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BANK ONE

December 1, 2000

VIA UNITED PARCEL SERVICE

Office of the Comptroller
of the Currency
Communications Division
250 E Street, SW
Washington, D.C. 20219
Attention: Docket No. 00-20

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance
Corporation
550 17th Street, NW
Washington, D.C. 20429
Attention: Comments/OES

Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th and C Streets, NW
Washington, D.C. 20551
Attention: Docket No. R-1082

Manager, Dissemination Branch
Information Management & Services
Division
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Docket No. 2000-81

Re: Proposed FCRA Affiliate Sharing Regulations

Dear Ladies and Gentlemen:

BANK ONE CORPORATION is writing to comment on the proposed FCRA Affiliate Sharing Regulation (the "Proposed Regulation") issued jointly by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision (together, the "Agencies") under the Fair Credit Reporting Act (the "FCRA").

BANK ONE CORPORATION ("BANK ONE") is a multi-bank holding company headquartered in Chicago, Illinois, with offices located in Arizona, Colorado, Delaware, Illinois, Indiana, Florida, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Texas, Utah, West Virginia and Wisconsin. BANK ONE also operates numerous non-bank subsidiaries that engage in credit card and merchant processing, consumer finance, mortgage banking, insurance, trust and investment management, brokerage, investment and merchant banking, venture capital, equipment leasing and data processing. First USA Bank, N.A., the largest VISA issuer in the United States, is a subsidiary of BANK ONE.

BANK ONE appreciates the opportunity to comment on the Proposed Regulation. We are eager to work with the Agencies to develop a workable regulation that addresses the concerns of both banks and consumers, and allows the development of new products and greater customer service within the banking industry. We thank the Agencies for allowing us to take part in the development of this Proposed Regulation.

We commend the Agencies for their efforts in developing the Proposed Regulation. Although we recommend a number of important modifications, we agree with many of the concepts embodied in the Proposed Regulation. Our comments are intended to reflect our desire for a final FCRA regulation (the "Final Regulation") that provides consumers with meaningful disclosure of an institution's affiliate sharing practices while preserving effective industry practices that have proven beneficial to consumers and financial institutions.

General Comments

Effective Date.

The regulation issued pursuant to Title V of the Gramm-Leach-Bliley Act ("GLBA") (the "Privacy Regulation") requires a financial institution to provide an initial GLB privacy notice to all of its customers. This initial notice must include any disclosures that the institution makes regarding the sharing of information among affiliates under the terms of the FCRA and related opt out instructions.

It is likely that the FCRA Proposed Regulation will not be finalized until February or March of 2001 at the earliest. Until the Final Regulation is issued, banks will have no firm guidance on the requirements for the FCRA notice and opt out. We are in the process of printing millions of copies of our initial GLB notice and have included in this notice a description of our information sharing practices with affiliates and an FCRA opt out. We had no choice but to proceed with printing the initial GLB notice in order to insure that we will be able to deliver it to each of our customers before the July 1, 2001 effective date. If the Final Regulation requires a different disclosure than the one that we have included in our initial GLB notice, we may be required to deliver a revised FCRA notice and opt out to each of our consumer customers before we share non-experience information about them among Bank One affiliates. By the time the Final Regulation is issued, it will be too late for us to reprint our initial GLB notices in time to distribute them by July 1, 2001, so we will have to deliver a revised FCRA notice separately. We believe that customers will be confused and annoyed if they receive a second FCRA notice and opt out shortly after receiving our initial GLB notice. This last-minute change to the language and delivery method of our FCRA disclosure would also disrupt the processes and employee training programs that we are putting in place to comply with GLBA, which would have a detrimental effect on our ability to serve our customers.

To avoid this undesirable outcome, we recommend that the Final Regulation should not be effective until the later of July 1, 2002 or such time as an institution distributes its first annual

GLB privacy notice in 2002. The Agencies should also clarify that the Final Regulation does not apply retroactively to any FCRA notices used by an institution prior to the effective date of the Final Regulation, and that consumer elections of whether or not to opt out made pursuant to the previously-delivered FCRA notices are still valid. Many institutions have previously delivered FCRA notices to individuals, such as loan applicants or small business owners, who do not qualify as "customers" under the GLBA and therefore may not receive the GLB privacy notice. The Agencies should clarify that institutions are not obligated to send a new FCRA notice and opt out disclosure to these individuals, and may continue to rely on their earlier opt out decision.

Coordination with GLB Privacy Regulation.

We appreciate the effort by the Agencies to ease compliance with the Proposed Regulation by coordinating it with the Privacy Regulation. For the most part, coordination between the two regulations will facilitate compliance and produce more meaningful disclosures for consumers. The Proposed Regulation, however, cannot mirror the Privacy Regulation in every respect. FCRA and GLBA are very different statutes and require very different regulatory schemes. FCRA applies only to credit information about consumers, while GLBA applies to most of the information about consumers held by a financial institution. FCRA applies to any organization that shares credit information about consumers, while GLBA applies only to financial institutions. FCRA does not prohibit the sharing of certain information, but merely imposes additional requirements on those institutions that become "credit reporting agencies" under its terms. A number of statutory exceptions are included in GLBA, while exceptions have been developed under FCRA only through the Commentary and agency interpretations.

