August 16, 2004

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments, RIN 3064-AC73
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: No. 2004-31

Communications Division
Public Information Room
Office of the Comptroller of the Currency
250 E Street, SW, Mailstop 1-5
Washington, DC 20219
Attention: Docket No. 04-16

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1203

Ms. Becky Baker
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: Fair Credit Reporting Affiliate Marketing Regulations; Proposed Rule
69 FR 42502 (July 15, 2004)

Dear Sir or Madam:

America's Community Bankers ("ACB")[1] is pleased to comment on the proposed Fair Credit Reporting Affiliate Marketing Regulations[2] issued by the federal banking agencies[3]. The proposed rule would implement the affiliate marketing notice and opt out provisions of the Fair

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[1] America's Community Bankers is the member-driven national trade association representing community banks that pursue progressive, entrepreneurial and service-oriented strategies to benefit their customers and communities. To learn more about ACB, visit *www.AmericasCommunityBankers.com.*

[2] 69 Fed. Reg. 42502 (July 15, 2004).

[3] The proposal has been issued jointly by the Office of the Comptroller of the Currency ("OCC"); the Board of Governors of the Federal Reserve System (the "Federal Reserve"), the Federal Deposit Insurance Corporation ("FDIC"), Office of Thrift Supervision ("OTS") and the National Credit Union Administration ("NCUA"), collectively referred to as the agencies.

and Accurate Credit Transaction Act of 2003 (the "FACTA")[4]. The proposal would require institutions that share customer information with corporate affiliates to provide customers with the ability to chose not to have such information used for marketing purposes.

ACB Position

Responsible information sharing practices allow community banks to facilitate transactions, protect their customers, understand customers' financial needs, and improve overall customer service. The benefits from responsible information sharing can result in significant economic benefit for both consumers and financial institutions. ACB supports the efforts of the agencies to develop a regulation that satisfies the intent of the FACTA, while preserving the ability of community banks to share information among affiliates.

While we generally support the proposal we have several specific concerns. ACB suggests the agencies:

- Clarify some of the key definitions in the proposal;
- Broaden the scope of pre-existing business relationships to better reflect the statutory language of FACTA;
- Include guidance for "clear and conspicuous" disclosure;
- Reconsider the requirements for electronic notices; and
- Allow institutions at least one year to come into compliance.

Background

FACTA establishes a new restriction in the Fair Credit Reporting Act (the "FCRA")[5] for solicitations made for marketing purposes when those solicitations are based on information received from an affiliate. The restrictions apply to a broad category of customer information beyond what would traditionally be considered a consumer report. The proposal refers to this information as "eligibility information" and it includes transaction and experience information typically exempt from the definition of a consumer report.

FACTA prohibits any business from using eligibility information obtained from an affiliate for marketing purposes without first providing the consumer with notice and an opportunity to opt out of receiving such marketing solicitations. Exceptions exist for customers with whom the affiliate has some sort of pre-existing business relationship and in cases where the customer initiates contact with the organization.

The new affiliate marketing restrictions of FACTA are in addition to existing FCRA notice and opt-out requirements relating to sharing consumer report information among affiliates. Additionally, information-sharing restrictions with nonaffiliated third parties established by the Gramm-Leach-Bliley Act (the "GLBA")[6] continue to apply. As such, many institutions will be

[4] Pub L. No. 108-259 (2003).
[5] Pub. L. No. 91-508 (1970).
[6] Pub. L. No. 106-102, Title V (November 12, 1999).

subject to a minimum of three distinct privacy notice and information sharing requirements: (1) FCRA affiliate sharing; (2) FCRA affiliate marketing restrictions; and (3) GLBA privacy notices and third party opt out.

Clarification of Key Definitions

The proposal includes several key definitions that ACB suggests should be clarified in order to ensure regulatory compliance and minimize legal risks. Additionally, the definition section for the proposed OTS regulations is not consistent with the proposed definitions of the other agencies. For example, the proposed regulations for the Federal Reserve, OCC, FDIC and the NCUA all define the term consumer as "an individual."[7] In what appears to be an unintended omission, the proposed definition section of the OTS regulations[8] omits the term. Several other key terms are similarly missing from the proposed OTS definitions section. ACB recommends that the OTS proposed regulations be revised to be consistent with that of the other regulators. ACB also suggests the agencies revise the proposed definitions for the following terms:

Affiliate –In the proposal, the term affiliate means "any person that is related by common ownership or common corporate control with another person." In the preamble, the agencies acknowledge that there are several variations of this definition in banking law and regulation and request comment on whether the differences among the definitions are significant. For example, the privacy regulations required by the GLBA define the term as "any company that controls, is controlled by, or is under common control with another company."[9] GLBA provides specific definitions for what is meant by control, including control of 25 percent or more of the financial interests of an organization and control over the selection of the board of directors. While the definitions appear to be functionally equivalent, ACB requests that the agencies use the definitions developed for purposes of the implementing regulation for GLBA for "affiliate" and "control." By establishing a consistent definition, the agencies will help avoid any potential confusion and facilitate the creation of a more simplified consumer notice with a single definition.

