



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

PUBLIC VERSION

February 23, 2001

VIA FACSIMILE AND EXPRESS MAIL

Federated Department Stores, Inc.
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Re: Petition of Federated Department Stores, Inc., on Behalf of its Subsidiary, FACS Group, Inc., To Quash Civil Investigative Demand -- File No. 992-3271

Dear Messrs. Wolff and Kalt:

This letter constitutes the Federal Trade Commission's ("FTC" or "Commission") ruling on the petition you filed on behalf of Federated Department Stores, Inc. and its subsidiary, FACS Group, Inc. (collectively "petitioner"), to quash a civil investigative demand ("CID") issued by the FTC on May 30, 2000 (the "petition"). The petition is denied for the reasons stated below. Petitioner is directed to produce the documents and answer the interrogatories required by the CID on or before March 12, 2001, and appear at 9:00 a.m. on March 23, 2001, for the testimonial hearing.

Your petition has been referred to the full Commission for a determination in the first instance (*see* 16 C.F.R. § 2.7(d)(4) (2000)); and this letter sets out the determination of the full Commission. Accordingly, the typical opportunity to request full Commission review of a ruling by a designated Commissioner is superseded in this case. *See* 16 C.F.R. § 2.7(f) (2000).

I. BACKGROUND

Federated Department Stores, Inc. ("Federated") is the ultimate parent of several large department store chains, including Macy's and Bloomingdale's. Federated also has related direct mail catalog and internet sales operations. These department stores and retail operations offer private label credit cards to consumers. The credit cards are issued by a bank, an indirect

subsidiary of Federated, called the FDS Bank.¹ Another Federated subsidiary, FACS Group, Inc. ("FACS Group"), which is not a bank, performs various services for the FDS Bank in connection with the credit cards.²

According to Federated's web site (<http://www.federated-fds.com/home.asp>), "approximately 40 percent of customer purchases are through the use of these credit cards. Each business day, Federated collects, organizes and analyzes millions of customer transactions." "Federated customers opened more than 3.4 million new proprietary charge accounts in 1999, bringing the total number of accounts on record to 67.4 million. In all, more than 26 million individual customers used their Federated store charge accounts in 1999."

The FTC is the primary enforcer of the Fair Credit Reporting Act ("FCRA"),³ which seeks to ensure accuracy and fairness in the consumer reporting process. Among other things, the FCRA regulates those who furnish information to consumer reporting agencies. For example, the statute imposes a duty to reinvestigate disputed report entries. Simply put, when a consumer challenges the accuracy of an item on his or her credit report, the company that furnished the information is required to investigate and determine the challenged item's accuracy. The FTC investigation that gave rise to the CID at issue here seeks to determine whether the parties being investigated are complying with the FCRA.

¹ At the time the petition was filed, Federated's bank, FDS National Bank, was a limited purpose national bank in the business of issuing credit cards. As a national bank, FDS was chartered and subject to regulatory oversight by the Office of the Comptroller of the Currency ("OCC"). While petitioner has not filed any supplement to its petition, press reports state that the bank has now received a charter as a federal savings bank, which, in turn, permits it to expand its banking activities beyond issuing credit cards. As part of this change, the bank has been renamed FDS Bank. See Gene Fox, *Federated Department Stores to Open Own Bank*, Dayton Business Journal, April 30, 1999, available at <http://dayton.bcentral.com/dayton/stories/1999/05/03/newscolumn3.html>, and Julie Thompson, *Retailer Banking on Credit Cards*, Dayton Business Journal, July 28, 2000, available at <http://dayton.bcentral.com/dayton/stories/2000/07/31/story1.html>, and follow-up confirmation at http://www.cardforum.com/html/news/031300_4.htm (March 13, 2000, *Federated Gets New Bank Charter*). As a savings bank, regulatory oversight shifts to another of the multiple federal banking agencies: the Office of Thrift Supervision ("OTS"). The Commission's analysis and conclusion here are applicable to savings associations and their contractors as well.

² According to the Affidavit of Amy Hanson, Senior Vice President of Credit Services of FDS National Bank, "FACS performs services with regard to obtaining credit reports from credit reporting agencies, applying the bank's underwriting guidelines to the information contained in those reports, providing required disclosures to applicants and customers of the Bank, handling customer account disputes, and furnishing customer account information to consumer reporting agencies, all on behalf of and at the direction of the Bank." *Affidavit of Amy Hanson* (Exhibit 5 to the Petition) ¶ 2.

³ 15 U.S.C. §§ 1681 - 1681u (2000). As discussed in detail below, under the FCRA, enforcement authority with respect to banks (as well as a few other specified businesses not relevant here) is committed to other federal agencies. *Id.* at 1681s.

