(23)

Via Email; Original to follow

December 4, 2000

Communications Division
Office of the Comptroller of the Currency
250 E Street, SW
Washington, D.C. 20219
Docket No. 00-20
Email to: regs.comments@occ.treas.gov

Ms. Jennifer J. Johnson,
Secretary
Board of Governors, Federal Reserve System
20th and C Streets, NW
Washington, D.C. 20551
Docket No. R-1082
Email to: regs.comments@federalreserve.gov

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

Manager, Dissemination Branch
Information Management and Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, D.C. 20552
Attn: Docket No. 2000-81
Email to:public.info@ots.treas.gov

Re: Comment on Joint Notice of Proposed Rule Making Published October 20, 2000, Implementing provisions of the Fair Credit Reporting Act

Dear Sirs and Madams:

This is the comment letter of MBNA Corporation, a multiple bank holding company, and its two national banking associations, MBNA America Bank, N.A. and MBNA America Bank (Delaware), N.A. (collectively, "MBNA") regarding the Joint Notice of Proposed Rule Making implementing provisions of the Fair Credit Reporting Act ("FCRA") published in the Federal Register on October 20, 2000 (Volume 65, No. 204, Pages 63120 – 63141) by the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("FRB"), the Federal Deposit Insurance Corporation ("FDIC") and the Office of Thrift

Supervision ("OTS") (collectively, the "Agencies"). We refer to the proposed FCRA regulations of the Agencies collectively as the "Proposed Rule". While MBNA's primary regulator is the OCC, we and our affiliates also are subject to regulation by the FRB and the FDIC and we issue this letter to the Agencies because of the common issues involved and our desire for uniformity in the final FCRA Regulations of the Agencies (the "Final Rule").

MBNA appreciates the opportunity to comment on the Proposed Rule and requests that the Agencies consider our recommendations when revising the Proposed Rule for adoption of the Final Rule.

MBNA is one of the world's largest issuers of MasterCard- and Visa-brand credit cards with approximately 21 million Customers in the United States. In business for 18 years and listed on the New York Stock Exchange since 1991, our managed loan outstandings at September 30, 2000 were $84.7 billion and our earnings for 1999 were $1.024 billion. Affinity and Co-branding relationships, where MBNA provides credit card and other financial products and services to members of a group sharing common interests or to customers of other financial institutions or commercial organizations as part of an overall financial services program, are an integral part of our business. Worldwide, MBNA's products are endorsed by more than 4,500 organizations. In addition to credit cards (both for consumers and for businesses), through our multiple bank holding company structure, our affiliates offer consumer deposits, consumer finance, mortgages, small business loans, insurance, debt cancellation and travel products. Offering a wide range of financial products and services is one way we satisfy our Customers and sharing permitted information among our MBNA affiliates and our Affinity and Co-branding partners significantly enhances our ability to do this. Our products and services are sold and serviced almost entirely over the telephone and through the mail, although the Internet is an increasingly important channel. Our success lies in getting the right Customers and keeping them.

Our primary concerns with the Proposed Rule are:

(i) the absence of an effective date, leading to the conclusion that implementation by July 1, 2001 is required (an implementation date of July 1, 2001 does not allow financial institutions sufficient time for confident, cost-effective and comprehensive compliance, and will cause confusion to both financial institutions and consumers);

(ii) the need for the Final Rule to incorporate many of the exceptions set forth in Title V, of the Gramm-Leach-Bliley Act ("GLBA");

(iii) obligations which extend beyond Congress' intent as set forth in FCRA and GLBA and definitions lacking in clarity and contrasting with existing interpretation and practice in ways that may imperil compliance by financial institutions and invite examination confusion and future litigation; and

(iv) the unnecessary level of detail required in disclosures to Consumers and Customers, burdening financial institutions and increasing the likelihood that Consumers and Customers will neither read nor react to the required notice, which defeats the entire purpose.

Our comments follow the Sections of the Proposed Rule.

§__.1 Purpose and scope

1.1 Subsection (b)(2) lists, for each of the Agencies within their respective versions of the Proposed Rule, the financial institutions covered by the Proposed Rule. We note that the OCC's version of the Proposed Rule includes "national banks" but does not mention "their affiliates". Similarly, we note that the FRB's version of the Proposed Rule does not mention "bank holding companies and their affiliates", which under §506(a)(2) of GLBA were specifically placed under the FRB. We urge the Agencies to develop comprehensive and coordinated scope definitions in adopting the Final Rule. MBNA Corporation is a multi-bank holding company with affiliates, one of which is MBNA America Bank, N.A. Comprehensive and coordinated scope definitions provide uniformity of consumer expectation and of financial industry application, reducing complexity and cost of compliance.