Consumer – The proposed definition of the term "consumer" as an "individual" is inconsistent with that of the regulations issued to implement Title V of GLBA. This inconsistency makes it difficult for institutions to harmonize privacy related disclosures required by both the FCRA and GLBA. The use of the terms "consumer" and "customer" interchangeably within the statutes creates compliance challenges for financial institutions. Moreover, we note that the FCRA applies directly to natural persons and that its application should not apply to information relating to any business or incorporated entities. Previously, as part of the GLBA implementing regulations, the agencies have developed regulations, official commentary, and examples that provide a clear definition of the terms "consumer" and "customer" that minimize confusion relating to when specific notices are required. ACB requests the agencies to establish that the term consumer has the same meaning as defined by the appropriate regulations issued by each

[7] 69 Fed. Reg. 42520, 42525, 42529, 42538 (July 15, 2004).
[8] 69 Fed. Reg. 42502 (July 15, 2004).
[9] 12 CFR 40.4

agency pursuant to Section 509 of the GLBA and rely on the definitions established by the GLBA for other terms wherever possible.

Eligibility Information – As required by the statute, the information covered by the affiliate sharing provision is broad and includes transaction and experience information typically exempted as part of the definition of a consumer report. The agencies have proposed a new term, "eligibility information," that attempts to describe the information covered. In defining the term, the agencies have attempted to conform the regulatory definition to the statutory definition that relies on a series of exceptions. ACB recommends that the agencies create a simple clear definition of the term that removes any ambiguity as to what is covered. The definition should also articulate that non-sensitive information, such as names and addresses of consumers, is not considered eligibility information. The Federal Trade Commission has consistently interpreted the FCRA to exclude from the definition of "consumer report" lists of names and addresses of consumers with no further classification of the consumers.[10] ACB believes that it is important for the agencies to codify this interpretation to insure consistent compliance standards for all provisions in the FCRA.

Pre-Existing Business Relationships

The FACTA provides the agencies with broad authority to expand the circumstances that would constitute a "pre-existing business relationship." This is a key provision of the law intended to allow businesses of all types the flexibility necessary to maintain and develop customer relationships. ACB supports the inclusion by the agencies of several illustrative examples of what would be considered a pre-existing business relationship and how information can be used by affiliates. ACB urges the agencies to review and expand on these examples over time as necessary.

The agencies asked for comment on the use of "constructive sharing" of eligibility information among affiliates. This is described as the practice by which an institution conducts marketing on behalf of an affiliate based on criteria established by the affiliate with customers of the institution. While the example is not discussed in the proposed regulatory language, the agencies request for specific comment in the preamble indicates that one may be provided in the final regulations. ACB believes that a specific example regarding constructive information sharing is unnecessary and that institutions should be able to conduct marketing on behalf of their affiliates. Banks should have the ability to present products and services to their customers that best meet their needs whether the source is an affiliate, joint marketing partner, or other third party. In the example of "constructive sharing" provided, no information about the consumer flows to the affiliated entity for which the marketing is being conducted. Nothing in the statutory language of the FACTA indicates that lawmakers had intended to limit the discretion of banks (or any other business) to present products or services to their customers. Moreover, defining such an example would have the unintended consequence of making it easier for an organization to market the products of nonaffiliated third parties over those provided within the corporate family of companies.

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[10] 16 CFR Part 600, Appendix—Commentary on the Fair Credit Reporting Act.

Additionally, as defined in the FACTA, the term "pre-existing business relationship" is "a relationship between a person, or a person's licensed agent, and a consumer." In the context of this proposed regulation, the term "person" would most often represent a financial services firm subject to the regulatory authority of one of the agencies. In the proposed regulations, the agencies omitted the term "a person's licensed agent" from the definition. ACB believes that the statutory language in this regard is clear, and that the definition should be revised to include licensed agents. ACB also suggests that the agencies clarify in an example that licensed agents include the financing of products provided through a franchised dealer relationship.

Clear and Conspicuous Standard Creates Potential Liability

The FACTA requires that affiliate sharing opt out notices be "clear, conspicuous and concise." This standard is included in the proposed regulations and is more fully articulated in the preamble discussion in proposal. The subjective definition of "clear and conspicuous" is open to broad interpretation, and therefore creates potential liability for institutions. Similar disclosure requirements provided in the GLBA limit the authority of a consumer to bring legal action against the institution. No such limits exist in this section of the FACTA. The discussion in the preamble outlines reasonable expectations for what would be considered "clear and conspicuous" and ACB suggests that the agencies incorporate similar language as an example in the regulation.

