American Bankers Association

Building Success. Together.

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By electronic delivery to:
http://www.regulations.gov

Mr. David Silberman
Associate Director
Research, Markets & Regulations Division
Bureau of Consumer Financial Protection
1700 G Street, N.W.
Washington, D.C. 20006

Re: Reply Comments to the Notice of Streamlining Project and Request for Information; Docket No. CFPB-2011-0039

Dear Mr. Silberman:

The American Bankers Association (ABA) [1] appreciates having the opportunity to respond to the comments filed in response to the invitation of the Bureau of Consumer Financial Protection (Bureau) to identify regulatory streamlining priorities.[2] A review of the 136 comments that were submitted – the vast majority of which were written by community banks, savings associations and credit unions – underscores the industry's concern with existing regulatory burden. At a time when all banks are struggling to keep pace with compliance obligations, the fact that staff from so many small institutions took the time to identify streamlining candidates and to write a letter speaks volumes.[3]

While no consensus has emerged as to which regulation should demand the Bureau's immediate attention, we believe that the sheer number and variety of regulatory provisions identified in the comment letters underscore the need for a commitment to regulatory simplification and clarity that extends beyond an independent streamlining initiative to an ongoing basic operational commitment that serves to inform all aspects of the Bureau's work. Good regulatory policy requires a constant effort to reduce regulatory burden and to update compliance obligations. We believe that a well planned, measured, and steady program of regulatory review and revision will achieve more than a one-time exercise in burden reduction.

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[1] ABA represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $165 million in assets.
[2] *See* Notice of Streamlining Project and Request for Information, 76 Fed. Reg. 75825 (December 5, 2011).
[3] We also believe that these letters should encourage the Bureau to implement our practical suggestions for easing compliance with the consumer protection regulations: promoting scalable compliance oversight and the publication of small bank compliance guides. *See* ABA comment letter, pp. 4 – 5.

The number and range of candidates also highlights the complexity of a regulatory streamlining review and the significant commitment of stakeholder time necessary to ensure adequate consideration of all potential consequences of any regulatory change. As stated in our initial comment letter, while ABA strongly supports the identification and elimination of *all* outdated, unnecessary, or unduly burdensome regulations, we continue to believe that the Bureau must be pragmatic in its approach and should adopt a schedule for review of the inherited regulations that accommodates both the mandatory deadlines of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and the resulting constraints on stakeholder resources.

As promised in the joint letter requesting an extension of time to file reply comments, during the reply comment period ABA hosted a meeting of financial service industry advocates and consumer representatives to discuss each of our streamlining priorities and to seek to identify common streamlining solutions that will advance the regulatory reduction initiative. Although we did not reach consensus on any one particular streamlining priority or solution, the meeting was an important first step in what we hope will be an ongoing dialogue toward our common goal of ensuring that the markets for consumer financial products and services operate fairly, transparently, and efficiently.

In summary, ABA reiterates our call for the Bureau to concentrate first on reducing regulatory burden associated with the mortgage lending regulations.[4] ABA continues to believe that the Bureau's first priority should be to develop a comprehensive plan to integrate and streamline all of the mortgage-related rules, including those previously initiated by the Federal Reserve and those mandated by Title XIV. This process should reflect clearly the Bureau's commitment to identify outdated, unnecessary, or unduly burdensome regulations. By coordinating the rules and simplifying disclosures in this critical market, the Bureau will develop credibility that will engender broad support for future streamlining endeavors.

Finally, as the Bureau considers its schedule for 2013 and beyond, we repeat our call for the Bureau to be pragmatic in the selection and prioritization of streamlining candidates. We recommend that the Bureau focus attention on specific and targeted streamlining candidates that promise real and immediate regulatory relief, as discussed below.

[4] We note that not all commenters identified a top streamlining priority, and of those that did, it is difficult to identify a priority endorsed by a majority. However, at least thirteen letters urged the Bureau to focus first on mortgage-related regulations, ensuring that the reforms required by Title XIV of the Dodd-Frank Act do not create new conflicts, redundancies, or confusion. See comment letters filed by: Credit Union National Association, Missouri Credit Union Association, Texas Credit Union League, Steuben Trust Company, First National Bank of Orwell, Northwest Credit Union Association, Financial Services Roundtable and its Housing Policy Council, Mortgage Bankers Association, Consumer Mortgage Coalition; Commonwealth of Massachusetts Division of Banks, Wisconsin Credit Union League , Ohio Credit Union League, and Community Mortgage Banking Project available at www.regulations.gov.

