BANC ONE CORPORATION
100 East Broad Street
Columbus OH 43271 0157

March 30, 2000

BANK ONE

VIA FEDERAL EXPRESS

Office of the Comptroller
of the Currency
Communications Division
250 E Street, S.W.
Washington, D.C. 20219
Attention: Docket No. 00-05

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

Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th and C Streets, N.W.
Washington, D.C. 20551
Attention: Docket No. R-1058

Manager, Dissemination Branch
Information Management & Services
Division
Office of Thrift Supervision
1700 G. Street, NW
Washington, DC 20552
Docket No. 2000-13

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Proposed Privacy of Consumer Financial
Information Regulations

Dear Ladies and Gentlemen:

BANK ONE CORPORATION is writing to comment on the notice of proposed rulemaking (the "Proposal") of the Office of the Comptroller of the Currency (the "OCC"), the Board of Governors of the Federal Reserve System (the "Federal Reserve"), the Federal Deposit Insurance Corporation (the "FDIC"), the Office of Thrift Supervision (the "OTS") and the Federal Trade Commission (the "FTC") (together, the "Agencies") relating to the Agencies' Proposed Privacy of Consumer Financial Information regulations (the "Proposed Regulations") under the Gramm-Leach-Bliley Act (15 U.S.C. 6801 et seq.) (the "Act"). 65 Fed. Reg. 8770-8816 (2000) (Proposed February 22, 2000).

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 released simultaneously by your Agencies. We support the objective of implementing the privacy provisions of the Act, and believe that the Agencies have done a commendable job in drafting a workable set of Proposed Regulations in a short time frame. We are eager to work with the Agencies to further develop a workable system that addresses the concerns of both financial institutions and consumers, and allows further development of new products and delivery channels within the banking industry. We place a high priority on addressing the privacy concerns of our customers to insure their continued confidence in our institution and the financial services industry. We thank the Agencies for allowing us to take part in the development of the law relating to information sharing by financial institutions.

Introduction.

Our goal is for financial institutions to be able to utilize a process that will be clear and understandable for consumers and manageable for financial institutions. We believe that the notices should be easy to understand so that our customers are clear about our policy and we want to make sure that our implementation does nothing to undermine the trust that we have sought to establish and maintain with our customers. We believe that it is important to articulate one consumer privacy policy for our entire organization. We plan to take a customer-focused approach to the distribution and fulfillment of the notices, which will require us to aggregate customer account relationships into one file and produce a special mailing. This approach will mean that we will not bombard our customers with multiple policies and notices, causing confusion and resulting in stress on customer service. Our customer-focused approach will require coordinating business processes and procedures across affiliates and business units. It will require the establishment and stringent testing of a central data system that records and maintains customer preferences on information-related issues. Moreover, extensive customer service training will be required. These important and necessary tasks take time; considerably more time than is provided for in the implementation schedule in the Proposed Regulation.

The risks of rushing to undertake a project of this magnitude and complexity are significant. As noted above, the risk of undermining the long-standing confidence of our customers is our primary concern. Inaccurate or incomplete disclosures could also jeopardize the safety and soundness of a financial institution if a product, service or processing arrangement must be terminated because of the failure to properly disclose.

The costs associated with implementation are material and significant additional costs would be incurred if a financial institution were forced to redisclose due to an inaccurate initial notice. In addition, there will be significant incremental costs associated with the short implementation deadline, including additional charges from printers, mailing houses and other servicers for providing rush service. Furthermore, with many financial institutions required to produce notices within the same short time frame, it is highly likely that there will be insufficient capacity among these vendors to produce and mail notices for all of the financial institutions who require their services. Finally, the short implementation period may prevent financial institutions from using the cost effective method of enclosing the initial notice with account statements, because some customers only receive account statements quarterly or annually.

For the reasons noted above, we believe that the effective date of the Proposed Regulation should be extended to December 31, 2001 to give financial institutions a full opportunity to comply with this complex Regulation. Financial institutions need this additional time to permit flexibility in scheduling the distribution of initial notices to current customers, and in completing all of the tasks described above.

The following are some specific comments on the Proposed Regulation, organized by section.

Scope (Section ___.1)

We request further guidance from the Agencies as to whether an operating subsidiary of a bank that is engaged in insurance activities is subject to the Proposed Regulation. We believe that the versions of the Proposed Regulation that have been released by the various Agencies are inconsistent on this point.

Definitions (Section ___.3)

"*Clear and conspicuous*". We believe that the examples given in this definition are unnecessary and may set a standard for disclosures under the Proposed Regulation that would be very difficult to meet. We believe that the same standard should apply as applies under the existing consumer banking regulations such as Regulations Z and DD; a standard that has already been interpreted by the regulators and the courts. For these reasons, we suggest that the examples set forth in this definition be deleted.

"*Consumer*". The joint notice from the Agencies includes an example of an individual who repeatedly engages in isolated transactions, such as withdrawing funds at regular intervals from an ATM owned by an financial institution with whom the consumer has no account. This example should be included in the final Regulation.

In addition, we note that the definition of "consumer" includes both an individual *and* the individual's legal representative. We believe that the word "or" should be substituted for "and" to avoid a requirement for duplicate disclosures.

