enacted. Congress made a conscious decision not to define "reasonable opportunity" more precisely in order to allow for significant cross-marketing and risk-control opportunities, benefiting both financial institutions and their customers. The "reasonable" time period, for purposes of determining whether a financial institution provided a reasonable opportunity for the customer to opt out, will vary depending upon the medium used for the delivery of the opt out notices. 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 to opt out. The agencies thus should reduce, rather than increase, the number of examples in this section in the final rule, and should not include the 30-day requirement in the examples.

In any event, while it is important that the consumer understand that the right to opt out may be exercised at any time, it is equally important that the consumer understand that the opt out will apply only to future information sharing. The agencies thus should clarify that a consumer's right to opt out, if exercised, prohibits an institution that is not a consumer reporting agency from sharing opt out information with its affiliates subsequent to receipt of the consumer's opt out. Additionally, the agencies should make clear that the regulations do not impose any requirement that an institution retrieve or otherwise take action with respect to information on a consumer previously shared with affiliates prior to the receipt of the same consumer's opt out instruction.

Definition of "Opt Out Information" (Proposed §__.3(k))

The Financial Services Roundtable believes that the proposed definition of "opt out information" in section __.3(k) is too broad. The agencies should clarify what falls under the umbrella of "opt out information," either by providing additional language or by providing additional examples in section __.5(d). In any event, the agencies should narrow the scope of the definition. As drafted, the rule would expand the type of information covered beyond what is considered a "consumer report" under the FCRA and inappropriately eliminate permissible uses of information under the FCRA. The agencies should make very clear that the notice and opt out requirements in the FCRA apply only to information that otherwise constitutes a "consumer report" under the FCRA and is being communicated by a consumer reporting agency.

Additionally, proposed section __.3(k) fails to reflect all of the exclusions from the definition of a "consumer report" contained in the FCRA. More specifically, proposed section __.3(k)(3), which covers transaction and experience information, should be expanded to explicitly cover the other exclusions from consumer reports in section 603(d)(2) of the FCRA, such as the consent exception. The agencies provided an example of the consent exception in the final GLBA privacy regulations. The agencies should explicitly recognize that financial institutions are able to share information through other means besides notice and opt out, including through express customer consent, under an agency relationship to service or process a consumer's accounts or transactions, or for fraud control purposes. The Roundtable thus feels that the final rule should make clear that notices are not required under the FCRA, that existing exceptions and exclusions to the FCRA under statutory language and regulatory interpretations are preserved, and that financial institutions may obtain and use customer consent to disclose FCRA information.

An area of particular importance to the Roundtable is retention of the "joint user exemption" currently recognized by the Federal Trade Commission ("FTC").[2] This exemption permits financial institutions to share consumer credit information with affiliates, without having to give notice and opt out, for purposes such as processing applications, making joint credit decisions, and providing back office data processing services. If this exemption is not preserved, many institutions that currently rely on this exemption would have to make radical changes that would be disruptive to their business practices and systems. The Roundtable respectfully recommends that the agencies explicitly reference the FTC's Staff Opinion Letter on this matter to clarify that the "joint user exemption" is fully applicable under the final FRCA regulations.

Duration of Opt Out (Proposed §__.11)

The Financial Services Roundtable opposes the requirement in proposed section___.11 that a consumer provide either written or electronic revocation. Such a requirement is not imposed by the FCRA and is inconsistent with the overall structure of the proposed regulations. The proposed regulations allow a customer to opt out orally but do not permit that same customer to withdraw that opt out election in the same manner. There is no logical reason for this distinction, and customers should not be forced to go through the effort of sending a written or electronic revocation for their choices to be deemed effective. The final regulations thus should explicitly provide for the oral revocation by consumers, both in person and by telephone. Such a revocation method is convenient to consumers and financial institutions alike.

Delivery of Opt Out Notice (Proposed §__.8)

The Financial Services Roundtable opposes the requirement in proposed section__.8 that financial institutions provide opt out notices in writing or, if the consumer agrees, electronically. This is, in effect, a blanket prohibition against oral notices. Nothing in the FCRA bars the provision of oral notices, and there is no reason to create a new and burdensome requirement for written or electronic notices, especially in cases where it would be most convenient and efficient to provide oral notice, such as when the customer establishes the relationship over the phone. Thus, the final rule should allow oral notice to remain consistent with the FCRA requirements.

