September 18, 2006

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments, Federal Deposit Insurance Corporation
550 17th Street, NW.
Washington, DC 20249

Re: Joint Notice of Proposed Rulemaking: Red Flags Rule / RIN 3064-AD00

Dear Mr. Feldman:

First County Bank ("First County") appreciates the opportunity to respond to your request for comments on the joint notice of proposed rulemaking that would implement sections 114 and 315 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"). As a reminder, First County is a Connecticut bank serving the residents of lower Fairfield County, with thirteen branches in six towns.

Although the federal banking agencies ("Agencies") have attempted to soften the impact the proposed rules will have on financial institutions, we believe that the proposal would unduly increase the already heavy, and continuously increasing, compliance burden that financial institutions are now shouldering. This burden particularly hinders the ability of financial institutions of our size to prosper in an ever-more competitive industry.

Regulations and Guidelines on Detecting, Preventing and Mitigating Identity Theft

To satisfy the requirements of section 114 of the FACT Act, the Agencies are proposing regulations and guidelines (the "Proposal") for financial institutions to use in developing required policies and procedures for addressing identity theft. The Proposal includes, in Appendix J to the regulations, a listing of red flags to assist financial institutions in "identifying patterns, practices, and specific forms of activity, that indicate the possible existence of identity theft."

While First County supports the risk-based approach the Proposal allows a financial institution to take when developing its identity theft prevention program

("Program"), we believe many of its other provisions will result in an unreasonable increase in compliance burden for First County and other financial institutions.

The definition of the term "account," which determines which customers a financial institution's Program will cover, should be limited to individuals with whom a financial institution has an established, ongoing relationship. It should not be expanded to include relationships that are not continuing, such as may arise by a person's occasional use of a financial institution's services. Requiring financial institutions to gather and maintain information from such individuals for the purpose of detecting identity theft would be overly burdensome and would likely necessitate the addition of human as well as technological resources beyond reasonable levels.

First County strongly urges the Agencies to limit the definition of "customer" to natural persons The vast majority of cases of identity theft involve natural persons, not commercial entities. Including commercial entities in the definition would likely require financial institutions to develop and maintain, at significant cost, *separate* Programs for commercial entities, as there are risks and red flags applicable to commercial customers that are not applicable to natural person customers, and vice versa.

The Agencies should also limit the definition of "Red Flag," specifically by eliminating the "precursors of identity theft" as part of the definition. The precursors of identity theft are potentially unlimited and any list of such will likely grow to such an unmanageable length that implementation of a Program, particularly the staff training component, will become impossible. Further, the nature of an identity theft precursor is such that it is not identifiably linked to a specific individual, making a determination of its effect on any customer or group of customers speculative, which in turns makes the kind of mitigation efforts the Proposal seems to require difficult to implement. It should also be noted that financial institutions are already required by other laws, regulations and guidance to respond to the two examples of precursors the Agencies provide in the Supplementary Information to the joint notice of proposed rulemaking. For instance, section 501(b)(3) of the Gramm-Leach-Bliley Act and relevant provisions of the Interagency Guidelines Establishing Standards for Information Security require financial institutions to respond to unauthorized access to customer information, including taking steps to mitigate the risk of identity theft. The Agencies have also issued guidance on how to address "phishing" attacks. For these reasons, we believe that the definition of the term Red Flag should be limited to those instances that indicate the possible <u>existence</u> of (not the "risk" of) the theft of a particular natural person's identity.

Please understand that as a community bank, First County is concerned about the well being of its customers. We certainly do not want to see our customers become the victims of identity theft. When problems arise, we will often volunteer to help our customers. However, in this context, it must be recognized that in most cases a bank is merely a witness to identity theft (or the "possible risk of identity theft") and is not the cause thereof. As such, banks should not be shouldered with an unfunded mandate of acting as a police force charged with the responsibility of detecting "possible risks" of identity theft. We realize that Congress has expressly deputized the banking industry for certain purposes. But we urge the Agencies to be extremely judicious in any expansion of that role beyond what was expressly mandated by Congress.