Eliminate Regulation E's requirement for a physical ATM fee notice

The comments filed in this proceeding amply support elimination of the requirement for a physical notice to be posted on an ATM that a fee "will" or "may be imposed." Indeed, by our count, forty-five commenters[5] state their unequivocal support for elimination of the requirement and only two oppose it.[6]

Whether a fee *will* be imposed depends on several factors: whether the ATM operator has elected to charge at the ATM and under what conditions; whether the operator participates in any surcharge-free networks or programs; and whether the card issuer is a participant in the surcharge-free networks or programs. The only way to know for sure whether a fee will be charged is for the customer to initiate the transaction. At that point, the on-screen notice informs the customer of the exact amount of the fee and requires the consumer to affirmatively consent to the fee before proceeding with the transaction. Indeed, as pointed out in the comment letter filed by Credit Union 24:

> [T]he number and complexity of no-charge networks and programs has increased since this regulation was first adopted, making the benefit of [the physical notice] less useful. It may actually be confusing to consumers who have identified the ATM as a surcharge-free terminal in a no-surcharge program corresponding to the logo on their debit card, [to then be] confronted with a sign on the ATM that states that a fee "will" or "may be imposed" at that ATM.

As discussed in our initial comment letter, today there is no consumer protection rationale for requiring two notices; instead the requirement is useful only to a growing number of class action plaintiffs. Implicitly recognizing this fact, the National Consumer Law Center (NCLC) states that it would "not oppose an attempt by the Bureau to establish rules to implement the defense" afforded to institutions that posted a sign that was subsequently removed or damaged. NCLC suggests that the Bureau "propose a rule that a financial institution is in compliance if it has reasonable procedures in place to observe that signs are present (the

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[5] Actually, the number may be much higher as we do not include in our count single issue comments filed by individuals. *See* comment letters filed by: American Financial Services Association, JPMorgan Chase, Financial Services Roundtable, Wisconsin Credit Union League, Northwest Credit Union Association, Steuben Trust Company, Texas Credit Union League, Electronic Funds Transfer Association, ATM Industry Association, National Association of Federal Credit Unions ,California Credit Union League, Nevada Credit Union League, Michigan Credit Union League, Credit Union 24 , Magnolia Federal Credit Union, Wisconsin Bankers Association, Bank of Central Florida; American Momentum Bank; Credit Union National Association, Missouri Credit Union Association, First State Bank, Freedom First Credit Union, Consumer Bankers Association, Independent Bankers Association of Texas, US Chamber of Commerce Center for Capital Markets Competitiveness, Commonwealth of Massachusetts Division of Banks, Massachusetts Bankers Association, Securian, Indiana Credit Union league, Conference of State Bank Supervisors, Credit Union Association of New York, Resource One Credit Union, EECU Credit Union, Cardtronics, First Tennessee Bank, Credit Union Association of the Dakotas, Ohio Credit Union League, VISA, Mid-Size Bank Coalition of America, The Clearing House, Lake Sunapee Bank, and Wells Fargo *available at* www.regulations.gov.

[6] *See* comments filed by the National Consumer Law Center and Curtis Zaun. *See also* the Americans for Financial Reform comment letter ("A number of AFR members have not yet had time to develop a position on this [the ATM notice requirement]; some may submit an additional comment on the issue.")

Bureau could also define what are reasonable procedures) and to replace a missing sign within 3 days of notice."

