(20)

CHARTER ONE® BANK F.S.B.

December 5, 2000

Delivered via e-mail to
public.info@ots.treas.gov

Manager, Dissemination Branch
Information Management and Services Division
Office of Thrift Supervision
1700 G Street, N.W.
Washington, DC 20552

Attention: Docket No.2000-81

Re: Joint Notice of Proposed Rulemaking - affiliate sharing provisions of the Fair Credit Reporting Act

Ladies and Gentlemen:

This comment letter is filed on behalf of Charter One Bank, F.S.B., and its lending affiliates and subsidiaries (collectively, the "Bank") in response to the joint notice of proposed rulemaking published by the Board of Governors of the Federal Reserve System (the "Board"), the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency and the Office of Thrift Supervision (collectively, the "Agencies") to implement the affiliate sharing provisions of the Fair Credit Reporting Act (the "FCRA") (the "Proposed Rule"). The Bank is a federally-chartered savings bank and a wholly-owned subsidiary of Charter One Financial Inc. (a $31 billion asset financial holding company) with branch operations in the states of Ohio, Michigan, New York, Illinois, Massachusetts, and Vermont. The Bank has multi-state residential mortgage lending, non-prime residential mortgage lending and automobile finance operating subsidiaries.

Although the Bank recommends a number of important modifications to the Proposed Rule, we commend the Agencies for their efforts and agree with many of the concepts embodied in the Proposed Rule. Our comments are intended to reflect our desire for the adoption of the Proposed Rule in a final form (the "Final Rule") which provides consumers with meaningful disclosure of an institution's affiliate sharing practices while reflecting the provisions of the FCRA and preserving effective industry practices that have proven beneficial to consumers.

Coordination with Gramm-Leach-Bliley Act Privacy Rules

The Bank commends the Agencies for their desire to ease compliance with the Proposed Rule by making it consistent with the Agencies' rules implementing applicable portions of Title V of the

Gramm-Leach-Bliley Act (the "GLBA") (the "Privacy Rules"). While consistency between the two rules may facilitate compliance and produce more meaningful disclosures for consumers, the Proposed Rule should not mirror the Privacy Rules in every respect. The privacy provisions of the GLBA different significantly from the affiliate sharing provisions of the FCRA. Other than the requirement to furnish notice to consumers and an opportunity to opt out of certain disclosures, none of the congressionally mandates required by GLBA were included in the FCRA. Much of the additional detailed requirements of the Proposed Rule cannot be justified based on FCRA's language. Had Congress intended the FCRA notice to be as detailed as those required under the GLBA, Congress would have further amended the FCRA in Title V of the GLBA. Congress, however, expressed the intent that the GLBA not "modify, limit, or supersede the operation of the Fair Credit Reporting Act." Since Congress chose not to "modify, limit, or supersede the operation" of the FCRA, the Agencies should refrain from doing so as well.

The legislative grant of FCRA rulemaking authority provided to the Agencies under section 506(a)(2) of the GLBA only authorizes the Agencies to "prescribe such regulations as *necessary* to carry out the purposes" (emphasis added) of the FCRA. The Proposed Rule goes beyond this simple mandate and are not "necessary" to carry out the purposes of the FCRA affiliate sharing provisions.

Preserving Benefits To Consumers

Consumers receive benefits when affiliated entities are permitted to share information among themselves to improve the services, offerings, pricing options and other choices made available to those consumers. The Proposed Rule appears to substantially depart from the plain language of the FCRA by establishing a general rule that, after providing an affiliate sharing notice to a consumer, affiliates must wait at least 30 days before sharing any opt out information with affiliates.

This general rule will restrict consumer choice by forcing an affiliate to wait 30 days before sharing information even where the consumer wishes to have the information shared more quickly. The Proposed Rule appears to suggest that when a consumer applies for one financial product but is interested in obtaining information about other products offered by affiliates that the consumer may qualify for (such as, for example, lower rate of cost loan products available through an affiliate "referral up program"), the consumer would be required to wait at least 30 days before the information could be shared with the affiliate. Such a result would not benefit consumers and hardly appears to have been intended when the FCRA affiliate sharing provisions were enacted in 1996.

