



Wells Fargo Bank, N.A.

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September 25, 2008

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

Submitted via e-mail to regs.comments@federalreserve.gov

Re: Final Rules on Regulation S; Docket No. R-1325

Dear Ms. Johnson:

Wells Fargo & Company (“WFC”) is a diversified financial services company providing banking, insurance, investments, mortgage and consumer finance services through almost 6,000 stores, the Internet and other distribution channels across the United States and internationally. WFC has \$609 billion in assets and 160,500 team members across its 80+ businesses. WFC’s national banking subsidiary, Wells Fargo Bank, N.A., operates over 3200 banking stores in 23 states. Wells Fargo Bank, N.A. is pleased to offer these comments on behalf of itself and WFC.

We appreciate this opportunity to submit our views regarding the proposed amendments to Subpart A of Regulation S (the “Proposed Rules”) by the Board of Governors of the Federal Reserve System (the “Board”) concerning the rates and conditions under which a financial institution will be paid for assembling and providing financial records to a government authority pursuant to the Right to Financial Privacy Act (RFPA).

The Proposed Rules are intended to update Regulation S’s provisions governing the fees reimbursed for certain costs that financial institutions incur in producing financial records in response to requests under the RFPA. The Proposed Rules are designed to encourage electronic production of documents by limiting the circumstances in which a per-page photocopy or per-frame microfiche charge will be reimbursed, and to provide an automated mechanism for updating labor rates in Regulation S.

We strongly support the Board’s proposal to update Regulation S to reflect the ever-increasing cost of locating, reproducing and transporting records. We also support the Board’s efforts to

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encourage electronic document production under the RFPA. We believe that many of the provisions in the Proposed Rules will be helpful to both government authorities and industry.

We note, however, that under the Proposed Rules the circumstances under which certain costs will be reimbursed are ambiguous and may not reflect the actual costs of producing documents pursuant to requests for records under the RFPA. In addition, under the Proposed Rules, the circumstances under which fees will be reimbursed for electronically stored records produced as photocopies or paper copies of microfiche (“hard copies”) are exceedingly limited, and may have unintended consequences.

We respectfully request that the Board incorporate the suggestions below to create a rule that more fully achieves the Board’s goal of updating Regulation S’s reimbursement scheme to:
(a) accurately reflect financial institutions’ costs in producing records under the RFPA, and
(b) encourage electronic production whenever feasible.

DISCUSSION

1. The Proposed Rules’ Substitution of a “Per [Electronic Production] Request” Reimbursement for a “Per Diskette” Reimbursement Creates Ambiguity and Fails to Accurately Reflect the Cost of the Production of Electronically Stored Records in a Digital Format (an “electronic production”).

The Board’s request for comments on the Proposed Rules indicates that one of the purposes of the Proposed Rules is to update the rates of reimbursement for electronic productions to more accurately reflect the cost of those productions.¹ As part of the update to Regulation S concerning electronic productions, the Proposed Rules substitute a “per request” reimbursement for the “per diskette” reimbursement currently provided under Regulation S. As drafted, however, the Proposed Rules create uncertainty regarding what is included in such a “request,” and do not update the reimbursement rates for compact disks, other electronic media, and email transmissions to truly reflect those costs.

The Proposed Rule Fails to Define What Constitutes a “request.”

Currently, the costs of certain electronic productions under the RFPA are reimbursed at a rate of \$5.00 per computer diskette used in an electronic production. Under the Proposed Rules, the per diskette reimbursement would be replaced with a \$5.00 reimbursement per electronic production “request.”

However, the Proposed Rules do not define a “request,” thus creating ambiguity regarding what is included in such a “request,” and whether that “request” will include the records of one

¹ “Reimbursement for Providing Financial Records; Recordkeeping Requirements for Certain Financial Records (Proposed Rule; Request for Comments),” Federal Register 73:159 (August 15, 2008), p. 47855. Available from Federal Register Online via GPO Access [wais.access.gpo.gov]; Accessed: 08/20/08.

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customer or a thousand; involve one account or thousands; require one search query or many. If a “request” is not defined in the Proposed Rules, this lack of a defined term will create inconsistency in reimbursement to financial institutions because government authorities are likely to have differing interpretations of what is included in a “request.”