This suggestion, however, ignores the cost of regular monitoring and of defending a lawsuit initiated because a sign has been removed or vandalized. Many banks operate off-premise ATMs for the convenience of their customers; to require regular monitoring of these ATMs to ensure that the physical notices are in place and have not been defaced imposes significant monitoring burdens and costs without contributing to consumer protection in any way. One ABA member bank that operates 133 ATMs reports that the litigation risk has forced it to contract with its ATM servicer do the following: install new tamper resistant signage; photograph all machines to document the installation; audit all machines on a monthly basis to ensure signs have not been removed or damaged, and complete an audit worksheet to document the inspection. The cost of the exercise is estimated to be $18,300 for the first year (due to the cost of purchasing and installing the signs) with ongoing monitoring costs of $8000 – $9000.[7] Moreover, even the most vigilant ATM owner can be the target of a vandal and then a lawsuit and be forced to spend thousands of dollars defending or settling the lawsuit. Plaintiffs across the country are taking day trips in search of ATMs lacking the physical notice; to date hundreds of lawsuits have been filed and settlements have ranged from several thousand to more than a million dollars.[8]

ABA is actively supporting efforts to convince Congress to amend the Electronic Funds Transfer Act, but we also encourage the Bureau to make elimination of the regulatory requirement a priority. We believe that it is a perfect candidate for the Bureau's streamlining initiative. Its elimination will not only remove a burdensome and costly monitoring exercise that results in no consumer benefit, but it should also discourage the continued spread of frivolous class action litigation.

Amend Regulation P's requirement for an annual privacy notice

The comment letters also provide overwhelming support for the amendment of Regulation P's requirement for providing customers with an annual privacy notice.[9] Only three out of 136

[7] The bank reports that it believes these costs are artificially low because they are using their ATM servicer to conduct the audits. The servicer absorbed much of the audit costs in order to win the servicing contract in a competitive market. The bank anticipates an increase in the monitoring charge in future contracts.

[8] See *American Banker* "ATM Nuisance Suits Should Be Thrown out of Court" by Eric P. Magnuson, April 4, 2012 *available at* http://www.americanbanker.com/bankthink/atm-nuisance-suits-should-be-thrown-out-of-court-1048149-1.html.

[9] See comment letters filed by: Wisconsin Credit Union League, Steuben Trust Company, National Association of Federal Credit Unions, Credit Union League, Nevada Credit Union League, Debt Buyers Association, Michigan Credit Union League, Wisconsin Bankers Association, Bank of Central Florida; American Momentum Bank, Credit Union National Association, Missouri Credit Union Association, First State bank, American Federal Savings Bank, First National Bank of Orwell, JPMorgan Chase, American Financial Services Association, Financial Services Roundtable and its Housing Policy Council, Consumer Bankers Association, Independent Bankers Association of Texas, US Chamber of Commerce Center for Capital markets Competitiveness, Wells Fargo, Commonwealth of Massachusetts Division of Banks, Massachusetts Bankers Association, Securian, Indiana Credit Union League, The Palmetto Bank, First Tennessee Bank, Credit Union Association of the Dakotas, Glenview State Bank, Ohio Credit Union League, Passumpsic Savings Bank, Brattleboro Savings & Loan, Springfield Savings & Loan, and Lake Sunapee Bank available at www.regulations.gov.

comment letters urged the Bureau not to consider elimination of the annual notice where the provider's privacy practices have not changed for financial institutions that do not share personal information beyond what is permitted by regulatory exceptions.[10] This common ground helps explain why bankers applaud Representative Luetkemeyer's sponsorship of an amendment to the Gramm Leach Bliley Act in H.R. 5817 that would eliminate any compulsion to issue annual privacy notices where there is no change in the customer's privacy protections.

During the previously described meeting among industry and consumer associations, we discussed whether Regulation P is an appropriate candidate for targeted burden reduction. During the course of the conversation, ABA offered an initial step toward burden relief—one at least implicitly suggested by the NCLC comment letter: elimination of the annual privacy notice for those institutions whose policy has not changed *and* that affords customers no "opt-out" rights because their institution only shares information in a manner permissible within existing regulatory exceptions under GLBA.[11] For these institutions (estimated to comprise at least 75% of the industry) eliminating the annual re-notification requirement simply does away with a notice that customers cannot use. There is no opt-out right to exercise and no consideration about making a change regarding the bank's sharing their personal information—because none is being shared in a way that triggers GLBA options. Taking this basic step would provide real and immediate regulatory relief without impacting a customer's rights or existing privacy protections.