In that regard, we recognize the fact that the Agencies have provided an important degree of flexibility which allows a bank to develop its own customized "Program". Indeed, as a community bank, we particularly appreciate the language which allows a bank to tailor its Program in light of "size and complexity" of the institution. However, even with this flexibility, we believe that it is dangerous for the Agencies to include additional risk detection considerations (i.e., beyond those expressly mandated by Congress). Although FACTA does not expressly include private rights of action, there is always the risk that banks will be faced with civil lawsuits alleging negligence (or other wrongful conduct) in the formulation and implementation of its Red Flag detection program. It is simply a fact that community banks will not be able to afford the leading-edge programs adopted by the money-center banks. Judges, juries, and aggressive plaintiffs' lawyers might not appreciate the "size and complexity" distinctions when faced with a sympathetic victim, the uncharitable distortions of hindsight, and the desire to find someone to blame. We respectfully, but strongly, encourage the Agencies to avoid creating a roadmap for that type of litigation.

On a related point, Appendix J to the proposed regulations includes a long and comprehensive list of red flags that financial institutions must incorporate within their Programs. We believe that individual financial institutions will find that many of the listed red flags are not relevant to their institution. Therefore, we would oppose the elimination or weakening of the Proposal's provision that allows a financial institution to determine, based on an appropriate risk evaluation, which red flags are relevant to detecting identity theft at its institution.

The Proposal also includes provisions that require a financial institution to verify the identity of an individual at the time of account opening. Most, if not all, of what the Proposal requires is already required by the USA Patriot Act and its Customer Identification Program ("CIP") rules. Therefore, we urge the Agencies to maintain the provisions in the Proposal that deem a financial institution that is in compliance with the CIP rules to be in compliance with the identity verification provisions of the Proposal.

While section 114 of the Fact Act implies that the Agencies should implement regulations that require financial institutions to respond to individual instances of identity theft, it does not set forth any requirements or parameters for such response. First County believes that the Agencies' proposed regulations governing how a financial institution should respond go too far. The proposal unfairly shifts the burden of protecting customers away from the customers themselves and onto their financial institutions. For instance, First County employees will spend an unreasonable amount of time assessing the multitude of red flags that are sure to arise on a daily basis and monitoring accounts for evidence of identity theft.

Finally, we object to the language which requires each financial institution to establish a "reasonable basis for concluding" that each red flag it encounters "does not evidence a risk of identity theft". This language creates an unreasonable risk of liability for the financial institution. Should a financial institution incorrectly determine that a particular red flag does not present a risk of identity theft, this provision would provide the customer with a potential claim against the financial institution, such as by

challenging the reasonableness of the financial institution's determination. The proposed language suggests the need for *recordkeeping* to support, from an evidentiary standpoint, the "reasonable basis" for each and every decision. Given the scope of Red Flags (and the sheer number of different decisions that will have to be made), such a requirement will be incredibly burdensome and dangerous.

Notice of Address Discrepancies from Consumer Reporting Agencies

The Agencies have also proposed regulations to implement section 315 of the Fact Act. The regulations propose guidance for financial institutions when establishing policies and procedures for addressing notices of address discrepancies from consumer reporting agencies.

First County strongly urges the Agencies to maintain the proposed regulations' safe harbor that allows a financial institution to satisfy the requirement that the financial institution form a reasonable belief that it knows the identity of a consumer, or to determine that it can not do so, by complying with its own CIP procedures. The CIP procedures are sufficient to allow a financial institution to form this belief. However, we encourage the Agencies to not use the term "reasonably confirm" when describing a financial institution's section 315 duty to reconcile a consumer's address with the consumer reporting agency that provided the notice of address discrepancy. This term connotes a higher level of duty than we believe is expressed in section 315. We request that the terminology be changed to require the financial institution to form and communicate to the consumer reporting agency a reasonable belief as to the accuracy of the address of the consumer.

Conclusion

While we appreciate the risk-based approach of the proposed regulations, we believe that they establish specific requirements that exceed what is necessary to achieve the goals of sections 114 and 315 of the FACT Act. These provisions will unreasonably increase compliance burdens for financial institutions and expose them to risks they should not have to bear.

Thank you for the opportunity to offer these comments.

Sincerely,

Richard E. Taber
Chairman & CEO

Thomas L. Bartram
President & COO