The Huntington National Bank
Legal Department
Huntington Center
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August 16,2004

To: regs.comments@occ.treas.gov

John D. Hawke
Comptroller of the Currency
Office of the Coinptroller of the Currency
250 E Street S.W.
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Attn: Docket Number 04-16

To: regs.comments@federalreserve.gov

Jennifer J. Johnson
Secretary of the Board
Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue, NW
Washington, D.C. 2055 1

Attn: Docket Number R-1203

Re: Fair Credit Reporting Affiliate Marketing Regulations
69 *Federal Register* 42502 (July 15,2004)

Dear Mr. Hawke:

This letter is submitted on behalf of The Huntington National Bank ("Huntington")[1] in response to the above referenced regulations proposed jointly by the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System, and other federal banking agencies (the "Agencies") with respect to §2 14 of the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act"), governing use for marketing purposes of certain information received from an affiliate. We appreciate the opportunity to comment on the proposed regulations.

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[1] Huntington is the principal subsidiary of Huntington Bancshares Incorporated, a $30 billion regional bank holding company headquartered in Columbus, Ohio. Along with its affiliated companies, Huntington has more than 138 years of serving the financial needs of its customers, and provides innovative retail and commercial financial products and services through more than 300 regional banking offices in Indiana, Kentucky, Michigan, Ohio and West Virginia. Huntington also offers retail and commercial financial services online at www.huntington.com; through its technologically advanced, 24-hour telephone bank; and through its network of nearly 700 ATMs. Selected financial service activities are also conducted in other states including: dealer sales offices in Florida, Georgia, Tennessee, Pennsylvania and Arizona; private financial group offices in Florida; and mortgage banking offices in Florida, Maryland and New Jersey. International banking services are made available through the headquarters office in Columbus and additional offices located in the Cayman Islands and Hong Kong.

For purposes of this comment letter the term "sharing entity" means the entity whose eligibility information is shared with an affiliate, and the term ''receiving entity" means the entity that receives eligibility information from an affiliate.

Our specific comments regarding the Proposal are as follows:

Responsibility to Provide the Notice

In general, we appreciate the flexibility provided by the Agencies in ternis of which affiliated entity may provide the notice, including authority for a joint notice to be given by the sharing entity and one or more other affiliates, including the receiving entity. However, we do not agree with the Agencies that the responsibility for giving the notice is the responsibility of the sharing entity. The obligation set forth in $214 of the FACT Act is an obligation not to use certain information obtained from an affiliate. It is a prohibition on use, not a prohibition on sharing or receiving information. Since it is a prohibition on use, it is a prohibition that operates against the receiving entity, not the sharing entity. Thus if shared information is used by the receiving entity without the notice being provided, it is the receiving entity that is violating $214, not the sharing entity. If the receiving entity wants to use the information for marketing purposes in compliance with $214, the clearest way to read the statute is that it is the receiving entity's obligation to provide the notice. Moreover, putting the obligation on the sharing entity, as the Agencies do, creates drafting problems with the language the Agencies use in the proposed regulations. We understand that the Agencies have taken this approach at least in part because the sharing entity is the entity that (usually) has the relationship with the customer, but as described below, we believe the Agencies' concerns in that regard can be met, while still leaving the obligation to provide the notice with the receiving entity.

The structure of the proposed regulations by each of the Agencies establishes responsibility for providing the notice with the sharing entity. Additionally, in connection therewith, there is a stated prohibition on use by the affiliates of the sharing entity when the Agency may not have regulatory authority over such affiliates, depending on which affiliates they may be. This is an awkward structure at best. For example, OCC's regulation in §41.20(a)(1) states that if a 'bank' shares eligibility information with an 'affiliate', the 'affiliate' may not use the information to make or send a solicitation unless the sharing entity 'bank' provides the required notice. The term 'bank' is defined generally to mean a national bank and its non-functionally regulated operating subsidiaries (among other entities) and an 'affiliate' is generally any company under common control with the 'bank'. Thus, an affiliate of a national bank could be an operating subsidiary of that bank (*i.e.*, another 'bank', which is itself confusing when the same entity could be covered by two different defined terms) or it could be a subsidiary of the national bank's holding company. In the former case, the OCC has authority over the 'affiliate' (an operating subsidiary of the national bank), whereas in the latter case the OCC does not (a holding company subsidiary), yet the regulatory language purports to prohibit the 'affiliate' in either case from using the information. Furthermore, under the wording of