ACB urges the agencies to add a provision to the final regulations that would provide reasonable protection for banks against liability and administrative penalties for unintentional compliance errors, if the bank corrects those errors promptly after being made aware of them. In providing these protections, the agencies can look to the Truth in Savings Act, which contains a provision creating safe harbors against unavoidable errors and the ability to correct errors in a timely manner without incurring liability.[11]

Electronic Notice Confirmation Requirement Unnecessary

The agencies have proposed that when communicating opt out disclosure information electronically that a consumer must acknowledge receipt of that communication prior to allowing any affiliate to use eligibility information for marketing purposes. The proposal appears in two examples in the proposed rules (§__.22.(b)(ii) and §__.24(b)(iii)). This repetitive use of examples featuring consumer acknowledgement make it quite likely that courts, examiners and others will consider acknowledgement necessary before an institution "may reasonably expect that a consumer will receive actual notice". ACB believes that this requirement is unnecessary and inconsistent with the requirements outlined in the proposal for delivering notices and the related opt out requirements of the privacy notices required by GLBA. Moreover, we believe that the proposal does not comply with the clear language of the statute to establish an opt out methodology for affiliate sharing because it effectively creates an opt-in requirement for notices sent electronically, and an opt-out approach for all other types of notices.

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[11] 12 USC 4310, P. L. 102-242, 105 Stat. 2236 (Dec. 19, 1991).

In outlining the various ways an institution may deliver opt out notices; the agencies indicate that for notices provided electronically, compliance with either the electronic disclosure provisions described in this subsection (§__. 24), or with provisions of section 101 of the Electronic Signatures in Global and National Commerce Act (the "ESIGN Act")[12] is acceptable. ACB supports the agencies explicitly incorporating the ESIGN Act into the requirements for delivering notices. However, in a separate subsection (§__. 22) the agencies require consumers to acknowledge receipt of notices sent electronically. No such requirement exists in the ESIGN Act for ongoing electronic communication with a consumer. ACB believes this is an inconsistent application of the ESIGN Act, and that the consumer acknowledgment requirement for electronic notices should be removed.

The ESIGN Act establishes a rigorous legal framework for the legal recognition of electronic signatures, contracts, and other records. As outlined in section 101 of the ESIGN, a consumer must affirmatively consent to receiving electronic records and must be provided with detailed information that describes their rights to withdraw their authorization at any time along with instructions on how to obtain a paper copy of the document. The consumer must also demonstrate that he or she has the ability to access information in the electronic format provided. ACB believes strongly that the provisions of the ESIGN Act should govern the communication of electronic records.

If institutions are required to get acknowledgements before delivery of electronic notices becomes effective, institutions will have to send paper notices to be assured of compliance with the rule. It is unclear why the agencies would require paper notices in this case, when virtually every other regulatory disclosure can be made electronically if the consumer wishes. The ACB does not believe that it is wise to block consumers' ability to choose to receive information electronically.

Additionally, the agencies selectively relied on official examples of notice delivery provided by the privacy regulations required by GLBA. Several examples of acceptable notice delivery are consistent with those provided in GLBA, however, the list is incomplete. Pursuant to the examples provided in the GLBA, there is no requirement for a consumer to acknowledge receipt of a privacy statement and opt out notice required by GLBA. The regulations implementing these provisions of the GLBA include an example that indicates it is unreasonable to expect delivery of privacy statements and opt out notices when sending "the notice via electronic mail to a consumer who does not obtain a financial product or service from you electronically."[13] The logical corollary to this example is that it is reasonable to send such notices to consumers who agree to obtain a financial product or service electronically. ACB believes that the procedures established by the GLBA for communicating and receiving opt out notifications should be the model used for FACTA affiliate sharing opt out requirements. This will allow institutions to create a consistent customer experience for handling data use preferences.

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[12] Pub. L. No. 106-229 (June 30, 2000).
[13] 12 CFR 332.9(b)(2)(ii)

Effective Date

The proposal would provide institutions with six months after the date on which the final regulations are issued to be in compliance with the FACTA affiliate marketing restrictions. ACB believes that six months does not provide adequate time for institutions to evaluate the new requirements, develop an appropriate compliance strategy, and train staff as needed.

ACB requests that the agencies provide that institutions will have one year from the time the proposal is published in the *Federal Register* to come into compliance with the affiliate marketing regulations. Should the agencies believe that a shorter implementation timeframe is required to meet a FACTA statutory deadline, ACB suggests the agencies establish a separate effective date and mandatory compliance date as was done for the privacy regulations issued to implement GLBA. In the GLBA privacy rulemaking, the agencies established an effective date of November 13, 2000, however, institutions were granted with an additional seven months until July 1, 2001 to be in full compliance with the regulation.

Conclusion

ACB appreciates the opportunity to comment on this important matter and supports the federal banking agencies efforts to promulgate effective and workable regulations for affiliate marketing. We stand ready to work with the agencies as this regulation is developed. Should you have any questions, please contact the undersigned at 202-857-3148 or via e-mail at rdrozdowski@acbankers.org, or Charlotte Bahin at 202-857-3121 or via e-mail at cbahin@acbankers.org.

Sincerely,

Robert C. Drozdowski
Vice President
Payments and Technology Policy