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Submitted Via Federal eRulemaking Portal
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April 12, 2011

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

Re: Fair Credit Reporting Risk-Based Pricing Regulations, Docket No. R-1407 and RIN No. RIN 7100–AD66

Dear Ms. Johnson:

We are writing to offer our comments on the notice of proposed rulemaking related to the risk-based pricing notice rules issued by the Board of Governors of the Federal Reserve System and the Federal Trade Commission (collectively, the "Agencies"). Comerica Incorporated is a bank holding company, headquartered in Dallas, Texas, with offices in various states including Arizona, California, Florida, Michigan, and Texas. Comerica Bank, a subsidiary of Comerica Incorporated, is a state member bank that would be subject to the new risk-based pricing notice regulations. Accordingly and on behalf of Comerica Bank, Comerica Incorporated (collectively, "Comerica") appreciates the opportunity to comment on this proposal.

Comerica appreciates the promptness with which the Agencies have acted to reduce uncertainty about what users of consumer credit reports must do to comply with Sections 615(a) and (h) of the Fair Credit Reporting Act, as amended by Section 1100F of the Dodd-Frank Act. We urge the Agencies now to move quickly so that final regulations may be in place by July 21, 2011, when jurisdiction over these regulations transfers to the newly-established Bureau of Consumer Financial Protection. Unless the Agencies act by that date, uncertainty would be re-introduced into the process by which creditors are to provide risk-based pricing notices to consumers.

Although we view the proposal important to reducing uncertainty, we do have a few concerns for your consideration.

First, compliance with Section 1100F of the Dodd-Frank Act and the rules will require a significant amount of time in order to program and prepare for the required changes. Time will be necessary in order to allow financial institutions a meaningful opportunity to revise their risk-based pricing and adverse action notice forms and processes, implement and test the necessary data processing changes, and provide appropriate staff training. Accordingly, we recommend a mandatory compliance date of at least one year from issuance of the final rule.

Next, requiring the credit score and other information on loans where there are multiple applicants would require the implementation of multiple adverse action notices. Each applicant would require a separate notice because the credit score of one applicant should not be shared with the other applicants. This is contrary to the Regulation B practice of using a single adverse action notice for all co-applicants

where to do so would violate certain privacy laws.

In several states, the sharing of specific credit scores of one co-applicant with another – this is what would occur if a single adverse action notice is used – would require the consent of each applicant to waive certain privacy rights. This would be especially problematical in California where financial privacy is a constitutional right; and, the disclosure of one customer's financial information to another has been held to be prohibited.[1] Should this part of the proposed rule remain unchanged, creditors would need to prepare a different adverse action notice for each co-applicant.

The issue of multiple adverse action notices is not consistent with Regulation B in that under those requirements only the primary applicant needs to be provided an adverse action notice. Further, we also note that for loans secured by real estate, the notice to home loan applicants already includes a similar credit score disclosure that is provided to all applicants whether or not they receive an adverse action notice but that disclosure is not unique to each applicant. This causes the new information inserted into the adverse action notice to be redundant for these types of credit.

Lastly, if it is deemed necessary to provide the credit score disclosure on the adverse action notice, we believe it is appropriate to carve out an exception for real estate secured loans as similar information is provided in another legally required notice. In addition, for other types of credit, regulations and other law require that a credit score disclosure notice be provided to all applicants outside of the adverse action notice. In such instances, the credit score disclosure contains the credit score and supporting information but not the key risk factors. For such non-real estate secured credit applications, we also believe that providing this information on the adverse action notice would be redundant and possibly confusing to the applicant. Accordingly, we suggest that including an exception or determination that this information is not required on adverse action notices where other law or regulation mandates similar disclosures would be appropriate.

We value each and every opportunity to provide comments regarding regulatory proposals. We trust that you find the comments noted above useful in formulating the final regulation. If you have any questions, please contact me at 313.222.6160.

Very truly yours,

DJ Culkar
Senior Vice President, Assistant General Counsel, and
Assistant Secretary

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1 For your benefit, we are attaching a copy of the *Valley Bank of Nevada v. Superior Court* case, which is particularly instructive regarding California law in this regard. 15 Cal.3d 652 (1975).