This 30-day waiting period requirement seems to produce unintended results, such as requiring delays in sharing information intended to be used by affiliates for fraud detection purposes or for suspicious activity reports.

This issue can be adequately addressed through three modest clarifications to the Final Rule as adopted. First, the Final Rule should clarify that the affiliate sharing notice and opportunity to opt out may be disclosed on or with documents such as applications or signature cards. If the

consumer submits the application or completes the signature card and chooses not to opt out at that time, the affiliates must be permitted to share the information unless and until the consumer subsequently opts out. Second, the Final Rule should clarify that affiliates may share among themselves information on a consumer who has received the affiliate sharing notice and has consented to the sharing. Third, the Final Rule should clarify that it does not in any way impact other interpretations of the FCRA which for many years have permitted affiliates (and unaffiliated third parties) to share information that might otherwise be deemed to be a consumer report.

Effective Date

While no effective date has been proposed for the Final Rule, portions of the Supplementary Information appear to suggest that financial institutions may be required to comply with the Final Rule as part of their efforts to comply with the Privacy Rules implementing the GLBA. To give sufficient time to prepare and disseminate the affiliate sharing notice, the Bank recommends that the Final Rule not be effective until the later of July 1, 2002, or the time at which the financial institution sends it annual notice required under GLBA for the calendar year 2002.

Definition of "*Opt Out Information*"

The definition of "opt out information" appears to be intended to reflect a basic statutory limitation on the scope of the FCRA affiliate sharing provisions. Specifically, this definition 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." Because the definition of "opt out information" only includes certain components of the definition of "consumer report," however, this important clarification has not been fully realized in the Proposed Rule. In order to more precisely implement this limitation on the scope of the affiliate sharing notice requirements, we recommend that the Final Rule include an additional clarification. Specifically, we urge that the Final Rule make it clear that the definition of "opt out information" only applies to information that satisfies the general definition of consumer report set forth in section 603(d)(1) of the FCRA if that information is not excluded from the definition of consumer report by virtue of the exceptions set forth in section 603(d)(2)(A)(i) or (ii), or (B), (C) or (D).

Contents of the Opt Out Notice

The Proposed Rule requires a level of detail be included in the affiliate sharing notice which as noted above, the plain language of the FCRA simply does not require. The Proposed Rule to more closely adhere to the plain language of the FCRA.

The Agencies specifically requested comment on whether financial institutions should be required to disclose: (i) how long a consumer has to respond to the opt out notice before the institution may begin disclosing information about that consumer to its affiliates; and (ii) the fact that a consumer can opt out at any time. The Agencies should refrain from including any such requirement in the Final Rule. The FCRA affiliate sharing notice is intended to provide a clear and conspicuous, as well as concise and simple, disclosure about affiliate sharing. A notice that

identifies the fact that affiliates will share information about the consumer and how the consumer may opt out of that sharing satisfies the plain language of the FCRA.

Reasonable Means of Opting Out

Under the Proposed Rule an institution would provide a consumer with a reasonable means of opting out if it provides a "reasonably convenient" method to opt out and a financial institution may require a consumer to opt out through a specific means so long as that method of opting out is reasonable for that consumer. These provisions should be retained intact and be incorporated into the Final Rule.

Delivery Method of Opt Out Notices

The Proposed Rule 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. Moreover, we acknowledge 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 affiliate sharing notice to be furnished in any type of communication, 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 Rule. Accordingly, we urge the Agencies to modify the Proposed Rule 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.

Duration of Opt Out

The Agencies propose that an opt out is effective until a consumer revokes it in writing. While we agree that an opt out should be effective until revoked by the consumer, the Agencies should delete the requirement that the opt out must be revoked in writing. There may be instances when a consumer is requesting an additional product by telephone that would require the institution to share opt out information with, or obtain opt out information from, an affiliate. If the consumer has previously opted out, that consumer may have to wait several days for the product he or she requested in order to provide a revocation of the opt out in writing. We do not believe that such a result can be justified and we urge the Agencies to delete the requirement that an opt out revocation must be in writing.

The Bank appreciates the opportunity to comment on the Proposed Rule. Should you have any questions regarding this letter, please contact the undersigned at 1-216-566-5300.

Very truly yours,

Robert T. Modney
Vice President