The Proposed Rules’ \$5.00 “Per Request” Reimbursement Payment Fails to Accurately Reflect the Cost of Electronic Production.

As technology has advanced, the types of media in which electronic information is conveyed have expanded to include not only computer diskettes, but also compact disks, email transmissions, and other electronic media, none of which are without cost. We recognize that the Proposed Rules seek to update the regulation’s current reimbursement scheme to cover all these electronic media. However, because the Proposed Rules lack a specific, narrow definition of a “request,” one “request” may encompass the production of many computer diskettes or equivalent media. Thus, it is likely that the Proposed Rules will lessen the amounts reimbursed for electronic productions rather than updating them to reflect the actual costs of such productions. However, if the Proposed Rules were revised to include a narrow and specific definition of the term, “request,” a \$5.00 per electronic request reimbursement could achieve the Board’s goal to update the amounts reimbursed for electronic productions.

Recommendation

We recommend that the Board include a definition of “per request” in the Proposed Rule. In addition, we recommend that such a request be defined as “a government authority’s request for the records related to a single individual customer.”

2. The Per Page Reimbursement for Hard Copies of Financial Records Should Be Kept, Regardless of Whether or Not Those Records Were Previously Stored in an Electronic Format.

Presently, when a government authority requests financial records under the RFP, a financial institution may receive a \$0.25 per page reimbursement for photocopies of those records and a \$0.25 per frame reimbursement for paper copies of microfiche records (“per page reimbursement”) if those costs are “directly incurred” and “reasonably necessary” to provide the requested records. Under the current rule, whether or not those records were originally stored as hard copies or stored electronically does not determine whether a cost is deemed to be “reasonably necessary.”

However, under the Proposed Rules, such costs are “reasonably necessary,” and thus eligible for per page reimbursement under Regulation S, only if: (1) the records to be copied were not electronically stored; or (2) the government authority specifically requested printed copies of electronically stored records.

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Data security and ID theft prevention are every financial institution's imperative. Both sound business practice and law, (for example, the Gramm-Leach-Bliley Act and the Fair and Accurate Credit Transactions Act) obligate financial institutions to protect the security and confidentiality of their customers' nonpublic personal information. Information transmitted in electronic form (whether over data lines or on disks by courier) is vulnerable unless it is securely encrypted for transmission. The recipient must be able to de-encrypt the transmitted information. In addition, data delivered electronically raises the risk of "frictionless transfer" – that is, it is easier to copy and misappropriate unless properly secured and protected while in storage – and the financial institution has no control or influence over the storage and management of the produced records.

For all these reasons, in the absence of a protective order or other assurances it will often make sense to produce such records as hard copies, even though the financial institution had stored those records electronically. Elimination of the \$0.25 per page reimbursement, if a financial institution produces electronically stored records in hard copy, will penalize financial institutions for following reasonable best practices to meet their obligations to protect customer information.

Recommendation

We recommend that the Proposed Rules' definition of costs that are "reasonably necessary" be broadened to include costs incurred for the production of records as hard copies, whether or not those records were originally stored electronically.

In the alternative, we recommend that the Proposed Rules' definition of "reasonably necessary" costs be broadened to include costs incurred for production of records that were stored electronically but produced as hard copies, when that hard-copy production is due to information security concerns.

3. Fees for Microfiche Duplication Should be Retained in the Proposed Rule.

The Board has requested comments on whether the Proposed Rules should eliminate its provisions regarding fees for microfiche duplication as outdated. Although new technologies are replacing or supplementing the use of microfiche, certain financial institutions still use microfiche for record storage.

Recommendation

We recommend that the Proposed Rules retain their provisions regarding fees for microfiche duplication, as certain financial institutions still maintain records in a microfiche format.

CONCLUSION

We strongly support the Board's actions in updating Regulation S to more accurately reflect the costs of record productions made under the RFPA. The Proposed Rules provide a much appreciated updating of rates and conditions under which financial institutions are reimbursed for

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the production of certain records. However, we urge the Board, in finalizing the Proposed Rules, to resolve the issues discussed above and thus ensure the efficacy of the proposed updates.

Wells Fargo Bank, N.A. appreciates the opportunity to comment on the Proposed Rules.

Very truly yours,

WELLS FARGO BANK, N.A.

By [SIGNED]

Jeanne M. Karnowski
Counsel