



May 10, 2004

Jennifer J. Johnson, Secretary  
Board of Governors of the Federal Reserve System  
20th Street and Constitution Avenue, NW.  
Washington, DC 20551

**Re: FACT Act Model Notice Relating to Furnishing Negative Information Docket No. R-1187, 69 Fed. Reg. 19123 (April 12, 2004).**

The Mortgage Bankers Association (“MBA”) appreciates the opportunity to submit comments on the Board of Governors of the Federal Reserve System’s (“Board” or “FRB”) proposed rule implementing the requirement of Section 217 of the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) that certain financial institutions that furnish negative credit information to consumer reporting agencies (“CRAs”) provide a disclosure to consumers.

The MBA supports the proposed disclosure but recommends several clarifications:

- The regulation should clarify that a financial institution that regularly provides positive as well as negative information to CRAs, should have the option of disclosing that fact as well. For example, it should be permissible to modify the language as follows:

We [may provide]/[have provided] information to credit bureaus about an insolvency, delinquency, late payment, or default on your account to include in your credit report. At times, we may also provide positive information about our credit experience with you.

- The regulation should clarify that an electronic disclosure complies with the FACT Act requirement that the disclosure be “in writing” if it accompanies other electronic disclosures that the consumer has agreed to receive

electronically under the Electronic Signatures in Global and National Commerce Act (“ESIGN”), 15 U.S.C. § 7001, *et seq.*, or the disclosure may otherwise be given electronically under applicable law. If the underlying transaction is a consumer transaction, then the

- Financial institution will generally have obtained consumer consent to make any required disclosures under the ESIGN procedures and, therefore, may make those disclosures electronically. If the consumer’s consent predates the effective date of the FACT Act provision, the financial institution should not have to get a new consent to provide this new disclosure electronically with other material that can already be provided electronically.
- The regulation should explicitly note that the statute provides that (1) the notice need only be provided once “with respect to the same transaction, extension of credit, account, or customer,” and (2) the notice “may be included on or with any notice of default, any billing statement, or any other materials provided to the customer,” other than the initial Truth in Lending Act disclosure.
- The statute references the definition of “customer” in Section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. § 6809).<sup>1</sup> That provision includes definitions for the privacy provisions of the Gramm-Leach-Bliley Act, which apply only to consumer transactions. The Gramm-Leach-Bliley provision does not define a “customer,” but it does define a “consumer” as:

[A]n individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes, and also . . . the legal representative of such an individual.

15 U.S.C. § 6809(9). It also defines a “customer relationship” as one involving a “consumer.” *Id.* § 6809(11). In addition, the FACT Act provision states that the notice may be provided with a billing statement, but not with a Truth in Lending Act disclosure (which would only be made in consumer transactions). Financial institutions occasionally may report negative information concerning business-related credit transactions to CRAs, such as when an individual defaults on a guarantee of a business-related debt.

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<sup>1</sup> It would appear that the citation intended in the preamble was to 15 U.S.C. § 6809, the definitions section of the Gramm-Leach-Bliley privacy provisions (rather than to Title 12 of the United States Code).

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Applying the FACT Act requirement in such a situation would be unfair, because other consumer requirements generally do not apply. Therefore, the regulation should specify that the disclosure requirement applies only in consumer transactions as defined in Gramm-Leach-Bliley.

Any questions about the foregoing should be addressed to Mary Jo Sullivan, Associate Director, Government Affairs at (202) 557-2859 or [msullivan@mortgagebankers.org](mailto:msullivan@mortgagebankers.org).

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kurt Pfothauer".

Kurt Pfothauer  
Senior Vice President  
Government Affairs