Although the representatives at the meeting were not authorized to endorse this suggestion as a consensus solution of the attendees, the fact that there was a suggestion in the NCLC comment letter and a willingness by the banking trades to entertain this common sense notion is recommendation enough for the Bureau to explore this possibility further.

As comment after comment states, receipt of the annual mailing irritates consumers and risks desensitizing them to other important bank communications and disclosures. Out of necessity, consumers are increasingly tuning out privacy disclosures; one study reports that it would take the average person about 250 working hours every year — about 30 full working days — to actually read the privacy policies of the websites he or she visits in a year.[12] Policy makers need to take every opportunity to reduce superfluous privacy disclosures to ensure that consumers will attend to changes when they do occur. ABA urges the Bureau to consider the amendment of Regulation P a streamlining priority.

[10] *See* comment letter of the National Consumer Law Center (even though a bank's privacy notice may not have changed, the annual notice is a useful reminder, particularly for those consumers whose personal circumstances have changed during the year); Americans for Financial Reform ("The notices remind consumers of their rights and how to exercise them if consumer preferences or awareness have changed."); *see also* Wolters Kluwer Financial Services (asserting that any exception would require Congressional action).

[11] *See* NCLC letter at 18 ("Only where the provider's policy is not to share its customer's information with any non-affiliated third-party should the provider be able to cease providing annual privacy notices.")

[12] *A Journal of Law and Policy for the Information Society: 2008 Privacy Year in Review issue* ,"The Cost of Reading Privacy Policies" by Aleecia M. McDonald and Lorrie Faith Cranor, *available at* http://lorrie.cranor.org/pubs/readingPolicyCost-authorDraft.pdf.

Amend Regulation Z's interpretation of "ability to pay"

Again, only three commenters oppose amendment of the provision of Regulation Z, interpreting the Credit CARD Act, which requires a credit card issuer to assess an individual borrower's ability to repay the loan.[13] However, their suggestion that the ability to pay provision does not have a disparate impact on stay at home spouses because it applies to adult children living with their parents and unemployed siblings living with employed siblings reflects a fundamental misunderstanding of the marital relationship and the Equal Credit Opportunity Act (ECOA). ECOA prohibits discrimination on the basis of sex and marital status. In addition, ECOA was intended to *promote* access to credit, credit history building, and ultimately financial independence for women who remain more likely to be the stay at home spouse. An adult child living with parents or an unemployed sibling living with an employed sibling, standing alone, are not members of a protected class.

Moreover, the parallel misunderstands the marital relationship and devalues the stay-at-home spouse's contribution to the family. ECOA recognized that non-income producing spouses make significant contributions to managing household finances and should be recognized for that contribution. Thus, ECOA requires creditors to report the contribution of non-income producing spouses to credit bureaus even if they do not earn the income used to repay household debts.

The suggestion in the NCLC and NAACP comment letters that the discriminatory impact of the ability to pay rule is attenuated by the fact that the rule's Official Commentary permits an issuer to consider income or assets of the working spouse (to the extent that the individual has an ownership interest in it) does not withstand scrutiny. Not all married spouses live in community property states and share joint bank accounts, a fact clearly recognized by Congress when it enacted ECOA.

Finally, NCLC and NCAAP assert that our support for amendment of the ability to pay rule is intended to promote access to retail charge cards approved at point-of-sale, i.e., instant credit. They contend that in the case of applications for general purpose cards, the issuer may follow up with a counteroffer, but this is not possible in the instant credit approval process that relies heavily on the "impulse buy" nature of the transaction, suggesting these transactions risk overburdening families. This argument, however, perpetuates dependency and penalizes stay-at-home spouses. It ignores the fact that issuers make credit decisions based on how individuals have managed household finances and credit, not whether they have "independent" income.

[13] *See* comment letters of National Consumer Law Center, Americans for Financial Reform, and the National Association for the Advancement of Colored People.

Conclusion

Thank you again for the opportunity to share our views on the principles and priorities that should inform the Bureau's streamlining project. ABA will provide additional suggestions as the Bureau progresses along the path of this initiative.

If you have any questions about matters raised in this letter, please contact Virginia O'Neill at 202-663-5073 or voneill@aba.com.

Respectfully submitted,

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