"*Customer*". There are a number of circumstances in which a financial institution may have access to information regarding individuals as a result of its servicing activities for another entity, but does not have a contractual relationship with the individual. Examples of these services include: 401(k) and other retirement plans, where the financial institution is a record keeper or investment advisor; pension funds where the financial institution is a paying agent; bond issues where the financial institution is a registrar, transfer agent or paying agent; trust company services as a custodian for lenders or investors in secured real estate assets; and employee benefit medical plans, where the financial institution administers the plan on behalf of corporate clients. These are commercial relationships between the financial institution and its commercial customer, and should not be subject to the Regulation. To require financial institutions to provide initial and annual notices in connection with the above services would be unduly burdensome, very expensive and would only lead to customer confusion about the nature of the financial institution's role. The final Regulation should clarify that these types of relationships are not covered and should provide that an individual is a customer only if he or she has a direct contractual relationship with the financial institution.

Financial institution employees should not be considered to be "customers" of a financial institution under the Proposed Regulation merely as a result of their employee relationship. For example, the fact that a financial institution offers its employees certain financial benefits such as pension plans and 401(k) plans should not cause the employee to be included as a "customer" of the financial institution under the Regulation. Employers in the financial services industry share information when they contract with outside vendors to administer health programs, administer and evaluate benefit programs, and provide payroll and other more specialized services. These relationships should also not be included in the scope of the Regulation.

The Proposed Regulation should clarify that in the context of a personal trust relationship, only the grantor/settlor is a "customer' during his or her lifetime, notwithstanding the existence of other beneficial interests. In many cases, settlors may not want beneficiaries to know of their beneficial interest or to have information about the trust estate, and requiring a financial institution to send notices to beneficiaries would be counter to the wishes of these customers.

Finally, we suggest that the Agencies clarify that a mere referral of an individual by a financial institution to a third party would not cause the individual to be a customer of the financial institution, and that an individual who merely inquires about rates and terms on a financial product or service should also not be deemed to be a customer of the financial institution.

"Nonpublic Personal Information". We believe that the definition of "nonpublic personal information" in the Proposed Regulation misinterprets the statutory definition in the Act. Section 509(4) of the Act defines "nonpublic personal information" as "personally identifiable *financial* information" (emphasis added) that is provided to, or obtained by, a financial institution. The statutory definition includes only information that is (i) personally identifiable, (ii) financial and (iii) provided by or otherwise obtained about a consumer in connection with a financial product or service. The Proposed Regulation eliminates the first two requirements from this definition, and is a serious misinterpretation of the Act. It ignores the clear intent of Congress to limit the special protections of the Act to financial information rather than all information held by a financial institution about a customer. This interpretation of the Act violates the most basic principle of statutory interpretation by rendering the word "financial" meaningless in the statutory definition.

Congress further demonstrated its intent to restrict the Act to financial information in Section 509(4)(C)(i) of the Act by including in the definition of nonpublic personal information "any list, description, or other grouping of consumers (and publicly available information pertaining to them) *that is derived using any nonpublic personal information other than publicly available information*" (emphasis added). If Congress had intended that all personally identifiable information be subject to the Act, there would have been no need to include the italicized language, because any customer list would have been included in the definition. As explained in a colloquy between Senator Allard and Senator Gramm on Title V, Congress only intended the term "personally identifiable financial information" to include information that describes a consumer's "financial condition."[1]

The final Regulation should adopt the narrower definition of "personally identifiable financial information" intended by Congress -- that is, only information that describes an individual's financial condition, such as an individual's assets and liabilities, income, account balances, payment history and overdraft history. In particular, the mere fact of a customer relationship, without any indication of the types of products or services purchased by the customer, should not be considered to be "personally identifiable financial information" because it contains absolutely no information regarding the consumer's financial condition. The final Regulation should make clear that mere identification information (*e.g.*, name, address and telephone number) or customer lists containing such identification information are not "personally identifiable financial information" under the Regulation. No public policy goal is served by restricting the release of such information by a financial institution.

We also do not believe that the goals of the Act would be served by restrictions on the disclosure of information that is not identified with a particular customer. The Regulation should clearly state that depersonalized information that cannot be identified with a particular individual is not included in the definition of "nonpublic personal information". Financial institutions share such depersonalized information with vendors who perform services such as marketing and profitability analysis, scorecard preparation

[1] 145 Cong. Rec. S13,902-03 (daily ed. November 4, 1999)

and revision, portfolio analysis for compliance and other purposes, and product design. It is very important that financial institutions be able to use this information freely and share it when necessary in order to promote safety and soundness and greater efficiency within the financial industry. The sharing of this depersonalized information benefits both financial institutions and their customers by facilitating the development of cost effective and needs-targeted products and services.

The Agencies have asked for comments on whether the definition of "nonpublic personal information" should include Alternative A or Alternative B. While we believe that both alternatives contain the same serious flaw in defining "nonpublic personal information" to include information about customers that is not financial in nature (such as customer lists), we prefer Alternative B. Alternative A would create a nightmare of recordkeeping requirements and factual inquiries as to how a financial institution had obtained certain information held in its records. If information is publicly available, financial institutions should be able to use it for the same purposes that other entities use publicly-available information, and it should be irrelevant how the information was obtained by the financial institution.

In addition, we believe that the Proposed Regulation should clarify that the definition of "nonpublic personal information" does not include information collected about an individual for business purposes, even if the individual also has a personal banking relationship with the same institution. Financial institutions often collect information about individuals for the purpose of credit underwriting for business transactions. These individuals may be an individual co-signer, guarantor or third party pledgor on a business loan or deposit account. Only information collected in connection with a financial product or service for personal, family or household purposes should be subject to the Regulation. The Act was clearly not intended to affect information collected for business purposes.

