AMERICAN BANKERS ASSOCIATION

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September 29, 2008

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

Re: **Docket No. R-1325**
Comments on Proposed Rule
Reimbursement for Providing Financial Records; Recordkeeping Requirements for Certain Financial Records

Dear Ms. Johnson:

The American Bankers Association ("ABA") submits this letter in response to a public request for comments regarding proposed amendments to Subpart A of Regulation S, which implements the requirement under the Right to Financial Privacy Act ("RFPA"). These regulations establish rates and conditions under which payment shall be made by a government authority to a financial institution for assembling or providing financial records pursuant to the RFPA.

The ABA appreciates the recognition by the Board that the costs associated with the production of financial records have increased since the rules were last updated. However, the ABA has serious and sincere reservations about the fundamental decision to condition the reimbursement of the costs of production by financial institutions upon the exclusive use of electronic document production technologies where the information to be produced is stored on bank systems in electronic form. As outlined below, many ABA members are simply not equipped to produce documents in an electronic form easily, efficiently, or cost-effectively. Using the cost-reimbursement structure to force a paradigm shift in how documents are produced will penalize many financial institutions, forcing them to absorb the non-compensated cost of reconfiguring their data systems in order to gain the required functionality or simply forfeiting their statutory right to reimbursement if they cannot produce documents in the desired format. We suggest that the Federal Reserve reconsider its approach or, at minimum, delay the implementation date to allow the industry to review and implement any changes that may be necessary in order to comply with the proposed regulations in a cost-effective manner.

I. Proposed Amendments To The Fee Structure in Section 219.3

ABA supports the proposed amendments to the fee structure contained in section 219.3. It has been twelve years since the Board last revised Regulation S and, as

noted in the background materials accompanying the proposed rule, the fee structure has become outdated. It is both necessary and appropriate for the Board to regularly review its reimbursement scheme under the RFPA in order to ensure that financial institutions are reimbursed for "such costs as are reasonably necessary and which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required or requested to be produced" under the RFPA. 12 U.S.C. § 3415. While the practical reality is that RFPA reimbursement structure has never completely covered *all* of the direct expenses incurred by an institution that are associated with producing documents under the RFPA – and we do not expect that the current amendments under consideration will fully remedy that situation – the proposed updates are most welcome.

II. Conditions For Payment in Section 219.5

The ABA's discussions with representatives from federal law enforcement agencies have made it clear that they prefer documents and other information to be produced in electronic format (preferably in their native form) – and we have taken from that dialog an appreciation of the practical benefits that an electronic production affords to law enforcement. Those benefits, however, will come at no small cost to the industry and the individual institutions that are being called upon to revise or modify their information systems in order to respond in the preferred format.

The ABA is concerned that amendments to section 219.5 – deeming payment for costs associated with photocopying or microfiche as being "reasonably necessary" only if "the institution has reproduced financial records that were not stored electronically" – will result in financial institutions incurring more unreimbursed cost in connection with responding to RFPA requests and subpoenas than under the existing rules. Many ABA members do not currently have the technical functionality within their information systems that enable them to quickly and efficiently respond to subpoenas and other requests for customer information in an exclusively electronic format even where the information resides in bank systems in electronic form. We submit that this not-so-subtle attempt to compel electronic-only document productions is unreasonable and beyond the Board's authority to mandate.

Apart from the technical and security issues raised by the proposal, the cost to individual institutions (and collectively the industry) to quickly design and implement the necessary changes to already functional and otherwise-compliant information systems will be significant, effectively negating any real benefit granted to the industry by the revised fee structure. The ABA submits that the Board should remove the proposed conditions for repayment contained in section 219.5 or delay its implementation in order to allow institutions to address in an orderly and cost-effective manner the myriad issues raised by this fundamental change in how documents are produced.

The essential difficulty with the Board's proposal is that it appears to be based upon a core assumption that a typical financial institution can, with just a few keystrokes, easily render an electronic file that contains all of the information relating to a single customer. Discussions with our members, however, reveal that the process of collecting and producing customer information in response to a subpoena or RFPA

request is rather more complex, and that information regarding a *single* account or customer may be housed in several different formats, systems, and databases.