On May 30, 2000, the Commission issued a CID to Federated in connection with its investigation of potential FCRA violations. The CID sought production of specified categories of documents, the submission of narrative responses to written interrogatories, and Federated's appearance at a testimonial hearing.

On June 15, 2000, Federated filed its petition to quash the CID. In its petition, Federated states that the only Federated entity with responsive materials is FACS Group. Federated argues that, although FACS Group is not a bank but simply a company that provides services to a bank, the Commission lacks jurisdiction over FACS Group because the Office of Comptroller of the Currency ("OCC") has exclusive FCRA jurisdiction over FACS Group through the operation of the Bank Service Company Act ("BSCA").

After careful review of the CID, the petition, the declarations and various correspondence Federated filed with the petition, and the relevant statutes and case law, the Commission finds that none of petitioner's arguments provides a basis for quashing the CID.

II. ANALYSIS

The FCRA incorporates the procedural, investigative, and enforcement powers set forth in the FTC Act "as though the applicable terms and conditions of the Federal Trade Commission Act were part of [the FCRA]." 15 U.S.C. § 1681s(a) (2000). The FTC Act authorizes the Commission to issue CIDs to gather information and to seek enforcement of its CIDs in federal district court. *See* 15 U.S.C. § 57b-1 (2000). In deciding whether to enforce compulsory process issued by the Commission, courts are to consider only whether (a) the investigation at issue is within the Commission's authority, (b) the information sought is reasonably relevant to the investigation, and (c) the request is not unduly burdensome. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992). Here, petitioner asserts that the Commission lacks authority to issue the CID to Federated.

Specifically, petitioner asserts that the OCC has exclusive jurisdiction to enforce the FCRA against companies, like FACS Group, which provide business services to national banks. To arrive at this result, petitioner reads the FCRA provisions granting enforcement jurisdiction over various types of "banks" to the federal banking agencies⁴ in conjunction with a provision of the Bank Service Company Act, 12 U.S.C. § 1867(c) (2000), which permits the banking agencies to reach the activities of contractors and others providing services to banks. In essence, petitioner argues that when Congress excluded specified banking institutions from the FTC's

⁴ These are the OCC, Federal Reserve Board, Office of Thrift Supervision ("OTS"), and Federal Deposit Insurance Corporation. The OTS now has authority parallel to that of BSCA § 1867(c) under 12 U.S.C. § 1464(d)(7), added in 1998.

jurisdiction under FCRA (e.g., “national banks” and “savings associations”),⁵ Congress also excluded anyone the banking agencies can reach as part of their oversight of these actual banking institutions. The plain language of the FCRA and the BSCA do not support petitioner’s argument. Petitioner also cites various passages from the legislative histories of these Acts and other related statutes to support its argument that all banking agency authority to enforce the FCRA is exclusive and that therefore the FTC is excluded from enforcement wherever a banking agency has authority under *any* law.⁶ Petitioner’s arguments do not support a finding that the banking agencies have exclusive jurisdiction over bank service providers, such as FACS Group.⁷

As detailed below, petitioner’s arguments fail because the language of the FCRA is clear on its face, the FCRA jurisdictional provisions are unaffected by the BSCA, and resort to legislative history is unnecessary. Moreover, nothing in the legislative history that petitioner cites contradicts our conclusion here that the FTC has authority to enforce the FCRA against non-banks, including those companies that contract with banks to perform clerical, administrative, and other functions for and on behalf of banks. Petitioner’s argument is further refuted by a provision of the recently passed Gramm-Leach-Bliley Act which explains that the exclusions for “banks” and “savings associations” contained in the FTC Act and statutes

⁵ These exclusions mirror those found in Section 45 of the FTC Act, which provides, in relevant part:

The Commission is hereby empowered and directed to prevent persons, partnerships, and corporations, *except banks, savings and loan institutions* described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, and corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

15 U.S.C. § 45(a)(2) (2000) (emphasis added).

⁶ Petitioner also cites an FTC administrative law judge’s initial decision in *Dillard’s Department Stores, Inc.*, (Dkt. No. 9269), 1995 FTC LEXIS 62. That case involved the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, which contains enforcement provisions parallel to those in the FCRA. The ALJ in that case adopted a jurisdictional argument similar to that advanced by petitioner here. However, the Commission subsequently dismissed the *Dillard’s* matter on other grounds without reviewing the ALJ decision, and denied as unnecessary a motion to vacate the decision. 1996 FTC LEXIS 49. Although that case is not now before the Commission on review of the ALJ’s ruling on this legal point, we here conclude that the ALJ’s determination of that legal point was incorrect.