"Publicly available information". We believe that the example in Section ____.3(p)(2)(ii) should not state that internet information is not "publicly available" if the user needs a password. A number of free information resources on the internet may require registration and a password in order to identify users for marketing purposes, but the information is freely available to the public. Non-financial companies are able to obtain and freely use such information, and there is no public policy reason why financial institutions should not be able to do the same.

Initial notice to consumers of privacy policies and practices (Section ___.4)

When initial notice is required (Section ___.4(a))

We are pleased that the joint notice states that financial institutions may provide the initial notice at the same time that a financial institution is required to give other required notices regarding an account, such as the initial disclosures required under

Regulation Z. This is a critically important clarification that should be added to the Regulation itself. Customers benefit by receiving important disclosures and notices regarding a loan or account all at the same time, instead of at various times during the process of establishing a customer relationship, and financial institutions benefit by not being forced to incur the substantial costs of establishing procedures for the multiple delivery of disclosures to the same customer in connection with the same product.

We ask the Agencies to consider providing additional flexibility with respect to the timing of the initial notice, which is necessary to address situations in which it might be impossible or impractical to provide an initial notice to a customer at the time of establishing a customer relationship. Specifically, we suggest that the final Regulation should provide that a financial institution may deliver the initial notice within a reasonable period after the customer relationship is established, so long as no nonpublic personal information relating to that customer is disclosed to a nonaffiliated third party before the initial notice and the opt out notice are provided, and the customer is given a reasonable amount of time to opt out before any such disclosure occurs. Customers will not be disadvantaged, and financial institutions will gain needed flexibility in complying with the Regulation.

If the Agencies decide not to make the above change, we would urge them to follow the language of the Act and permit disclosure "at the time of" entering into the customer relationship. Section ___.4(a)(1) of the Proposed Regulation provides that a financial institution must provide the initial notice to an individual "prior to the time that the institution establishes a customer relationship." This "prior to" standard is inconsistent with the statutory language of Section 503(a) of the Act, which states that a financial institution is expected to provide the initial notice to a customer "at the time of establishing a customer relationship".

Financial institutions establish customer relationships through many delivery channels, including telephone, internet, through the mail, as well as at banking centers. It would be difficult and expensive to deliver the initial notice prior to establishing a customer relationship through all of these various delivery channels. Customers would not be disadvantaged by delivery of the notice at the time of establishing the customer relationship, because no sharing of customer information can take place until the customer has received the notice and has had a reasonable opportunity to opt out.

How to provide notice (Section ___.4(d)).

The Agencies have requested comments on the issue of how the notices should be given for accounts with multiple parties. We urge the Agencies to clarify that if there is more than one party to an account, a financial institution is required only to provide one copy of the initial notice to the parties at the address specified by the parties for the account, or to the individual personally present at the financial institution or who otherwise is the party who initiates the relationship on behalf of the joint account customers. This rule is consistent with other consumer regulations, such as Regulation Z and Regulation DD, which require that only one set of disclosures be given to the parties to the account. In addition, joint accountholders have agreed as a matter of contract that only one notice will be sent per account and that it will be sent to the address of record. Financial institutions generally capture only one address per account, and locating the addresses of secondary account holders would be a virtually impossible task. The financial institution should be able to provide the notice and opt out to any joint account holder, leaving it to that person to consult with the other joint account holders about whether to opt out. We note, however, that we will be prepared to accept opt out elections made by any or all joint account holders on an individual basis.

Section ___.4(d)(2) of the Proposed Regulation recognizes two situations (oral contracts and purchases of portfolios) in which it is not feasible for a financial institution to provide the initial notice to a customer at the time the customer relationship is established, but numerous other similar situations exist. For example, a financial institution may allow a consumer who opens a credit card account at the point of sale to immediately use that account to make a purchase. It is often a third party, and not the financial institution itself, that accepts the application for the credit card account and forwards that information to the financial institution. It would be difficult for the institution to ensure that the third party has the most recent copy of the institution's initial notice, and that the notice was actually given to the customer by the third party at the point of sale. In addition, it may be more convenient for the customer to receive the initial notice at a later time, such as when the credit card itself is mailed to the customer or when a "welcome kit" regarding the account is mailed. The customer's privacy interests would be protected because the financial institution would not be permitted to disclose any information relating to that customer to any nonaffiliated third party until the customer had received the initial notice and had had a reasonable opportunity to opt out of such disclosure.

The same need for flexibility also arises when a financial institution mails a preapproved credit card solicitation to consumers and allows consumers who accept the preapproved solicitation to immediately use the credit line available on the credit card (such as for a balance transfer), before the credit card device is sent to the consumer. Requiring the financial institution to send its initial notice with each of the preapproved credit card solicitations would impose enormous costs on financial institutions, without any additional benefits for consumers. Again, the customer's privacy interests would be protected in such circumstances because no disclosure of the information would be permitted until the initial notice had been received and the consumer had had a reasonable opportunity to opt out of such disclosure.

With respect to oral contracts, Section __.4(d)(2)(ii) of the Proposed Regulation specifies that if a financial institution and a customer orally agree to enter into a customer relationship, the institution may provide the initial notice to the customer within a reasonable time thereafter *if the customer agrees*. If a customer relationship is established orally, the financial institution has no alternative but to provide the written initial notice to the customer at a time after the customer relationship has been established. The customer's consent to receiving the written notice at a later time is implied by the nature of the transaction. Requiring the institution to obtain the separate consent of the customer to such later disclosure would lead to customer confusion and would be difficult to document.