1.2 Subsection (b)(3) indicates that nothing in the Proposed Rule modifies, limits or supersedes the requirements for privacy of individually identifiable health information under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and its implementing regulations promulgated by Health and Human Services ("HHS"). We understand and agree with the concept of protecting the privacy of individually identifiable health information, and we propose that such protection be afforded in other, more pertinent regulation. We encourage the Agencies to carefully balance the need for protection against the impact on payment systems (*e.g.,* check clearing and credit card payment processes). The transfer of information among relevant parties (which may include the Affinity group or Co-branding partner) to facilitate a transaction authorized by the consumer must not be impeded by privacy regulations, which should instead focus on prohibiting unauthorized transfers or inappropriate uses of such information. Further, we caution the Agencies to take a comprehensive look at the rapidly expanding body of privacy regulations (GLBA, HIPAA and now FCRA) and carefully coordinate their respective approaches. The convergence of three or more sources of Federal privacy regulation (with State regulation also likely), what one author has referred to as the "Perfect Storm" scenario, is absolutely certain to create unnecessary burdens, increased costs, and confusion for both consumers and the financial industry.

§__.2 Examples

2.1 Notwithstanding our comments regarding particular language and the need for further examples set forth below, we congratulate all of the Agencies on their use of plain language and certain examples in the Proposed Rule.

2.2 We believe many of the examples in the Proposed Rule provide significant guidance. Most examples should be included in the Final Rule, as should the provisions that: (i) the examples are not intended to be exclusive or exhaustive; and (ii) compliance with an example or the sample notice, to the extent applicable, constitutes compliance with the requirements of the Final Rule. Notwithstanding the foregoing, we do not think examples are necessary for purposes of defining "clear and conspicuous" (see below). The Agencies, and in particular the FRB, have already promulgated ample guidance on the meaning of "clear and conspicuous" (*e.g.*, TILA).

2.3 All of the examples, like all provisions of the Final Rule, should be identical between Agencies except where deviation is absolutely necessary, and then only as a consequence of fundamental business or regulatory differences. In such cases the examples must still be consistent and comparable. The Agencies must, to the maximum extent possible, provide the same rules for everyone. MBNA needs this consistency and uniformity across its credit card (both for consumers and for businesses), consumer deposits, consumer finance, mortgages, small business loans, insurance and travel businesses as do many other financial institutions with multiple businesses and multiple regulatory relationships.

To the extent that the Final Rule will contain variations among the Agencies, for financial institutions with affiliates regulated by different Agencies, please consider whether the affiliates' disclosure efforts can be deemed satisfactory if they comply with one of the Agencies' requirements, but not another Agency's requirements.

2.4 We favor any modifications of the Proposed Rule which increase its uniformity and decrease the detail, length and complexity of the affiliate information sharing disclosure. MBNA is very concerned that the complexity of the Proposed Rule: (i) will cause financial institutions to prepare voluminous affiliate information sharing notices (to be incorporated within already substantial GLBA privacy notices) which consumers will not wish to read, effectively defeating the purpose of both FCRA and GLBA; and (ii) creates unnecessary time and expense burdens on financial institutions in terms of systems modifications, production of required notices and modifications of policies, procedures and practices such that satisfactory compliance by July 1, 2001 is not possible.

§__.3 Definitions

3.1 The definition of "clear and conspicuous" in the Proposed Rule appears consistent with the definition used in the GLBA privacy regulations. MBNA's comment letter dated March 31,

2000 regarding the GLBA privacy regulations sets forth our concerns with respect to this issue and we refer you to those comments.

3.2 We are concerned about the definition of "clear and conspicuous" in the Proposed Rule when the FCRA affiliate information sharing notice is included in the GLBA privacy notice. Again, convergence of overlapping regulations is a problem. Between the GLBA privacy regulations, Regulations B, E and Z and numerous opinions of the Agencies and courts there are multiple, conflicting (or at least uncoordinated) definitions of this term. The economies available to financial institutions by combining several disclosures within one form are called into question when each disclosure has its own definition of "clear and conspicuous". Where financing also is being offered in the context of sales finance, additional disclosure standards regarding the conspicuousness of disclosure concerning warranties, for example, make these seemingly competing standards difficult to reconcile. Must one "clear and conspicuous" disclosure be more "clear and conspicuous" than another? Do the rules change when a stand-alone disclosure is combined with others in one form? The Agencies must answer these questions to avoid unnecessary confusion, complexity and litigation.