⁷ While we reject petitioner’s contention that the banking agencies’ have *exclusive* FCRA jurisdiction over bank service providers, we do not question the ability of those agencies to reach the FCRA conduct of bank service providers. In short, we believe the FTC and the banking agencies have *concurrent* jurisdiction over these non-bank entities. *See infra* note 19.

enforced through it, such as the FCRA, shall not be read to exclude non-bank affiliates, such as FACS Group. At base, non-bank entities working with a bank, as separate companies, have an obligation, independent of the bank's own obligation, to comply with the FCRA. In this area of overlapping jurisdiction, the Commission coordinates with the banking agencies to ensure fair and efficient administration of the FCRA.⁸

A. THE UNAMBIGUOUS LANGUAGE OF THE FCRA APPOINTS THE FTC TO ENFORCE THE STATUTE WITH RESPECT TO FACS GROUP

“Statutory construction must begin with the language employed by the Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Park 'n Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). Furthermore, “[a]bsent a clearly expressed legislative intention to the contrary, [the statute’s] language must ordinarily be regarded as conclusive.” *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The statute at the heart of this matter is the FCRA. The language of the FCRA’s administrative enforcement section, 15 U.S.C. § 1681s, is plain. It commits the power to enforce the FCRA to the Federal Trade Commission “except to the extent that enforcement of the requirements imposed under [the FCRA] is *specifically committed to some other government agency under subsection (b) hereof.*” 15 U.S.C. § 1681s(a) (2000) (emphasis added). Subsection (b) of the FCRA specifically commits only “national banks” (and certain other entities not relevant here) and “savings associations” to the OCC and the OTS, respectively.⁹

⁸ It is not unusual that two different agencies have concurrent jurisdiction. In similar situations, the Commission also coordinates with those other agencies, such as the Food and Drug Administration, Consumer Product Safety Commission, and Environmental Protection Agency.

⁹ The relevant portions of subsection (b) read as follows:

(b) Enforcement by other agencies

Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to subsection (d) of section 1681m of this title shall be enforced under –

(1) section 8 of the Federal Deposit Insurance Act, in the case of –

(A) national banks . . . by the Office of the Comptroller of the Currency;

* * *

(2) section 8 of the Federal Deposit Insurance Act, by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation.

* * *

15 U.S.C. § 1681s(b) (2000).

While Federated's FDS National Bank, now a savings association called FDS Bank,¹⁰ clearly falls under these exceptions to the FTC's jurisdiction specified in the FCRA, FACS Group does not. FACS Group is not a national bank or savings association (or any other entity listed in subsection (b) of Section 1681s), and thus is not exempted from the FTC's jurisdiction under the FCRA. Subsection (b) does not specifically commit FCRA enforcement authority to the banking agencies with respect to non-bank companies that provide services to banks or with respect to all entities or activities subject to those agencies' oversight under other law.¹¹

Federated's petition (p. 4) also refers to subsection (d) of Section 1681s, which authorizes the various agencies identified in subsection (b) to use all the powers they have under any statute (which, of course, includes the BSCA) to enforce the FCRA.¹² This provision, however, does not support Federated's argument. Subsection (d) does not affect the FCRA's allocation of enforcement authority to the FTC. The statute provides expressly in subsection (a) that the only exclusions from FTC authority are those set forth in subsection (b). Petitioner has simply read out of the FCRA the language granting the FTC enforcement authority except as "specifically committed" to another agency "under subsection (b)" of the statute. Subsection (d) in no way conflicts with the FTC's authority over non-bank companies pursuant to subsection (b).

The language of the statute is plain on its face: the FTC has FCRA jurisdiction over FACS Group.

Our conclusion here is consistent with the precedent addressing this issue. Prior determinations of the Commission and court decisions have concluded that the exclusions from

¹⁰ See *supra* note 1.

¹¹ See *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent").

¹² FCRA subsection (d) provides:

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for purposes of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law.

15 U.S.C. § 1681s(d) (2000).

FTC jurisdiction under the FTC Act and the consumer credit laws such as the FCRA do not extend to an otherwise non-exempt company by virtue of contracting with an exempt entity.¹³

B. SUBSECTION 1867(c) OF THE BANK SERVICE COMPANY ACT DOES NOT DIVEST THE FTC OF ITS FCRA JURISDICTION

Petitioner argues that jurisdiction to enforce the FCRA against FACS Group is committed *exclusively* to the banking agencies (OCC or OTS) because the Bank Service Company Act permits the banking agencies to reach activities engaged in by FACS Group. Nothing in the BSCA, alone or when read in conjunction with the FCRA, supports petitioner's exclusive jurisdiction argument with respect to non-bank entities such as FACS Group. Indeed, as discussed *supra*, the terms of the FCRA contradict such an assertion.