As an alternative, if the agencies do require a written notice, the agencies should make it clear that a financial institution has the option to provide the opt out notice either by giving the notice in a form that a customer can retain, or allowing the customer to obtain another copy of the institution's then current opt out notice at a later time. The agencies should allow financial institutions to provide the initial notice orally, provided a written or electronic notice follows the oral notice within a reasonable time. In addition, 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, particularly since the notice must be provided annually as part of the GLBA privacy notice. It is important that the final rule provide financial institutions with this flexibility.

In addition, the proposed regulations could be read to require burdensome customer acknowledgments of receipt of electronic communications. If read in this manner, the proposed

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[2] *See* FTC Staff Opinion Letter to Linda J. Throne (November 20, 1998), which refers to "Joint users" – FCRA §§603(f) and 604(a)(3)(A).

regulations could 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 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. To avoid this illogical result, the final regulations should clarify that in requiring a consumer to acknowledge receipt of electronic communications, a consumer's "click-stream" response to a properly worded inquiry regarding receipt is sufficient. The use of "click-stream" customer acknowledgments is common practice under the E-Sign legislation and should be equally permitted under the FCRA.

The Roundtable also believes that the agencies should retain the joint opt out notice option in the final rule. Use of a joint notice, where appropriate, provides a way for financial institutions and their affiliates to reduce costs in providing the FCRA opt out notices. Also, financial institutions need this flexibility to determine how best to structure their FCRA notices to meet the needs of their customers.

Finally, the Roundtable believes that the provision on "joint consumers" in proposed section ___.8(f) needs further clarification. It is unclear from the proposed wording whether the agencies intend to require that all joint policyholders actually receive the notice. The Roundtable would be opposed to any such requirement. Under similar consumer protection regulations, such as the Federal Reserve Board's Regulation B, institutions only have to mail notices to the primary borrower or applicant. The Roundtable thus urges the agencies to include language in the final regulation specifying that institutions can satisfy the delivery requirement for joint consumers by mailing the opt out notice to the primary consumer.

Prohibition Against Discrimination (Proposed §__.12)

Section __.12(a) of the proposed rule indicates that if a consumer is an applicant for credit, the financial institution must not discriminate against the consumer if the consumer opts out of the institution's information sharing with affiliates. Simplistic and literal application of this discrimination rule may result in higher prices for all consumers. The agencies should make clear in the final rule that financial institutions can legally provide additional benefits and services to customers who decide not to opt out. Financial institutions should be able to reward those customers who allow the sharing of information without being concerned that these rewards may violate Regulation B. For example, an institution that uses a consumer report for multiple purposes rather than having to purchase multiple copies of a report, should be able to pass on those cost savings to consumers.

By sharing consumer information with affiliates, financial institutions are able to obtain, and forward to customers, significant cost savings and efficiencies. Ernst & Young recently released a study entitled "Consumer Benefits from Current Information Sharing by Financial Services Companies," which found that information sharing among financial institution affiliates provides consumers with more services at lower prices. Specifically, the study found that information sharing saves the customers of the Roundtable's ninety member institutions an average of $195 dollars and four hours per customer household per year. According to the study, the net benefit for all of these customers is a savings of $17 billion and 320 million hours per year. Finalization of the proposed regulation would deny these customers the cost benefits arising from affiliate sharing.

Contents of Opt Out Notice (Proposed §__.5)
The Financial Services Roundtable believes that the agencies should not require financial institutions to set a time limit on how long a consumer has to respond to the opt out notice before financial institutions may begin disclosing such information. This requirement is not contained in the FCRA, will likely be confusing to customers, and will create disequilibrium. For example, because the consumer has an ongoing right to opt out, stating that consumers have "X" days to respond could lead many consumers to believe that they have a right to opt out *only* during that time period. Also, the inclusion of such an approach would be inconsistent with the opt out notice provided in the final GLBA privacy regulations. To ensure that the final FCRA rule is not more burdensome than the privacy regulations, the rule should not require this additional notice requirement.

The Roundtable, however, supports proposed section __.5(b), which makes clear that an institution's notice can also state that an institution reserves the right to communicate certain types of information in the future. The agencies should retain this provision. Providing financial institutions with this flexibility enables institutions to take into account future practices, without having to go through additional customer notification costs and policy tracking procedures. In addition, this approach is consistent with the GLBA privacy regulations.

In addition, the Roundtable supports proposed section __.5(c), which explains that an institution may provide the consumer with the option of an opt out that covers only part of the information or certain affiliates. This partial opt out would allow institutions to provide consumers with a menu of options. The agencies should retain the partial opt out notice because it enables financial institutions to tailor opt outs to individual customer preferences.