We believe that an additional exception is needed in Section ___.4(d)(2) for the situation in which the "customer" in the relationship changes because of an external event, such as when a trust settlor dies and the beneficiary of the trust becomes the "customer". In such a case, the financial institution should have a reasonable time after it learns of the precipitating event to provide the initial notice.

We believe that there are several difficult issues under this Proposed Regulation regarding the sale of loans and servicing rights. The final Regulation should clarify that when both the loan and servicing rights are sold, the customer relationship with the originating lender is terminated and any opt out election made by the customer to the originating lender would only be effective for the information held by that originating lender, and would not be effective with respect to any information held by the new lender or servicer. The originating lender would no longer be required to send an annual notice, as set forth in the examples in Section ___.5(c)(2). We believe that the new owner of the loan and the new servicer would each be required to send an initial notice and opt out pursuant to Section ___.4, and the future information sharing practices with respect to the information held by the new owner and/or servicer would be governed by the new notices. If the customer desires that information held by the new owner and/or servicer not be shared, he would have to indicate his opt out preference to the new owner and/or servicer of the loan. This will no doubt be confusing for customers, who may rely on the fact that they had already indicated their opt out preference to the originating lender. Nevertheless, the new owner and/or servicer will most likely have different privacy policies from that of the originating lender, and the customer will need to make a new opt out decision based on the policies of the new owner and/or servicer, as described in their initial notices. Purchasers of loans and/or servicing rights will not have an obligation to honor the privacy policies of the originating lender or any previous opt out election that the customer may have made to the originating lender. We suggest that the Agencies add a reference to this fact situation in the final Regulation. Any other treatment of this issue would seriously restrict the ability of financial institutions to sell loans and servicing rights.

The Agencies have asked for comments about customers who have requested that their financial institution not send statements, notices or other communications to them. We believe that financial institutions should be allowed to honor the customer's request, and should not be required to send the initial notice or annual notices to them.

The joint notice clarifies that the retention and accessibility requirement of Section ___.4(d)(4) is intended only to require that a customer be able to access the most recently adopted privacy policy. This statement is very important and should be added to the Proposed Regulation. Otherwise, a financial institution would have great difficulty amending its privacy policy, because it would be required to retain and distribute various versions of the policy upon request.

We request that the Agencies clarify the application of the notice requirements in the internet environment. The examples provided in ___.4(d)(5) give some guidance but leave many questions unanswered. We suggest that the Agencies clarify in the final Regulation that a financial institution may provide the initial notice and opt out by email to a consumer who consents to such delivery. We believe that this is implied in ___.4(d)(5)(ii)(B), but it should be clarified. Because of the great expense of mailing this lengthy notice to customers each year, financial institutions will be able to realize significant operating savings if the notices can be delivered electronically to those customers who desire to receive it in this format.

We suggest that the Agencies clarify that the initial disclosure and opt out may be given in another language, if the customer has previously received disclosures in another language and as long as an English version is available upon request. Financial institutions should not be required to provide the notice in languages other than English, but may wish to do so as a customer service. This notice and opt out will be complex, and providing the notice in other languages would be a valuable service to many of our customers.

Annual notice to customers (___.5)

The Agencies have asked for comment on whether institutional policy or state law should be used to determine whether a deposit account is inactive. We believe that institutional policy should determine whether an account is inactive, because the use of state law as a guideline would create very difficult systems problems for financial institutions that have operations in multiple states. As stated above, we strongly believe that it will be best for our customers if we address privacy issues on a corporate-wide basis. This treatment will help to insure that our customers will not receive notices from several lines of business within our corporation, and will have a clearer sense of our corporate policy. In order to accomplish this, we need a regulation that allows us to maintain a unified national compliance program. State by state differences make this very difficult.

Information to be included in initial and annual notices (Section ___.6)

We believe that the form of notice required by the Proposed Regulation, as currently drafted, is counterproductive to the interests of consumers because financial institutions will be required to produce a notice that is lengthy and complex. It will require definitions of several different types of customer information and an explanation of the categories of permissible sharing of customer information under several regulatory schemes. We urge the Agencies to allow the financial institutions flexibility in complying with the disclosure requirements of the Act in order to provide a simpler, more customer-friendly disclosure.

Section ___.6(d) of the Proposed Regulation requires financial institutions to include in their initial notices so much detail about their policies on collecting, disclosing, and protecting nonpublic personal information of consumers that such notices could not possibly be meaningful to most consumers. In fact, the Proposed Regulation, by requiring overly detailed initial notices, would actually be counterproductive to the privacy interest of consumers. As a practical matter, a consumer is far less likely to read a financial institution's initial notice if it is lengthy and complex. Also, because consumers are likely to receive initial notices from many different financial institutions (typically 20 or more of such notices per consumer), the consumer will be overwhelmed if he or she receives lengthy, detailed notices from every financial institution with which the consumer has some type of relationship. We also believe that financial institutions should be permitted to use examples liberally in the disclosure, rather than supply long lists of types of information or third parties. Examples are more likely to clearly convey the required intent to consumers.