3.3 In Subsection (d) within the definition of "communication" the phrase "provided that the term includes electronic communication to a consumer only if the consumer agrees to receive the communication electronically" is not necessary and, with enactment of the E-Sign Act (defined in the next sentence), may cause confusion to the extent the reader would understand E-Sign Act compliance as not adequate. Pursuant to §101(c)(1)(B) of the Electronic Signatures in Global and National Commerce Act (the "E-Sign Act"), these concepts are already addressed in law and if any further phrase is required at all, it should be a reference to the E-Sign Act for uniformity. Further, within the Proposed Rule the word "communicate" is used only with reference to the sharing of information between affiliated entities, not with respect to contact between a financial institution and a consumer.

3.4 In Subsection (g) within the definition of "consumer report" and in Subsection (k) within the definition of "opt out information", the Agencies do not mention existing interpretations and opinions of what is and what is not a "consumer report" or "transaction and experience information" or information which falls in neither category and is not to be regulated under the FCRA. While such issues may well be addressed in the Advance Notice of Proposed Rule Making for the FCRA that the Agencies note in the Supplementary Information, it is inappropriate to ignore these existing interpretations, opinions and information categories at this time. Considerable uncertainty will result and unintended consequences to existing financial institution business practices will occur.

We urge the Agencies to review and specifically reject the inappropriate and unjustified interpretations of the FCRA made by some State Attorneys General. Further, the Agencies must remember that they are promulgating regulations to a statute in effect since 1970, or in the case of the FCRA amendments, since 1997. Specifically and most critically, the definition of "opt out information" should specifically exclude:

(i) information not covered under the definition of "consumer report" in §603(d)(1) of the FCRA; and

(ii) information excluded under the definition of "consumer report" in §603(d)(2)(A)(i) and (ii) and §603(d)(2)(B), (C) or (D) of the FCRA.

3.5 We also encourage the Agencies, in their definition of "consumer report," to clarify the inapplicability of the FCRA to the provision and use of information to facilitate commercial purpose credit relationships. This could be accomplished by clarifying that an individual directly or indirectly involved in (or being considered for) a commercial purpose credit relationship need not consent in writing (or at all) to a consumer reporting agency's dissemination of a "consumer report" where the lender requires use of such information in connection with the commercial purpose credit relationship.

§__.5 Contents of opt out notice

5.1 Section 603(d)(2)(a)(iii) of the FCRA requires merely that a financial institution provide notice to a consumer that information may be shared among affiliates and an opportunity for consumers to opt out of that sharing. The Proposed Rule exceeds the scope of Congress' intent by requiring that the notice explain: (i) the categories of opt out information about the consumer that the financial institution communicates; (ii) the categories of affiliates to which the financial institution communicates the opt out information; (iii) the Consumer's ability to opt out; and (iv) a reasonable means for the Consumer to opt out. Nothing in the FCRA requires disclosure of the categories of opt out information that the financial institution communicates or the categories of affiliates with which the opt out information is shared. Hundreds of financial institutions have successfully and economically complied with the law, and there is no evidence that consumers have failed to understand or take advantage of their ability to opt out as presently implemented by financial institutions. Even more confounding, §503(b)(4) of GLBA requires a financial institution's privacy notice to include only, "the disclosures required, if any, under section 603(d)(2)(A)(iii) of the Fair Credit Reporting Act" and §506(c) of GLBA provides that: "[e]xcept for the amendments made by subsections (a) and (b), nothing in this title shall be construed to modify, limit or supersede the operation of the Fair Credit Reporting Act . . . ".

5.2 Accordingly, the Final Rule should specify that a financial institution may comply with the FCRA affiliate information sharing notice without disclosing the categories of opt out information or the categories of affiliates with which opt out information is shared.

5.3 The Final Rule should not require that financial institutions disclose either: (i) how long a consumer has to respond to the opt out notice before the financial institution may begin sharing the consumer's opt out information with affiliates; or (ii) that a consumer may opt out at any time. Such requirements are not consistent with the GLBA privacy regulations, provide little value to consumers, and are burdensome to financial institutions (who must perform the due

diligence and drafting efforts required to prepare these notices) and to consumers (who must read considerable quantities of information to answer what is basically a simple question). Like too many other federally mandated disclosures that financial institutions produce, the notice required by the Proposed Rule will be so detailed and complex that it will lose its meaning and purpose.