In addition, there are a number of situations in which institutions deliver the FCRA notice and opt out separately from the GLB privacy notice, including consumer credit and deposit applications and to owners and guarantors of small businesses. The Proposed Regulation must provide workable rules to enable an institution to deliver a concise and reasonable disclosure in these situations. The FCRA disclosure required under the Proposed Regulation is substantially longer than the FCRA disclosures used by the industry in the past, primarily due to the requirement to disclose the categories of information that may be shared and the categories of affiliates with which the information may be shared. We suggest that the Agencies reconsider these extensive disclosure requirements, because they add unnecessary length and complexity to the disclosure, and impede our ability to deliver a clear and concise disclosure to customers as appropriate through a variety of channels.

Incorporation of Prior Agency Interpretations of FCRA.

The Proposed Regulation does not incorporate the exceptions that have been recognized in the past by the Federal Trade Commission (the "FTC") that permit affiliates (and nonaffiliated third parties) to share information under certain circumstances without being deemed to be "consumer reporting agencies" under FCRA. These exceptions should be incorporated into the

Final Regulation or the Agencies should clarify that the Final Regulation does not modify any of the permissible types of information sharing under the existing body of FCRA law.

For example, the FTC, in its Commentary to FCRA, has recognized a "joint user" exception, under which several parties may share credit-related information without becoming "credit reporting agencies" under FCRA, when they use the shared information to consider a consumer's application for credit and the applicant consents to this sharing of information. See 16 C.F.R. §600, Comment §603(f)-8. Many institutions have relied upon this exception to structure their procedures and operations and to provide appropriate products to consumers. For example, an applicant for a home mortgage loan may authorize the lender to forward an application to an affiliated lender for the purpose of considering the application for a home equity line of credit or an insurance product. It would cause great disruption to the banking industry and its customers if this practice is not permitted under the Final Regulation.

The FTC has also recognized that an agent and a principal may share a consumer report obtained and used by both for a shared "permissible purpose" without either becoming a "consumer reporting agency". See 16 C.F.R. §600, Comment §604(3)(E)-6(a). The Final Regulation should be revised to make clear that information shared with an affiliate under an agency relationship to service or process a consumer's accounts or transactions is not subject to the opt out rules. Such agency arrangements are common in the banking industry. Many bank holding companies conduct operations through servicing and processing affiliates, including data processing and underwriting operations. We suggest that the Final Regulation make clear that institutions are not required to provide an opt out for these types of information sharing, which are essential in order to provide consumers with the products and services they request.

The Proposed Regulation should also provide an exception to permit the immediate sharing of information for fraud prevention purposes, whether or not the consumer has elected to opt out. Such information sharing is in the best interests of consumers and the banking industry. Consumers are protected from the possibility of identity theft and repeated fraudulent transactions under their names, and the banking industry is able to maintain its safety and soundness standards.

As these examples illustrate, it is essential for the Agencies to recognize in the Final Regulation that there are many common business practices in which information may be shared, without the use of the opt-out notice, without an institution being viewed as a "consumer reporting agency" under FCRA. To require otherwise would greatly disrupt the safe and efficient delivery of services to consumers.

Definitions (§ ___.3).

Definition of "Opt Out Information". The definition of "opt out information" attempts to clarify that there is no need to comply with the FCRA affiliate sharing provisions unless the information to be shared would otherwise meet the definition of "consumer report", but the definition of "opt out information" only includes certain components of the definition of "consumer report." We recommend that the Final Regulation make it clear that the definition of "opt out information" does not include any information that is excluded from the definition of "consumer report" pursuant to § ___.3(g)(2) of the Proposed Regulation.

Communication of opt out information to affiliates (§ ___.4).

As discussed above, § ___.4 should be revised to clarify that there are certain circumstances under which an institution may share information (other than transaction and experience information) with its affiliates without having given the FCRA notice and opt out and not be deemed to be a "consumer reporting agency" under FCRA.

Contents of opt out notice (§ ___.5).

We are concerned that the disclosure required by the Proposed Regulation is quite lengthy, which will affect the ability of banks to deliver the FCRA notice effectively through various channels. As noted above, there are many instances when the FCRA notice will be delivered as a stand-alone notice, and not as a part of the GLB privacy notice. The length and complexity of the proposed sample notice will make it difficult to continue to deliver the notice and opt out in a convenient and efficient manner. The FCRA does not require this level of detail. In particular, we suggest eliminating the descriptions of the categories of information that may be shared and the categories of affiliates with whom the information may be shared.