In addition, the level of detail required by the Proposed Regulation would make it extremely difficult for diversified financial institutions to provide consumers with a single notice that would cover all of their various lines of business and subsidiaries within those institutions. Further, by requiring this level of detail in the initial notice, the Proposed Regulation would greatly increase the frequency with which a financial institution would be required to provide change-in-terms notices regarding its privacy policy to consumers. A financial institution could be required to provide a change-in-terms notice to consumers each time the institution offers a new financial product or service, obtains information from a new source or establishes a marketing program with a new partner. Any amendment to the notice will be prohibitively expensive, as it will require a redisclosure to all customers, as well as revisions to the initial notice produced through numerous delivery channels. This redisclosure expense would stifle innovation and create inefficiencies within the financial services industry.

The example in ___.6(d)(5) indicates that a financial institution adequately describes its policies and practices with respect to protecting the confidentiality and security of nonpublic personal information if it "explains who has access to the information and the circumstances under which the information may be accessed". This example suggests that a financial institution may have to set up a system of sophisticated levels of access to customer information for all of its employees. The focus of the Act is on the release of information to unaffiliated third parties, rather than the use of customer information within a financial institution by employees of the financial institution. We believe that this disclosure should also focus on external security rather than levels of access within the financial institution, and we urge the Agencies to allow a general description of security measures rather than detailed descriptions of which employees have access to certain types of customer information.

Limitation on disclosure of nonpublic personal information about consumers to nonaffiliated third parties (Section ___.7)

The example in Section ___.7(a)(3)(ii) implies that if a financial institution wishes to share nonpublic personal information collected during an isolated transaction with a consumer (such as the purchase of a cashier's check), the financial institution must give the initial notice and opt out at the time of the transaction. This contradicts ___.4(a)(2), which requires only that the initial notice and opt out must be given to a consumer prior to any sharing of the nonpublic personal information. We prefer the language of ___.4(a)(2). We believe that it is impractical to give an opt out notice to a consumer at the time of an isolated transaction. Few people would be willing to read a long notice and decide whether to opt out in the middle of purchasing a cashier's check or withdrawing money from an ATM. Few financial institutions would wish to inconvenience consumers with such a request. In addition, if a financial institution does not give the notice at the time of the transaction, it will forever be precluded from sharing the information. A financial institution should be able to decide at a later date if it wishes to share such information and be able to send out the required notices at such time, as long as the consumer receives the notice and has a reasonable opportunity to opt out prior to any sharing of the information.

Form and method of providing opt out notice to consumers (Section ___.8)

The first sentence of Section ___.8(a)(1) indicates that a financial institution must provide an opt out notice to "each of its consumers". This contradicts Section ___.4(b) and the joint notice, which both state that a financial institution is not required to provide an initial notice or opt out to a consumer unless the financial institution is planning to disclose nonpublic personal information about the consumer to any nonaffiliated third party. We urge that Section ___.8 be modified to reflect the rule set forth in ___.4(b).

We believe that an additional example should be added to Section ___.8(a)(2)(ii) permitting the use of an 800 number as a reasonable means for consumers to opt out. We do not believe, however, that the Regulation should include a mandatory requirement that an 800 number be provided for opt outs. Taking opt out elections by phone is desirable because it is a convenient method for customers, but it would require systems changes and training programs to implement it properly. Financial institutions may have difficulty making such a system available given the short time before the Regulation becomes effective.

The Agencies have asked for estimates of the costs of complying with the Proposed Regulation. We estimate that BANK ONE CORPORATION will spend about $25 million per year to comply with this Regulation. Included in this estimate are the costs of printing and mailing the initial opt out notice to existing customers, developing and maintaining a system for tracking the opt out elections, modifying account opening procedures, documents and software through each of our delivery channels (banking center, telephone, internet, mail and others) to include the initial notice and opt out and to be able to capture opt out elections, training banking center and telephone personnel to respond to customer inquiries and to take opt out elections, and reviewing and modifying procedures and documents in connection with brokered products.

We request clarification on whether a financial institution could change the terms of its privacy disclosure in the annual notice. We believe that this should be permitted, as long as the changes are highlighted.

Exception to opt out requirements for service providers and joint marketing (Section ___.9)

As currently drafted, Section ___.9 places significant restrictions on the ability of financial institutions to outsource activities; restrictions that we believe were not intended by Congress. This section addresses two very different situations: the sharing of information with a party that is providing marketing or other services on behalf of the financial institution involving the financial institution's own products and services, and the sharing of information pursuant to a joint agreement with another financial institution for the purpose of jointly marketing financial products or services. We believe that the disclosure and confidentiality requirements of Section 502(b)(2) of the Act were intended to apply only to the joint marketing arrangements, and not to basic outsourcing practices. We urge the Agencies to remove these restrictions on outsourcing practices, so that financial institutions will have the flexibility to realize the efficiencies of outsourcing marketing and other services and to manage their businesses effectively.

In order to utilize the Section ___.9 exception, as currently drafted, a financial institution must include in its initial notice a separate description of the categories of information that the financial institution discloses pursuant to Section ___.9 and the categories of third parties with whom the financial institution has contracted. We are concerned that, once the initial notice is sent, the financial institution may not be able to outsource a new service because it would require a new disclosure to all of its customers, which would be prohibitively expensive. Financial institutions will be locked in to the outsourcing decisions they had made prior to the time of the initial disclosure. In order to economically justify the use of a new outsourcing arrangement, the financial institution would have to factor in not only the cost of the outsourcing and the practical benefits, but also the cost and confusion of sending a change-in-terms notice to each of its customers.