5.4 Moreover, the use of examples in ___.5(d) is inappropriate, as these examples expand or change the scope of the underlying act. As currently written, proposed section ___.5(d)'s use of "categories" and "examples" structurally implies that the examples shown are necessarily subject to the opt-out requirements, which is actually a case-by-case determination under the definitional tests of _____.3(g) and the newly added ___.3(k).

We therefore specifically recommend that __.5(d) be deleted or clarified to read as follows (new text underlined):

> _____.5(d)(1) ...if applicable. However, the use of these examples does not mean that the information in the example is always "opt out" information or a consumer report.
>
> _____.5(d)(2) Categories of opt out information that, based on the circumstances, meet the definition of _____.3(k) may ...
>
> _____.5(d)(3)...of this section may, in certain circumstances, include a ...

§__.6 Reasonable opportunity to opt out

6.1 Allowing 30 days for a consumer to opt out by mail is reasonable but the Proposed Rule inappropriately extends this time period as a general rule. Combined with the Agencies' conformance of the Proposed Rule with the GLBA privacy regulations solely with respect to requirements but not exceptions, this produces outcomes that make no sense and are detrimental to both financial institutions and consumers.

6.2 First and foremost, the exceptions to notice and opt out set forth in §___.14 and §__.15 of the GLBA privacy regulations, including consent, servicing or processing, securitization, protection of confidentiality or security, protection against fraud and any other applicable exceptions must be incorporated into the Final Rule. This enhances the Agencies' efforts to conform these regulations, recognizes the trade-offs between new requirements and exceptions that were part of enacting GLBA and prevents unintended consequences.

6.3 Consent is by far the most important of these exceptions. If the goal of privacy regulation is to provide consumers with control over their personal information, consent makes perfect sense. Further, it can be of great benefit to consumers and to financial institutions to share information among affiliates and offer several financial products at the inception of a customer relationship (*e.g.*, mortgage and hazard insurance; checking account and credit card).

In these instances there is no reason to wait 30 days. If the consumer authorizes the sharing the financial institution should be allowed to proceed immediately.

joint user exception is also important. It has been memorialized through commentary, interpretations and guidelines published by the Federal Trade Commission ("FTC") and the business practices of many financial institutions depend upon its continued recognition. If the Agencies believe that the joint user exception cannot be incorporated as a complete exception from both notice and opt out, it could be treated much like the "joint marketing agreement" exception under the GLBA privacy regulations, and made an exception to the opt out requirement only.

6.5 The Final Rule must allow the affiliate information sharing notice to remain on applications and within terms and conditions (or "tissue" agreements) sent by financial institutions to consumers. Further, the Final Rule must not eliminate the current oral disclosure option for the affiliate information sharing notice. There is no such prohibition in the FCRA and creating one in the Proposed Rule places MBNA at a competitive disadvantage because: (i) of the number of credit card accounts we acquire through telemarketing; and (ii) of the variety of products offered by our affiliates under our multiple bank holding company structure. If kept simple and to the point, the affiliate information sharing notice is an understandable concept that can be coherently delivered over the telephone and to which a consumer may immediately react.

§__.8 Delivery of opt out notices

8.1 We refer to our comment immediately above that the Final Rule must not prohibit oral disclosure of the affiliate information sharing notice.

8.2 The Final Rule should not inhibit financial institutions and their affiliates from using consumer information without indicators of personal identity to test or improve credit scoring, market response or other consumer behavioral models. These database management techniques are critical to maintaining the safety and soundness of financial institutions, to the development of strategies for "continuous relationship management" and to enhance our risk detection strategies.

§__.9 Revised opt out notice

9.1 The Final Rule should not require the affiliates to be named when a financial institution chooses to use a joint notice across all affiliates. This creates a disparity in treatment between large banks and small banks and provides little benefit to consumers, who often do not recognize the distinctions between affiliates. However, if the Agencies choose to retain this requirement then the Final Rule must be revised to indicate that any revised affiliate information sharing notice required as a result of establishing a new affiliate must be delivered only to those consumers whose information the financial institution intends to share with such new affiliate.

Further, the Final Rule must specify that a revised notice is not required where information is shared with a new entity so long as the entity was adequately described in the earlier notice.