Valley Bank of Nevada, Petitioner, v. The Superior Court of San Joaquin County, Respondent; Joseph A. Barkett Et Al., Real Parties in Interest

Supreme Court of California

15 Cal. 3d 652; 542 P.2d 977

December 9, 1975

OPINION BY: RICHARDSON

OPINION

In this case we consider under what circumstances a litigant may, through ordinary civil discovery procedures, obtain from a bank information disclosed to it in confidence by a customer. We have concluded that although such information is discoverable in a proper case, nevertheless the bank must first take reasonable steps to locate the customer, inform him of the discovery proceedings, and provide him a reasonable opportunity to interpose objections and seek appropriate protective orders.

Petitioner (Bank) sued real parties to recover the balance assertedly due on a promissory note executed and delivered by them to Bank to assist them in the purchase of the King's Castle Casino at Lake Tahoe. Although Bank loaned real parties $ 250,000 for this purpose, the remaining financing was unavailable and the purchase was never completed. Real parties defaulted on the note, and the present suit followed.

Real parties' primary defense to the suit is that Bank misrepresented the availability of additional financing "in order to induce defendants [real parties] to borrow $ 250,000 to give to the seller, Nathan Jacobsen, who would use the money to keep King's Castle open," thereby protecting the investment in King's Castle of other specified Bank customers, including the Teamsters Union.

In order to prove these allegations, real parties noticed the deposition of Bank's chairman, Mr. Thomas, asking him to bring with him bank records pertaining to loan transactions between Bank and seven named persons and corporations (including Jacobsen and King's Castle), "together with any and all records of any banking relationships with the Teamsters Union and/or any casino owned, operated or mortgaged to the Teamsters Union."

Bank, objecting to the disclosure of allegedly confidential information received from its customers, sought a protective order pursuant to section 2019, subdivision (b)(1), of the Code of Civil Procedure. In support of its motion, Bank submitted the affidavit of its president, Mr. Sullivan, which stated, among other things, that Bank "insists upon protecting the privacy of its customers and is not willing to disclose copies of any documents or records concerning the confidential transactions of its customers, other than the parties to this action."

A hearing was held, at which counsel for Bank and real parties were present. The trial court ordered the information disclosed subject to certain limitations concerning the relevant time period and types of financial transactions to be disclosed. Although the court made no formal findings, the record indicates that the court determined that the requested information was both relevant to real parties' asserted defense to Bank's action and was not privileged or protected from discovery procedures. Bank brought the instant proceedings for mandate or prohibition to compel the trial court to make an appropriate protective order. We issued an alternative writ of mandate, having concluded that the issue before us is of first impression and of general interest to the bench and bar. (See Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal.3d 161, 169.)

Preliminarily, we note that the record supports a conclusion that the requested information is "relevant" to real parties' defense in this action. Under the discovery statutes, information is discoverable if it is unprivileged and is either relevant to the subject matter of the action or reasonably calculated to reveal admissible evidence. (See Code Civ. Proc., §§ 2016, subd. (b), 2031; Pacific Tel. & Tel. Co. v. Superior Court, supra, 2 Cal.3d 161 at pp. 172-173.) As we stated in the Pacific case, ". . . the relevance of the subject matter standard must be reasonably applied; in accordance with the liberal policies underlying the discovery procedures, doubts as to relevance

should generally be resolved in favor of permitting discovery [citation]." (Fns. omitted; 2 Cal.3d at p. 173.). The information sought by real parties may assist in establishing an estoppel or fraud defense to Bank's suit.

Assuming relevance, and considering Bank's contention that such information is privileged and protected from discovery, we review the statutory privilege described in the Evidence Code (§ 900 et seq.). There is revealed no bank-customer privilege akin to the lawyer-client privilege (Evid. Code, § 950 et seq.) or the physician-patient privilege (id., § 990 et seq.). Indeed, the general rule appears to be that there exists no common law privilege with respect to bank customer information. (58 Am.Jur., Witnesses, § 363, p. 215; Annot. (1937) 109 A.L.R. 1450.) Furthermore, it is clear that the privileges contained in the Evidence Code are exclusive and the courts are not free to create new privileges as a matter of judicial policy. (Evid. Code, § 911, subd. (b); Pitchess v. Superior Court (1974) 11 Cal.3d 531, 539-540.)

Nevertheless, despite the exclusivity of the Evidence Code on the subject of privileges and the absence of either a common law or statutory authority, overriding constitutional considerations may exist which impel us to recognize some limited form of protection for confidential information given to a bank by its customers.