We see no public policy benefit in requiring the initial notice to describe outsourcing arrangements under Section ___.9, because the Regulation does not permit consumers to opt out of the sharing of information under such outsourcing arrangements. The notice will simply cause confusion among consumers. Outsourcing programs under Section ___.9 should be accorded the same treatment as the outsourcing programs under ___.10. In both cases, a financial institution is choosing to contract with a third party to provide a service on its behalf, for reasons of efficiency or other considerations. These exceptions allow financial institutions to make rational economic decisions about how best to run their businesses.

Financial institutions use service providers for many purposes, including marketing of the financial institution's products on behalf of the financial institution through direct mail, telemarketing or other channels, the preparation and validation of scorecard models, and answering customer service calls. Sometimes the service provider is the initial point of contact between the financial institution and a prospective customer. For example, a financial institution may contract with a service provider to act as its agent to make telemarketing calls with individuals on a prospect list, in order to try to sell them products or services offered by the financial institution. In this situation, it would be impossible to give the consumer the initial notice before information is shared with the service provider. Such outsourcing arrangements will not be possible under the Proposed Regulation, as currently written.

The Agencies have asked whether ___.9(a)(2)(ii) would prohibit using consumer information without personal identity indicators to re-validate credit scoring models. As stated above in the discussion of the definition of "nonpublic personal information", the language of Section 509(4) of the Act clearly indicates that Congress did not intend to regulate the disclosure of information that is not personally identifiable. Therefore, financial institutions should be permitted to freely share consumer information without personal identity indicators. In addition, re-validation of a credit scoring model is an inherent component of the purpose for which the information was originally disclosed.

We believe that the final Regulation should permit third parties to receive depersonalized information and use that information on behalf of the financial institution to improve credit score models, analyze market trends and marketing programs, and for other purposes. Congress recognized that there is value in permitting financial institutions to distribute de-personalized information, in order to allow financial institutions to continually refine their risk models and to keep consumer costs low. Consumers profit from accurate models, which are only possible with access to accurate information.

Joint Marketing Exception (Section ___.9(b))

Additional examples to clarify the types of agreements and marketing arrangements that are within the scope of the exception would be helpful. For example, it should be clear that a marketing arrangement between a financial institution and its proprietary mutual funds is not subject to an opt out.

The joint marketing exception is available only for marketing arrangements with a financial institution. It will therefore be critical for the FTC to establish a clear and predictable definition of "financial institution", so that entities will be able to determine whether a proposed marketing program would fall under the joint marketing exception. The Proposed Regulation issued by the FTC defines a financial institution based on the nature of the specific activity in which the entity is engaged each time customer information is disclosed. An entity that is considering a joint marketing arrangement would be obligated to perform extensive research and analysis in order to determine whether a proposed joint marketing partner would be a "financial institution" under the FTC Regulation, in order for the marketing program to qualify under the joint marketing exception. We urge the FTC to provide clear guidance regarding the definition of a "financial institution" based on the primary business of the entity.

We believe that financial institutions should be able to use this joint marketing exception to offer any products or services that may be offered by a financial institution, including those that are "complementary" to financial products and services, as defined in Section 4(k) of the Bank Holding Company Act of 1956, as amended. Institutions should not be penalized for the business decision to offer complementary products through a venture with an unaffiliated third party, rather than incurring the costs associated with developing an in-house capability to market such products and services. The joint marketing exception was designed to allow a financial institution to outsource activities that it could perform itself, and there is no public policy benefit to be gained by limiting the ability of financial institutions to offer innovative products that are "complementary" to financial services through cooperative relationships.

If, in the future, a new product is deemed to be financial in nature and the product category was not included in the joint marketing language of the initial notice, then a financial institution will not be able to offer the new product through a joint marketing arrangement unless it first rediscloses to all of its customers. This may limit the development and availability of new financial products, and operate to reduce choices for consumers. We urge the Agencies to permit broader language in the initial notice to allow for the future development of financial products that will benefit consumers.

The Agencies have asked whether financial institutions should be required to monitor their joint marketing partners to insure that they comply with the confidentiality requirements of the joint marketing arrangement. We are greatly concerned about a regulatory requirement that could lead to financial liability for a financial institution based on an unaffiliated third party's failure to comply with the terms of a confidentiality agreement. Financial institutions should not have the added cost, burden and potential liability associated with policing the compliance of unaffiliated entities with legal or contractual requirements to which they are subject.

Exceptions to notice and opt out requirements for processing and servicing transactions (Section ___.10)

We request clarification that the standard practices of many insurance agencies are within the Section ___.10 exception for "effecting . . . a transaction requested or authorized by the consumer". Insurance agencies sell products offered by non-affiliated third parties, which involves obtaining the nonpublic personal information necessary for determining eligibility or obtaining a quote and forwarding it on to non-affiliated third parties. In some cases the consumer may have applied for an insurance product, but often the consumer has only made an inquiry. We believe that such practices should fall under the Section ___.10 exceptions. Section ___.10(b)(2)(v) addresses underwriting of the insurance application, but would not cover an insurance agency's activities in assisting a consumer in finding the right insurance. It would be nearly impossible to continue to do business in this manner if an financial institution is required to provide the initial notice required under ___.9 or to obtain written consent as required by ___.11 before sharing such information with third party providers. We suggest that an example be added, making clear that a financial institution that is offering financial products or services of non-affiliated third parties in an agency capacity may disclose to those third parties nonpublic personal information of a consumer who has expressed an interest in obtaining those products or services through the financial institution, for the purpose of pursuing the consumer's interest. Insurance agencies play a valuable role in helping customers to find the optimal insurance coverage based upon their particular circumstances. There is no regulatory purpose to be served in preventing this valuable customer service.