§__.10 Time by which opt out must be honored

10.1 The Final Rule should not establish a fixed number of days constituting a "reasonably practicable" time period for a financial institution to process a consumer's opt out. As indicated in our comments to the GLBA privacy regulations,, there are likely to be times when opt outs are processed in less than 30 days and times when more than 30 days transpires. The flexibility provided by the term "reasonably practicable" is lost when a specific time period is designated.

§__.11 Duration of opt out

11.1 We refer to our comments in Sections 6.4 and 8.1 above that the Final Rule must not prohibit oral disclosure of the affiliate information sharing notice. Similarly, the Final Rule must not require a consumer's revocation of an affiliate information sharing opt out to be in writing. Nothing in the FCRA supports such a position and the requirement may actually delay a financial institution's ability to satisfy a consumer's requests.

§__.12 Prohibition against discrimination.

12.1 The Final Rule should not include provisions prohibiting a financial institution from offering special pricing on additional products and services if the consumer does not opt out of affiliate information sharing on the original product requested. The very act of affiliate information sharing saves costs to the financial institution and directly affects the pricing of such additional products and services to consumers. Incentives toward information sharing are not prohibited in other marketing environments (*e.g.*, e-tailing) and the Agencies should not place financial institutions at a competitive disadvantage. Additionally, without incorporation into the Final Rule of some of the exceptions in the GLBA privacy regulations mentioned above (*e.g,* the servicing and processing exception), it may be impossible for some financial institutions to provide a particular product or service to consumers opting out of affiliate information sharing.

Comment to Appendix A

The trailing note in Appendix A is not an accurate statement. To say "we may share other information about you with our corporate family as permitted by law" (emphasis supplied), implies that the information about which direction has been received cannot be shared. But, it may not just be other information that is shared. Some of the information shared will be the information about which direction has been received.

We therefore recommend the Note to read: "Notwithstanding your direction, we may share information about you with our corporate family as otherwise permitted by law."

Effective date; transition rule

The Proposed Rule has no effective date. Given the Agencies' efforts to conform the Proposed Rule to the GLBA privacy regulations, the general conclusion is that compliance by July 1, 2001 is required. With the GLBA privacy regulations published in final form on June 1, 2000, many financial institutions are already in the process of printing their privacy notices and such an effective date will adversely affect them Other financial institutions are in the middle of the systems designs and policy and procedure revisions required to comply with the GLBA privacy regulations, and face similar adverse consequences from a July 1, 2001 effective date. Even those financial institutions that believe they have time to incorporate the Proposed Rule's requirements into their privacy notices and to design their systems to record disclosure of the affiliate information sharing notice and track consumer opt outs face considerable uncertainty in proceeding on the Proposed Rule as opposed to the Final Rule. The Agencies must specify in the Final Rule that a financial institution's good faith compliance with the Proposed Rule shall be deemed sufficient and that the Final Rule shall not be retroactively applied in a manner requiring needless issuance of revised affiliate information sharing notices. The Final Rule is unlikely to be published before March or April, 2001, leaving far too little time available for compliance by July 1. This timeframe represents a significant compliance burden given the magnitude and cost of the operational changes needed to implement the Proposed Rule. We cannot stress enough that the Agencies should postpone the date for mandatory compliance. We recommend that compliance be made optional as of July 1, 2001, with an extended phase-in period to July 1, 2002.

Cost

The cost to implement the Proposed Rule is considerable. Cost implications include system and programming changes; costs to develop, print, mail and maintain written affiliate information sharing notices; education of personnel; legal and audit fees; and overall opportunity costs incurred by allocating resources previously devoted to business development and customer services to implementation of the Proposed Rule.

We firmly believe that the considerable costs to be incurred in implementing this Proposed Rule were not given sufficient consideration. Implementation costs will be covered by financial institutions reducing expenditures for previously planned marketing and operational activities. Extending the implementation period will greatly ease the financial burden and provide management with greater flexibility in making the necessary changes in systems, personnel, etc.

Systems

The system changes required in implementing the Proposed Rule are significant. They include programming necessary to support the delivery of revised privacy notices, processing of "opt

out" notifications, and suppression of opt out information when being transferred to affiliates. While the latter aspect of system functionality has been in place at any financial institution sharing information among affiliates since 1997, the Agencies' conformance of the Proposed Rule to the GLBA privacy regulations means in many cases a new system design and in all cases a thorough review of existing systems.

MBNA appreciates this opportunity to provide comments on the Proposed Rule. If you have any questions please contact the undersigned at 302-432-0716.

Sincerely,

Joseph R. Crouse,
Senior Executive Vice President and Legislative Counsel