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NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

700 11th Street, NW
Washington DC 20001

REGULATORY & INDUSTRY
RELATIONS DEPARTMENT

Joseph M. Ventrone
Managing Director
202.383.1095
Fax 202.383.7568

August 5, 2004

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

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

Office of the Comptroller of the Currency
Mail Stop 1-5
250 E Street, SW
Washington, DC 20219
Docket No. 04-16; RIN 1557-AC88

Office of Thrift Supervision
Regulations Comments
Chief Counsel's Office
1700 G St., NW
Washington, D.C. 20552
No. 2004-31; RIN 1550-AB90

RE: Fair Credit Reporting Affiliate Marketing Regulations

Dear Sir or Madam:

The NATIONAL ASSOCIATION OF REALTORS® (NAR) appreciates the opportunity to provide comments to the Federal Banking Agencies (FBAs) on the proposed rule required by section 624 of the Fair Credit Reporting Act (FCRA), added by the Fair and Accurate Credit Transactions Act of 2003 (FACT Act). The FBAs' proposed regulations generally prohibit a person or entity from using information received from an affiliate to solicit a consumer for marketing purposes, unless the consumer receives notice and an opportunity and simple method

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to opt out. The proposed FBA rules apply to affiliates of insured depository institutions and other entities regulated by the FBAs

NAR represents more than 1,000,000 real estate professionals engaged in all aspects of the residential and commercial real estate business including mortgage lenders and real estate settlement services and some 1,500 state and local associations of REALTORS®.

Impact on the Real Estate Industry

To the extent real estate firms are involved in sharing eligibility information with affiliates, or receiving eligibility information from affiliates, for marketing purposes, they will be subject to the Federal Trade Commission (FTC) affiliate marketing regulations. The FBA regulations, for the most part, will not apply to real estate brokerage, leasing, or management because these are commercial activities, not financial, and real estate firms generally are not affiliated with banks. Some state laws, however, permit state-chartered banks to affiliate with real estate firms. In addition, federal savings associations may own a real estate firm as a service company subsidiary, and a grandfathered unitary thrift holding company may do so as well (whether or not there is a thrift in the chain of ownership). In these cases, both the FBA and FTC regulations would apply. Accordingly, NAR is submitting comments on the FBAs' proposed rules, consistent with the comments we have already submitted to the FTC.

REALTORS® Committed to Consumer Privacy

Trust is foundation of the relationship between a REALTOR® and a consumer. And this relationship is the livelihood of REALTORS®. Consumers must trust that the REALTORS® to whom they provide personal or financial information will protect what is confidential and use the balance of information in an appropriate fashion that is consistent with promoting their best interest. To cement this trust, REALTORS® value the privacy of their clients and are committed to protecting their personal financial information.

Real estate licensees protect confidential consumer information as the result of the fiduciary responsibilities imposed by most state real estate laws. The NATIONAL ASSOCIATION OF REALTORS® Code of Ethics and Standards of Practice reinforce the fiduciary responsibilities of REALTORS® to protect consumer information.

Exceptions Triggered by Oral, Electronic, or Written Communication

The new affiliate marketing limitations do not apply to an affiliate that uses the information "in response to a communication initiated by the consumer" or "in response to solicitations authorized or requested by the consumer." NAR applauds the FBAs for clarifying that these statutory exceptions may be triggered not only in writing but also orally and electronically.

NAR believes it is extremely important also to permit oral communication as an acceptable form of consumer consent. Permitting only written or electronic communications would have costly unintended consequences that are disproportionate to the good it would seek to address and would harm consumers. This would be the case, for example, in the situation where quick action is necessary if a consumer is going to be able to benefit from an affiliate's services within a very short timeframe.

Recommendation. As for electronic communications, NAR requests that the FBAs make explicit in the final rule that it means both e-mail and facsimile transmissions. We assume you at least intend to permit e-mail communications. Specifying both e-mail and facsimile communication would be extremely helpful to give consumers the broadest choice, which promotes the public interest. It will also avoid uncertainty and the need for the agencies to interpret the rule.

Regulatory Burden

NAR is concerned about the extent which Congress has imposed yet another layer of regulatory burdens on our members. These proposed rules are limited to the sharing of "eligibility information" between affiliates for the purpose of making or sending marketing solicitations. The Gramm-Leach-Bliley Act and FCRA impose different, but overlapping, restrictions on sharing of consumer information with or among affiliates. NAR appreciates the FBAs' strong support for reducing regulatory burden on the institutions you regulate and urges you to work with Congress, perhaps in connection with the decennial deregulation initiative mandated by the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), to streamline the current mishmash.

Duplicative Coverage

Both the FTC and the FBA regulations apply to a real estate firm affiliated with a federal savings association or state bank. While the regulations appear to be substantively the same, being subject to two sets of requirements has the inherent regulatory burden of having to monitor both sets of regulations for applicable changes and agency interpretations. If the law permits, we urge you to work with FTC to tailor the regulations so only one applies to any one individual or entity. If the law does not permit, we urge you to work with Congress, perhaps in connection with the EGRPRA deregulation initiative, to remove the existing overlap.

Implementation Period

The FACT Act requires you to issue final regulations implementing the affiliate marketing requirements by September 4, 2004, and to make them effective within six months. You asked for comment on setting a later date for compliance. NAR requests you set a

compliance date 12 months from the effective date of the regulations. This will provide sufficient time for affected entities and individuals to learn about their new duties, establish compliance procedures, and coordinate with existing privacy notices. A long lead time is especially appropriate for small businesses, such as real estate firms, that are affected not only by this new requirement but also with other FACT Act requirements and additional new compliance requirements for the Do-Not-Call, Do-Not-E-Mail and, potentially, unsolicited fax requirements in the early months of 2005.

Conclusion

In sum, NAR appreciates the FBAs' decision to permit oral communications, requests that the final rule specify that electronic communication includes both e-mail and facsimile communications, and urges you to set a compliance deadline that takes effect 12 months from the effective date of the final rule.

The NATIONAL ASSOCIATION OF REALTORS® appreciates the opportunity to comment and stands ready to work with the FBAs on this and other consumer privacy-related issues.

Sincerely,

Joe Ventrone
Managing Director
Regulatory and Industry Relations Department