Finally, the Roundtable believes that the agencies should require reference in opt out notices to only two categories: (1) the categories of opt out information that the financial institution may share; and (2) the categories of affiliates to whom the financial institution discloses opt out information. The disclosure of additional categories is unnecessary and will only complicate the overall FCRA disclosure and the privacy policy notices in which it will be included.

Reasonable Means of Opting Out (Proposed §__.7)
The Financial Services Roundtable strongly supports proposed section __.7(d), which permits an institution to require each consumer to opt out through a specific means, as long as that means is reasonable for that consumer. It is essential that the agencies retain this provision in the final rule. This approach has been used in other consumer notice laws, including the GLBA privacy regulations, and by allowing financial institutions to specify the means that a consumer must use to opt out, financial institutions will be able to effectively and efficiently receive and implement consumer opt out requests. In addition, the agencies should retain the examples used for reasonably convenient means of opting out, contained in proposed section ___.7(b).

Revised Opt Out Notice (Proposed §__.9)
The Financial Services Roundtable believes that the agencies should not require financial institutions to send revised opt out notices to consumers every time there is a change in the privacy policies of the institutions. Instead, the institutions should be allowed to provide such

information in the annual notices that must be provided by financial institutions to their customers.

Time By Which Opt Out Must Be Honored (Proposed §__.10)
The Financial Services Roundtable believes that the agencies should not set a fixed number of days for financial institutions to comply with consumer opt out requests. What constitutes a reasonably practicable time period will vary due to numerous factors, such as the technology used by the particular financial institution or the delivery method of the opt out notices. The time period should be sufficiently flexible to enable institutions, both large and small, to determine reasonable procedures for honoring customer opt outs. Moreover, the GLBA privacy regulations do not have a fixed time period and the final rule should not be more burdensome than the privacy regulation requirements.

Definition of "Clear and Conspicuous" (Proposed §__.3(c))
The proposed rule's definition of "clear and conspicuous" is generally consistent with the standard used in the GLBA privacy regulations. The Roundtable feels, however, that the agencies should clarify that "clear and conspicuous" as a standard can be complied with in one place for both the GLBA privacy disclosures and the FCRA disclosures.

Purpose and Scope (Proposed §__.1)
In the opening section on purpose and scope, the Federal Reserve Board should clarify which entities are specifically covered by its FCRA rule. Amendments to the FCRA made by GLBA clearly provide that the Board's FCRA rule applies to bank holding companies, financial holding companies, and their affiliates. The Federal Reserve Board should also make clear that its new FCRA affiliate sharing rule, and any other FCRA rules it adopts, apply to bank holding companies, financial holding companies, and their affiliates, and that those entities are subject solely to those Board rules. For bank holding companies and financial holding companies to have uniformity in compliance throughout the corporate entity, it is crucial that they are able to rely on the Federal Reserve Board's FCRA rules, as contemplated by the statute. In addition, a uniform application of the final rule would reduce the likelihood that a consumer could receive inconsistent or conflicting FCRA notices from affiliates within the same corporate family.

Examples (Proposed §__.2)
The Financial Services Roundtable supports the agencies' use of examples to provide guidance regarding how the requirements would apply in specific situations. Illustrative examples are helpful to financial institutions in determining how to comply with the obligations of the FCRA. At least at the outset, the agencies should use examples, rather than commentaries or questions and answers, because examples provide better guidance to institutions in implementing the FCRA rule as initially adopted. In addition, the agencies should retain in the final FCRA rule the statement that the examples are not intended to be exhaustive. This important statement clarifies that the examples set forth in the rule are just that, examples of how financial institutions may comply with the FCRA requirements and are not exhaustive means of compliance. Examples should not, however, be used to impose regulatory requirements where none exist in the underlying statute, as in the case of the agencies' "example" of a 30-day waiting period for a consumer to exercise an opt-out.

Also, the final FCRA rule should continue to state that compliance with an example or use of the sample notice, to the extent applicable, constitutes compliance with the requirements of the rule. This assures financial institutions that compliance with the examples constitutes compliance with the rule.

Thank you for considering The Financial Services Roundtable's views on these important issues. If you have any further questions or comments on this matter, please do not hesitate to contact me at (202) 289-4322.

Sincerely,

Richard M. Whiting

Richard M. Whiting