§41.20(b) as proposed, the receiving entity 'bank' could never use the information if the infomiation was provided by a holding company subsidiary and that subsidiary provided the notice. This is because subsection (b) says that the receiving entity 'bank' can only use the information for marketing purposes if a notice is provided "as described in" subsection (a)", and subsection (a) refers to a 'bank' giving the notice. If the sharing entity 'affiliate' in this case were a holding company subsidiary, the sharing entity providing the notice would not be a 'bank' and thus notice would not be provided "as described in" subsection (a)". Similar problems exist with the regulations of the other Agencies.[2]

Instead of this terminology—which does not properly work and, depending on the nature of the affiliate, is beyond the authority of the OCC—we recommend dropping the language relating to the bank communicating or sharing eligibility information, since that is unnecessary. Instead, the regulatory language should focus on what happens when a bank receives eligibility information. In other words, there is no need to say what happens if the bank communicates eligibility information to an affiliate, because in that context the affiliate may be an entity outside of the jurisdiction of the particular Agency, and in any case, the obligations under 92 14 are obligations on the receiving entity. Instead, $41.2 should delete subsection (b), and revise subsection (a) to provide there about what happens if the bank receives information from an affiliate (including another 'bank'), and say that in that case the receiving entity 'bank' cannot use such information for marketing purposes until that receiving entity 'bank' has provided the notice to the consumer or sees that the notice is provided by another affiliate or jointly with that 'bank' and the other affiliate.

An example of how the language of §41.20(a)(1) could be revised is as follows:

(a) *General duties of a bank receiving eligibility information from an affiliate*—(1) *Notice and opt out.* If a bank receives eligibility information from an affiliate (including an affiliate which is also another bank), the bank which has received the information may not use the information to make or send solicitations to a consumer unless, prior to such use by the bank which has received the information:

(i) The bank which has received such information provides a clear and conspicuous notice to the consumer stating that the information may be used by such bank to make or send solicitations to the consumer about its products and services;

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[2] The other Agencies use the term 'you' for what the OCC calls the 'bank', and thus at least the other Agencies' regulations do not have the confusion generated by using two terms ('bank' and 'affiliate') for potentially the same entity. But otherwise, the other Agencies' regulations have the same problem since they purport to prohibit 'your' affiliate from using information when such affiliate may be one that is beyond the scope of the particular Agency's jurisdiction. Moreover, the other Agencies' regulations have a similar subsection (b) problem as the OCC in that the other Agencies' subsection (b) says that 'you' (as the receiving entity) may not use the information unless the consumer has been provided a notice "as described in" subsection (a), and subsection (a) is referring to 'you' as the sharing entity. Thus, with the 'you' terminology employed by the other Agencies, 'you' as the receiving entity would never be permitted to use the information for marketing purposes because 'you' as the receiving entity could only do so if 'you' as the sharing entity (which 'you' are not) provide the information. Again, this way of using terminology and structuring the language of the regulation does not work.

(ii) Such bank provides the consumer a reasonable opportunity and a simple method to "opt out" of such use of that information by such bank; and
(iii) The consumer has not chosen to opt out.

Similar changes would need to be made throughout §41.20(a) to reflect this revised approach. For example, subsection (a)(2) should use language such as: "The notice required by this paragraph (a) may be provided either in the name of the bank receiving the information, in the name of the affiliate which provided such information, or in one or more common corporate names shared by such bank and the affiliate which provided the information, and may be provided in the following manner. . .".[3]

At least part of the reason for the way the Agencies have structured the proposed language of the §___.20 provision the way they have is stated to be a concern that the consumer may not recognize the receiving entity, and that since the consumer is already a customer of the sharing entity, a notice coming from the sharing entity would be from an entity which the consumer recognizes. This is certainly a legitimate concern, but accounting for it does not require the approach that the Agencies have taken. Instead, this concern could just as easily be dealt with by requiring the receiving entity to provide the notice in such a way as to reference the sharing entity. Thus, the language in subsection (a)(2) could read as follows instead of the language used in the foregoing paragraph: "The notice required by this paragraph (a) may be provided either in the name of the bank receiving the information (provided that such bank also identifies the affiliate which provided such information), in the name of the affiliate which provided such information, or in one or more common corporate names shared by such bank and the affiliate which provided the information, and may be provided in the following manner. . ."