Deposit systems, loan systems, e-mail systems, etc., are often independent of one another, employing different hardware and software configurations. For example, banks frequently arrange their systems to segregate active/recent account information from older account data, etc. Documents such as monthly statements check images, electronic payments data, and applications for loans are likewise housed on different databases or systems. If a customer has more than one account with a financial institution (e.g. credit card account, car loan, or checking account) then the number of systems that must be searched for responsive information is multiplied. Complicating the matter further is the fact that these data systems frequently do not have the capability to selectively produce an electronic file relating to individual customers in an easily-readable, cross-compatible, and universally-accessible format. Information about a particular customer is frequently buried in a report containing information regarding customers other than those who are the subject of the request.

Given the typical dispersal of customer information across several independent information systems and the difficulty of producing a discrete output file relating to a particular customer, many of ABA's members currently find that the only practical and cost-effective way to respond to a subpoena or RFPA request is to locate the relevant data on the various systems and then print the information for the agency. The Board's amendments to section 219.5 were obviously designed to compel institutions to produce materials in electronic format – we note that the RFPA does not mandate the format in which a financial institution is to produce documents or information in order to be entitled to the statutory compensation, which strongly suggests that the Board's attempt to impose a *de facto* electronic-only production format on the industry by withholding reimbursement that is unquestionably owed to responding institutions under 12 U.S.C. §3415 exceeds its legal authority.

Putting the underlying legality of the proposed section 219.5 to one side, the Board's elimination of the freedom to choose the best and most appropriate method for responding to a subpoena will inevitably result in an increase in the cost of compliance with mandatory requests for information. For those institutions that are unable to immediately produce documents in a format that complies with the Board-imposed conditions on reimbursement, they will be foreclosed from recovering *any* costs associated with an RFPA request until they develop (at their own considerable expense) a system with the requisite functionality.

We note that, wholly apart from the increased compliance cost to the banking industry associated with the proposal, the Board fails to take into consideration the likely cost to the *government* of complying with its reciprocal obligations under the RFPA under an amended section 219.5. Forcing institutions to produce documents in an inefficient and labor-intensive format will inevitably result in a significant increase in compensable labor costs connected with the collection and transfer of responsive data from existing systems. Also ignored in the Board's proposal are the issues of data compatibility, data security, and privacy. Producing records in different formats in which they are maintained will add significantly to the cost of

production, assuming the systems can be configured for the required format. Will banks be required to ensure that the electronic data that they produce will be in a format that is compatible with the systems in use by the requesting agency? If so, who will bear the cost?

The proposal also fails to address the issue of the ability of the financial institution to later authenticate its records if they are introduced in a court proceeding. Bank records are typically authenticated in paper form with either an affidavit completed by the records custodian or court testimony of the records custodian. The production of data in its raw native format rather than paper form renders it difficult for bank officials to subsequently confirm that their institution was indeed the source of the information and that it accurately reflects what the institution produced pursuant to the subpoena or request.

Similar uncertainties arise in the area of data encryption; many institutions have policies that prohibit most downloads of customer information to CDs/DVDs and other transportable media – particularly in unencrypted form. Will institutions be required to provide law enforcement with unencrypted data? Who will bear the risk if the information is subsequently lost?

And finally there is the unanswered question of whether banks would be expected to produce electronic data files that include information relating to customers other than those who are the subject of the request, if the information cannot be easily segregated. The answer to that particular question should be "no," at least under the RFPA, a result that preserves customer privacy but leaves the institution to absorb the cost of production if it cannot produce the data in the format required under the regulations.

Based upon these obvious problems with the Board's proposed amendments to section 219.5, the ABA strongly recommends that the proposed revisions to this section be abandoned. The Board should continue to authorize reimbursements for photocopy and microfiche charges even though information may be stored electronically. Should the Board determine to proceed with the proposed amendments to this section, the ABA recommends that the implementation be deferred for at least 12 months in order to allow institutions who would be unable to qualify for compensation of their costs under the RFPA to implement any necessary changes to policy and data storage and retrieval systems in an orderly and efficient fashion.

Should you have any questions, please do not hesitate to contact me. I may be reached at (202) 663-5028.

Sincerely,

Gregory F. Taylor
Associate General Counsel
American Bankers Association