We also believe that the language of the sample notice in Appendix A is too broad and does not accurately reflect the FCRA or the text of the Proposed Regulation. The sample language does not indicate that certain information is not subject to the FCRA opt out, including transaction and experience information and other information that does not constitute a "credit report" under FCRA. For example, the first sentence of the sample language states that "Unless you tell us not to, [Financial Institution] may share with companies in our corporate family information about you including...". The examples that follow do not limit this broad introductory language.

In addition, the opt out paragraph in Appendix A should clearly indicate that the opt out applies only to a limited type of credit information, rather than all information held by the financial institution about the consumer.

Reasonable Opportunity to Opt Out (§ ___.6).

Thirty-Day Requirement. The Proposed Regulation indicates that an institution provides a reasonable opportunity to opt-out if it provides a reasonable period of time following the delivery of the opt-out notice for a consumer to opt out. The Agencies also provide several examples of a "reasonable opportunity" to opt out. Each example provides for a 30-day time period, regardless of the method of delivery of the notice. We believe that a 30-day time period for opting out is not appropriate under all circumstances, and will seriously restrict the ability of institutions to provide timely information about products and services to their applicants and customers.

Under the Proposed Regulation, an institution may not be able to share opt out information with its affiliates for 30 days, even if the customer wishes to have the information shared more quickly. This may prevent an institution from offering related products from an affiliate in a time frame that serves the customer's needs. For example, consumers who apply for a home mortgage loan are often interested in receiving additional information about an equity line of credit or insurance products. The Proposed Regulation would require the institution to wait 30 days before the information could be shared with affiliates for use in responding to the consumer's request for additional information, even if the consumer wanted the information to be forwarded immediately.

Institutions also offer combined products that consist of two or more products offered by different bank affiliates, such as a product that combines a checking account from one affiliate and a line of credit from a different affiliate. If the institution is required to wait 30 days before sharing credit-related information with an affiliate, even with the consent of the applicant, the two components of this product could not be opened simultaneously, which would make the product package unworkable.

To address this problem, we believe that the Final Regulation should clarify that if the FCRA notice and opt out are delivered to a consumer on an application or a signature card, and the consumer submits the application or signs the signature card and chooses not to opt out at that time, then the institution should be permitted to share the information unless and until the consumer subsequently opts out.

Acknowledgment of Notice. The Proposed Regulation also provides an example for electronic opt-out notices which requires institutions to obtain acknowledgements from customers of the receipt of the notices, a standard that is not required for notices delivered by mail. The Agencies should not require financial institutions to obtain acknowledgements from consumers that they have received notices. Such a requirement would be overly burdensome to financial institutions and is inconsistent with the opt-out rules adopted by the Agencies in the Privacy Regulation. In addition, consumer financial protection laws and regulations that require delivery of information (for example, Regulations B, E, and Z) do not require acknowledgements from consumers to meet the requirement for the delivery of notices or disclosures under those regulations, and such acknowledgments should not be added to the FCRA Regulation.

Delivery of Opt Out Notice (§ ___.8).

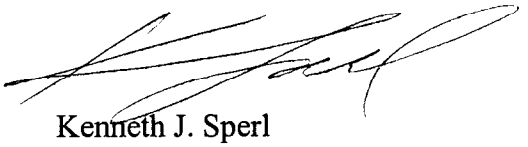
The Proposed Regulation requires that the opt out notice must be delivered so that each consumer can reasonably be expected to receive actual notice in writing or, if the consumer agrees, electronically. We agree with the general standard requiring delivery so that each consumer reasonably be expected to receive actual notice, and we agree that it is appropriate to obtain a consumer's consent or agreement before delivering notices electronically. We note, however, that unlike the GLBA, the FCRA does not require that the affiliate sharing notice be furnished in writing. This is an important distinction which was intended to provide sufficient flexibility to allow the FCRA notice to be furnished in any type of communication and through the same delivery channels used to offer products, including orally during telephone communications. In this regard, the only restrictions imposed on the affiliate sharing notice are that it must be furnished "clearly and conspicuously . . . before the time the information is initially communicated" among affiliates.

It is important that the flexibility established by the plain language of the FCRA be preserved in the Final Regulation. We urge the Agencies to modify the Proposed Regulation to permit oral disclosures of the FCRA opt out notice. This will preserve the flexibility necessary to provide many types of products requiring or enhanced by affiliate information sharing even when such products are requested over the phone. This flexibility is important to ensure that financial institutions can implement the wishes of consumers who may apply for financial products over the phone, such as when a consumer initiates a home equity loan by telephone and at the same time requests information about whether the consumer may qualify for a credit card offered by an affiliate.

We also suggest that §___.8(f) be revised to clarify that a single FCRA disclosure may be delivered to an applicant and a guarantor, in the same manner as is permitted for other joint consumers.

Thank you for the opportunity to comment on this proposed regulation. If you have any questions concerning these comments, please contact Julie Johnson, Director of Information Policy and Privacy at (614)248-5654, or Andrea Beggs, Law Department, at (312) 732-5345.

Very truly yours,



Kenneth J. Sperl
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