A constitutional amendment adopted in 1974 elevated the right of privacy to an "inalienable right" expressly protected by force of constitutional mandate. (Cal. Const., art. I, § 1.) Although the amendment is new and its scope as yet is neither carefully defined nor analyzed by the courts, we may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life. Indeed, we recently discussed at length the "reasonable expectation of privacy" which a bank customer entertains with respect to financial information disclosed to his bank. Thus, in Burrows v. Superior Court (1974) 13 Cal.3d 238, we held that customer information voluntarily disclosed by a bank to law enforcement officers without the customer's knowledge or consent constituted the product of an unlawful search and seizure under article I, section 13, of the California Constitution. We stated in Burrows that "It cannot be gainsaid that the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations, will remain private, and that such an expectation is reasonable . . . . [para.] A bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes." (Italics added, 13 Cal.3d at p. 243.) Similarly, it is the general rule in other jurisdictions that a bank impliedly agrees not to divulge confidential information without the customer's consent unless compelled by court order. (First National Bank in Lenox v. Brown (Iowa 1970) 181 N.W.2d 178, 183; Milohnich v. First National Bank of Miami Springs (Fla.App. 1969) 224 So.2d 759, 761; 10 Am.Jur.2d, Banks, § 332, p. 295; Annot. (1963) 92 A.L.R.2d 900.)

As is apparent from the foregoing discussion, we indulge in a careful balancing of the right of civil litigants to discover relevant facts, on the one hand, with the right of bank customers to maintain reasonable privacy regarding their financial affairs, on the other.

Under present statutory provisions, no attempt is made to achieve such a balance. As noted above, information is discoverable if relevant and unprivileged (Code Civ. Proc., §§ 2016, subd. (b), 2031), and the burden is placed upon the party opposing discovery to show good cause for a protective order limiting discovery (id., § 2019, subd. (b)(1)). Pursuant to existing law, when bank customer information is sought, the bank has no obligation to notify the customer of the proceedings, and disclosure freely takes place unless the bank chooses to protect the customer's interests and elects to seek a protective order on his behalf.

The case involves opposing considerations, personal and financial, and it is readily apparent that the existing discovery scheme is inadequate to protect the bank customer's right of privacy which now is constitutionally founded. The protection of such right should not be left entirely to the election of third persons who may have their own personal reasons for permitting or resisting disclosure of confidential information received from others. On the other hand, we

readily acknowledge that relevant bank customer information should not be wholly privileged and insulated from scrutiny by civil litigants. The Legislature has not so directed, and in expressing a contrary position we said in In re Lifschutz (1970) 2 Cal.3d 415, 425 [85 Cal.Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1], "In order to facilitate the ascertainment of truth and the just resolution of legal claims, the state clearly exerts a justifiable interest in requiring a businessman to disclose communications, confidential or otherwise, relevant to pending litigation. [Citations.]"

Striking a balance between the competing considerations, we conclude that before confidential customer information may be disclosed in the course of civil discovery proceedings, the bank must take reasonable steps to notify its customer of the pendency and nature of the proceedings and to afford the customer a fair opportunity to assert his interests by objecting to disclosure, by seeking an appropriate protective order, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered.

The variances of time, place, and circumstance which may invoke application of the foregoing principle cannot be anticipated, but in evaluating claims for protection of bank customers, the trial courts are vested with the same discretion which they generally exercise in passing upon other claims of confidentiality. (See Code Civ. Proc., § 2019, subd. (b)(1); In re Lifschutz, supra, 2 Cal.3d 415, 437-438; cf. Hauk v. Superior Court (1964) 61 Cal.2d 295, 298-299.) We have previously expressed those considerations which, among others, will affect the exercise of the trial court's discretion. They include ". . . the purpose of the information sought, the effect that disclosure will have on the parties and on the trial, the nature of the objections urged by the party resisting disclosure, and ability of the court to make an alternative order which may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances." (Greyhound Corp. v. Superior Court (1961) 56 Cal.2d 355, 382.) Where it is possible to do so, ". . . the courts should impose partial limitations rather than outright denial of discovery." (Id., at p. 383.)

With respect to bank customer information, the trial court has available certain procedural devices which may be useful in fashioning an appropriate order that will, so far as possible, accommodate considerations of both disclosure and confidentiality. These include deletion of the customer's name (evidently inappropriate in the instant case), ordering that the information be sealed, to be opened only on further order of court (see Code Civ. Proc., § 2019, subd. (b)(1)), and the holding of in camera hearings. There may well be others which ingenious courts and counsel may develop.

Let a writ of mandate issue directing the trial court to vacate its order granting discovery herein and to conduct further proceedings consistent with this opinion.