We have a similar concern with respect to mortgage brokers. They also take in customer information and forward it to various lenders in order to obtain the best deal for the customer. Again, an example acknowledging that these types of arrangements are covered by Section ___.10 would be most helpful.

To be consistent with Section 502(e) of the Act, the phrase "in connection with" should be added to the beginning of the clauses in Sections ___.10(a)(2) and (a)(3) of the Proposed Regulation. In particular, Sections 502(e)(1)(A) and (B) of the Act provide that the obligations of a financial institution to provide initial notices and opt out notices to consumers do not apply if the financial institution is disclosing nonpublic personal information "in connection with" servicing or processing a financial product or service requested or authorized by the consumer. This "in connection with" language is essential because it makes it clear that the exceptions in Sections 502(e)(1)(A) and (B) (as implemented by Sections ___.10(a)(2) and (a)(3) respectively) include activities that relate to servicing or processing a financial product or service or maintaining or servicing the consumer's account, even where these activities are not absolutely necessary to service or process the financial product or financial service or to maintain or service the consumer's account.

We also request clarification about the practices commonly used in connection with student loans. These loans require cooperation and information sharing among the loan originator, the lender, the school and government or private insurers. For example, in order for a student to qualify for a loan under the Federal Family Education Loan Program, authorized under the Higher Education Act of 1965, the school must certify the student's eligibility to the lender and the government insurer. The same practice has been universally carried over to private education loans as well. In order to obtain the required certification, the lender must share nonpublic personal information with the school and the insurer. We believe that such information sharing would fall under the ___.10 exception, but adding the "in connection with" statutory language as discussed above would help to clarify the situation.

Section ___.10(b)(1) should also be revised to clarify that a financial institution may share nonpublic personal information with its agents, attorneys and collection agencies in connection with legal or collection services on behalf of the financial institution.

Other exceptions to notice and opt out requirements (Section ___.11)

Care should be taken that any safeguards do not unduly restrict the ability of customers to grant their consent in specific instances. We are concerned about the effect of a requirement that consent to disclose nonpublic personal information pursuant to ___.11(a)(1) be in written form. Unduly restricting the ability of customers to consent to the sharing of customer information may stifle innovation in the development of new and more convenient products or delivery channels.

Many of our customers use the telephone or the internet to apply for loan or deposit products, and a requirement for written consent will severely restrict our ability to provide credit or deposit products in this manner. In order to process a mortgage loan, the lender must verify employment, income, credit history, collateral value and certain other information, as well as share information with title companies, closing agents, appraisers, credit insurance companies and employers. When written loan applications are used, these applications generally include the customer's consent for the lender to share this information. This authority to disclose customer information benefits the customer, because if the lender cannot share this information, the transaction either becomes impossible or the consumer must gather much of the information himself and send it to the lender. A requirement for written consent would make the telephone transactions virtually unworkable and internet transactions uncertain at best. Such a requirement would not be in the best interests of consumers, because it would restrict the availability of credit or other services through these convenient means.

In addition, financial institutions offer bundled products with multiple legal entities providing pieces of a single product and credit card affinity programs with unaffiliated partners. In these situations, a customer's consent to the sharing of information among the participating entities should be implied by the customer's purchase of the product.

The protections being afforded to consumers under the Regulation should not reduce consumers' opportunities to purchase products and services in the manner they choose. If consumers are interested in inquiring about or applying for a product or service over the telephone, they should not be prevented from doing so because the financial institution must mail them a consent form.

We suggest that if a customer's consent to share information is revoked, the financial institution should have a reasonable period, such as 30 days, to implement the change.

An additional exception is needed to permit financial institutions to share information with the holder of a check about the availability of funds in the account on which the check is drawn. This is a long-standing practice within the banking industry and provides a needed service to facilitate commerce.

We also suggest that an additional exception be added to Section ___.11(a) as follows to permit the sharing of information:

> "in connection with a proposed or actual offering of securities (i) issued by the financial institution or any affiliate of the financial institution, or (ii) representing interests in, or secured by, assets originated or purchased by the financial institution or any affiliate of the financial institution, to the extent that the nonpublic personal information disclosed is reasonably related to the securities offering."

This exception is needed because underwriters of a securities offering, along with a variety of other parties, may need to conduct due diligence investigations of the issuer and its affiliates, which may involve the review of individual customer files. Likewise, the offering materials for a securities issuance may include disclosures about particular consumer products of the financial institution, and those disclosures may include customer information. We recognize that Section ___.10(a)(4) provides an exception for disclosures of nonpublic personal information in connection with a securitization, secondary market sale, or similar transaction. However, there are other types of securities offerings that would also require such an exception, but are not presently covered by the language in the Proposed Regulation.

Limits on redisclosure and reuse of information (Section ___.12)

Many financial institutions have chosen to outsource many of the functions associated with consumer lending. Some financial institutions use a vendor manager, which provides a number of services either on its own or through other vendors. We are concerned that the limitations in this Section will limit a vendor's ability to manage the lending process. For example, if a financial institution discloses information to its vendor manager under the Section ___.9 exception for service processors, it is not clear that the vendor manager could disclose the information to another vendor to process a statement or service the loan under a Section ___.10 exception. In this regard, we suggest that Section ___.12(b)(2) should be eliminated from the final Regulation. No consumer protection interest is served by this section, which gives greater protection to nonpublic personal information that is held by vendors than it does information that is held by financial institutions. The same standards should apply in both cases. The exceptions in ___.9, ___.10 and ___.11 have been deemed to be desirable in order to facilitate certain public policy goals, efficiency, and to promote commerce. Both financial institutions and their vendors should be permitted to disclose information that is covered by one of these exceptions.