Exception for Pre-Existing Business Relationship

The OCC's wording of the pre-existing business relationship exception in §41.20(c)(1) indicates that the restriction on use of eligibility infomation by the receiving entity does not apply if the 'bank' that is the receiving entity markets to a consumer with whom 'a bank' has a pre-existing business relationship. The way this is worded, as long as any national bank or national bank operating subsidiary in the corporate family (or any other entity covered by the term 'bank') has a pre-existing business relationship with the consumer, the exception will apply. The wording of the other Agencies' regulations is different because of the use of the term "you". The Federal Reserve's language, for example, says that the marketing restriction does not apply if 'you' use eligibility information 'you' receive from an affiliate to market to a consumer with whom 'you' have a pre-existing business relationship. The Federal Reserve's version seems to apply only if the receiving entity has the pre-existing relationship with the customer. We believe it is likely that OCC also intended the pre-existing business relationship exception to apply as long as the receiving entity is the one that has the pre-existing business relationship, since this is

[3] See the next paragraph for additional language suggestions for this provision

what the statute appears to be saying,[4] and is what the other Agencies are apparently saying. If so, OCC should revise its language to reflect more properly the statutory exception.[5]

Exception for Communication Initiated by the Consumer

The statute and the proposed regulations indicate that the marketing restrictions do not apply if the receiving entity uses eligibility information to market a consumer in response to a communication initiated by the consumer. However, the discussion of this exception in the preamble to the Agencies' proposed regulations and in the regulatory language itself interprets this exception so narrowly that it will often be unworkable in practice.

The preamble and proposed regulations indicate that: (i) if the consumer calls asking about directions to an office or hours of operation, the receiving entity is not permitted to solicit based on eligibility information received from an affiliate because that would not be "responsive" to the consumer's inquiry; (ii) if the consumer calls to ask about the receiving entity's products or services, solicitation related to "those products'' would be covered by the exception, although the time period for such solicitation "will depend on the facts and circumstances"; (iii) if the receiving entity calls the consumer and leaves a message for the consumer to call back, the return call by the consumer is not a communication initiated by the consumer; and (iv) the consumer must leave contact information during the call by the consumer in order for the consumer's call to be considered initiated by the consumer. There is no policy reason and no basis in the statute or legislative history for this kind of narrowing of this exception.

These narrowing interpretations make it difficult, if not impossible, for financial institutions subject to §214 to provide usable instructions and training to their employees with respect to this exception. For example, if a consumer calls the institution to ask for directions to an office, it would be natural for the institution's employee taking the call to ask why the consumer needed to go to that office in order to ascertain that the consumer was going to the correct place for what the consumer wanted to do. That might naturally lead to the consumer mentioning some product or service of the institution's, in response to which the institution's employee would mention some other product or service that would better meet the consumer's

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[4] The wording of the statute is that "[t]his section shall not apply to a person--(A) using information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship". The word 'person' in both times it is used here appears to mean the same entity, and in tlie overall context of the statute appears to mean the 'person' against whom the statute operates, *i.e.*, the receiving entity.

[5] Technically, tlie otlier Agencies' regulations potentially have tlie same language problem as tlie OCC's, although the grammar of using tlie word 'you' does not make that immediately apparent like is the case with the language employed by the OCC and makes the problem somewhat more ambiguous. The other Agencies define the word 'you' to include multiple entities, which can lead to the same language problem. For example, the Federal Reserve defines 'you' to mean, among otlier entities, member banks of the Federal Reserve System (other than national banks), bank holding companies and holding company affiliates other than depository institutions (incidentally, this would include operating subsidiaries of national banks within tlie term 'you', which then technically makes such national bank operating subsidiaries subject to both the OCC's rule and the Federal Reserve's rule).

need, etc. The Agencies' interpretation appears to put the entire call outside the scope of this exception because of the way the call started off, without allowing for the way the conversation may ultimately develop. Furthermore, limiting the employee's discussion to the particular products or services that the consumer asked about is again generally unworkable as conversations quickly move to what makes the most sense for the consumer, and it is unrealistic—as well as being a disservice to the consumer as a customer—to expect the institution's employee to stay away from talking about any products or services that the consumer does not mention first. Moreover, putting return calls by the consumer outside the scope of the exception is often only practical, if at all, if the consumer's return call is to the employee who called and left the message. In many cases, however, the consumer's return call is just as likely to be answered by a different employee than the employee who first called the consumer and left the message. The employee answering the consumer's return call may or may not know the consumer received a prior call from the institution. Additionally, many, if not most, consumers calling the receiving entity, when such consumers are customers of the sharing entity or some other affiliate in the corporate family (at least if all of such affiliates operate under the same general brand) will assume that the receiving entity already has the consumer's contact information. Consumers rarely make distinctions between affiliated entities operating under the same brand, and in fact usually do not know, understand or care about the details of the separate legal entities. Thus, requiring the consumer to leave contact information during the call in order for this exception to apply is not practical because consumers will often not do so on the belief that the receiving entity already has the consumer's contact information. In general, it is not realistic or practical to expect financial institution employees to be trained in the subtle degrees of responsiveness—or to remember such fine distinctions in the course of the busy workday—that these interpretations put forward by the Agencies would require.