Financial institutions disclose nonpublic personal information to unaffiliated third parties when they sell ownership rights or servicing rights to a loan. The purchaser of the ownership or servicing rights is required to send its own initial notice and opt out notice to the consumer. The further disclosure of such information should be subject to the terms of the notice sent out by such purchaser, and whether the customer opts out of information sharing by the purchaser. This section should be modified to recognize that any further disclosures of the nonpublic personal information by the purchaser of the loan or servicing rights would be subject only to the terms of the purchaser's notice and opt out, and would no longer be affected by the disclosure policies or rights of the original lender.

Limits on sharing of account number information for marketing purposes (Section ___.13)

We believe that exceptions and safe harbor examples are needed in this Section. First, financial institutions should be permitted to share account numbers with service providers who are marketing the financial institution's products and services on behalf of the financial institution under the Section ___.9 exception. For example, a financial institution may engage a service provider to contact a financial institution's existing customers to make them aware of a new product that is available from that financial institution. The service provider is acting as agent for the financial institution in selling the financial institution's own products and services. We believe that the Act permits a financial institution to share account numbers with nonaffiliated third parties that are engaged in marketing the products or services of the financial institution. The prohibition in the Act was intended to apply to circumstances in which a financial institution provides account numbers to a third party for purposes of marketing the third party's products or services. The Proposed Regulation should be revised to clarify that financial institutions are permitted to outsource their marketing efforts. There is no public policy purpose to be gained by forcing financial institutions to become inefficient horizontally integrated marketing organizations.

In addition, we believe that Section ___.13 should not be interpreted to prohibit a vendor that processes account statements for a financial institution from inserting marketing material into the statement envelope at the direction of the financial institution. An example should be added to clarify that this practice is not prohibited under Section ___.13.

We believe that the Agencies should clarify that this Section does not prohibit a financial institution from sharing account numbers for fulfillment of customer requests and other non-marketing purposes. Section 502(d) of the Act (as implemented by Section ____.13 of the Proposed Regulation) restricts the sharing of information for marketing purposes, but not for other purposes. If a customer agrees with a third party to purchase a good or service and wishes to pay with a credit card or debit to his checking account, the customer's financial institution should not be prohibited from releasing his or her account number to the third party for the purpose of fulfilling the customer's request. This would not be a release of information for marketing purposes, and the Regulation should clarify that this practice is not restricted by Section ___.13.

Consent.

We believe that Congress intended to permit financial institutions to share customer account numbers with unaffiliated third parties with the consent of the customer. The Conference Report on the Act explicitly addressed the question of sharing account numbers in encrypted form, stating that the Agencies may:

> "consider it consistent with the purposes of this subtitle to permit the disclosure of customer account numbers or similar forms of access numbers or access codes in an encrypted, scrambled or similarly coded form, where the disclosure is expressly authorized by the customer and is necessary to service or process a transaction expressly requested or authorized by the consumer." Cong. Rec. H 11299 (November 2, 1999).

The final Regulation should specify that a financial institution may provide an account number to a nonaffiliated third party for use in marketing to the consumer, if the financial institution has obtained the consumer's prior consent to provide that information to the nonaffiliated third-party marketer.

This consent provision is particularly important in the context of co-brand or affinity credit or debit card programs. A financial institution often makes available account numbers relating to the co-brand or affinity accounts to the co-brand or affinity partners, so that when the co-brand or affinity partner communicates information relating to the accounts to the financial institution, the co-brand or affinity partner can accurately identify the account to which the information relates. As discussed above, the sharing of information by a financial institution with a co-brand or affinity partner -- including account numbers -- should be a matter of notice and consent. The consumer has chosen to participate in this arrangement which necessarily involves use of the information by both the financial institution and the co-brand or affinity partner.

Key-Encrypted Account Numbers.

We urge the Agencies to clarify that the term "account number or similar form of access number or access code" in Section ___.13 does not include an account number or other similar number that is key-encrypted when provided to the nonaffiliated third-party marketer, as long as the nonaffiliated third-party marketer is not given the information or device needed to decode or unscramble the encrypted number. In addition, the final Regulation should clarify that the term "account number or similar form of access number or access code" does not include a reference number used by the financial institution to identify a particular account holder, including a partial or truncated account number, provided that the reference number cannot be used by the recipient nonaffiliated third-party marketer to post a charge or debit against the particular account.

As stated by the Agencies in the joint notice, the prohibition in Section 502(d) of the Act is designed to avoid the risks associated with direct access by a third party to a consumer's account, whereby the third party can directly post charges or debits to the consumer's account by using the account number. These risks are not present, however, when key-encrypted account numbers are used, because the third-party marketer cannot decode the account number and use it to post a charge or debit against a consumer's account. Key-encrypted account numbers and reference numbers serve the important purpose of allowing a third party to identify accurately to the institution which account should be debited or charged, without imposing risks regarding unauthorized use of the consumer's account.

Thank you for the opportunity to comment on these Proposed Regulations. 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
Deputy General Counsel
Law Department

t:\persbank\ajb\privacy26-7.doc