This exception for communications initiated by the consumer was intended to create a simple rule for institutions to be able to follow: namely, that if the consumer calls the institution, the restrictions of $214 do not apply, so that the employees of the institution are not left guessing whether or not cross-selling or other marketing is permissible when they receive a call from a consumer. It is difficult to understand what abuse or evasion of $214 the Agencies' restrictive interpretations are trying to prevent, since the intervening consumer action of calling first has to occur before a solicitation using eligibility information can be made. Furthermore, if the concern is to prevent the annoyance of an unexpected call from the receiving entity, that is not present here either, since the consumer must first make the call.

Thus, these narrowing interpretations of this exception should be rejected by the Agencies, and the simple rule contemplated by the statute should be allowed to operate as legislatively intended.

Exception for Solicitations Authorized or Requested by the ***Consumer***

The agencies have worded the exception for solicitations authorized or requested by the consumer as "[i]n response to an *affirmative* authorization or request by the consumer"

(emphasis added). We note that the word 'affirmative' is not present in the statute, and there is no authority in the underlying statute for the Agencies to qualify this exception with that word.[6] We understand that, as stated in the preamble to the proposed regulations, the Agencies believe that a pre-selected check box or boilerplate language in a disclosure or contract would not constitute an authorization or request, but it is not necessary to add the word 'affirmative' to the regulation to cover that point. The word 'affirmative' adds further uncertainty and litigation risk to the regulation which could be avoided by staying with the statutory language, and we recommend that the Agencies drop that word in the final language of this exception.

Constructive Notice Issue

The Agencies request comment on what they characterize as the "constructive notice" issue. This is the situation where affiliate A does not share any information with affiliate B, but rather affiliate B provides criteria to affiliate A pursuant to which affiliate A markets affiliate B's product or service to affiliate A's own customers, and the marketing materials indicate that if the consumer is interested in the product, he/she is instructed to request further information from affiliate B. When affiliate B receives the request from the consumer, affiliate B is then implicitly made aware of certain information about the consumer, *i.e.*, that such consumer has the characteristics that qualify for the criteria affiliate B provided to affiliate A.

We think the Agencies are seeing an issue here that is resolved by the exceptions contained in $214 and does not need to be further addressed. Those exceptions are each independently available, and the Agencies have appropriately stated them in the disjunctive in §___.20(c). In the "constructive notice" example above, the consumer, by submitting his/her request to affiliate B, is authorizing or requesting affiliate B to solicit the consumer for affiliate B's product or service under the exception contained in §___.20(c)(5). To the extent any "constructive" sharing of information occurs, it only occurs after affiliate B receives the consumer's request, at which time any information shared from affiliate A to affiliate B, constructively or otherwise, would be permissible under the exception. Furthermore, the general prohibition under §214 would not be applicable in the first place, since outside of the "constructive" sharing which is permitted by the above exception, there would be no sharing of information with an affiliate to trigger the prohibition.

Consolidated Notices and Timing

We believe it is probable that most institutions will want to provide the notice required by $214 with their existing GLBA privacy notices (which include a GLBA-required FCRA notice) provided initially to consumers, since doing so will avoid multiple notices. Unlike GLBA, $214 does not have an annual notice requirement, and thus it is less likely that institutions will generally include a §214 notice as part of their annual GLBA notices. However, institutions may use the same notice text in a given year for both their initial notices and annual notices, in which

[6] The statutory language is "using information in response to solicitations authorized or requested by the consumer".

case it may be more efficient to include a $214 notice in the text that also operates as the annual notice. In addition, most institutions will probably elect to send a one-time mass mailing of a $214 notice to existing customers in order clearly establish whether those existing customers can be solicited, and it will be most efficient if the timing of that one-time mailing can be coordinated with the institution's annual GLBA notice. Moreover, the lead time for preparing, printing and distribution an institution's annual GLBA notices may be several months, and by the time these regulations become effective, it may be too late to include the one-time $214 notice with the GLBA annual notices being readied for the year 2005. Thus, we recommend that the requirements of these regulations become mandatory only at the end of year 2006.

Thank you for the opportunity to comment on the proposed guidance.

Very truly yours,

Daniel W. Morton
Senior Vice President & Senior Counsel