Subsection 1867(c) of the BSCA gives the banking agencies the authority to regulate and examine the activities of certain non-bank entities providing specified services to banks.¹⁴ In

¹³ For example, in promulgating the Telemarketing Sales Rule, implementing the Telemarketing Act which gives the FTC jurisdiction identical to that of the FTC Act, the Commission declined to adopt a provision urged by some commenters to exclude the agents of otherwise exempt entities. The Commission explained:

[A] nonbank company that contracts with a bank to provide services on behalf of the bank and a non-airline company that contracts with an airline to provide services on behalf of the airline, are not exempt from the FTC Act. . . . The Commission is not aware of any reason why the Final Rule should create a special exemption for such companies when the FTC Act does not do so. Accordingly, the final rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well.

60 Fed. Reg. 43841, 43843 (Aug. 23, 1995).

See also, e.g., Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980) (firm that contracted with airlines to publish airline schedules was not exempt from FTC Act under air carrier exemption); *FTC v. Saja*, 1997-2 Trade Cas. (CCH) P71,952 (D. Az. 1997) (telemarketer for nonprofit organization could not invoke the FTC Act nonprofit exemption); *FTC v. Greentree Acceptance, Inc.*, Civ. No. 4-86-469-K (N.D. Tex., Sept. 30, 1987) (FTC enforces FCRA and Equal Credit Opportunity Act as to subsidiary of savings & loan institution that provided the savings & loan with contract servicing, because the servicer was not itself a savings & loan or other institution allocated to another government agency under those statutes).

¹⁴ The BSCA specifies the following as the permissible activities for companies serving banks: "check and deposit sorting and posting, computation and posting of interest and other credits and charges, preparation and mailing of checks, statements, notices, and similar items, or any other clerical, bookkeeping, accounting, statistical, or similar functions performed for a depository institution." 12

relevant part, the subsection reads:

[W]henever a bank that is regularly examined by an appropriate federal banking agency, or any subsidiary or affiliate of such a bank that is subject to examination by that agency, causes to be performed for itself, by contract or otherwise, any services authorized under this chapter, whether on or off its premises –

(1) such performance shall be subject to regulation and examination by such agency to the same extent as if such services were being performed by the bank itself on its own premises

12 U.S.C. § 1867(c) (2000). Thus, when banks contract with separate companies to perform certain services, the banking agency may regulate and examine the performance of those services. Other provisions of the BSCA authorize banks to own specifically defined non-bank entities (bank service companies) to provide those services to banks, and provide the banking agencies with broad authority over those entities.¹⁵

Subsection 1867(c) ensures that banks cannot place any potentially relevant activities beyond the reach of the banking agencies by hiring a non-bank to perform those activities. Plainly, the banking agencies' mandate to ensure the safety and soundness of banks would be frustrated if the agencies could not examine the performance of these contractors.

Nowhere in the BSCA did Congress state that in extending the reach of the banking agencies to such service providers it also intended to displace the usual jurisdiction of the FTC over these non-bank entities. Nothing in the BSCA suggests that the banking agencies have *exclusive* jurisdiction over these non-banks. As the chief counsel of the OTS explained, in a 1991 memorandum addressing the OTS' power to enforce the FCRA and other consumer credit laws against certain non-bank entities: "Congress consciously chose to give the federal banking agencies broad enforcement jurisdiction that in some cases overlaps with the jurisdiction of other governmental agencies so as to enable the banking agencies to fulfill their statutory mandate to protect the deposit insurance funds." Gen. Couns. Mem. 1991 OTS LEXIS 78, p. 13 (Dec. 27, 1991).

Notably, although the FCRA was enacted after the BSCA, which permitted creation and contracting with non-bank entities to provide services to banks, the FCRA's assignments to the banking agencies specify only banking institutions themselves. The FCRA does not mention any specific commitment to the banking agencies of non-bank entities, such as bank service

U.S.C. § 1863 (2000).

¹⁵ We note that "bank service corporation" is defined to mean a company organized to perform certain services for banks, "all of the capital stock of which is owned by one or more insured banks." 12 U.S.C. § 1861(b)(2) (2000). FACS Group is not owned by the FDS Bank, and therefore does not qualify as a bank service company. See Petition at Ex. 3, Attachment 1 (chart showing corporate structure).

companies or others contracting to provide services to banks, or of those services themselves. Both the BSCA and FCRA have been amended several times since 1970, but in none of these amendments has Congress suggested, or enacted language creating, exclusive banking agency jurisdiction over non-bank entities or their services.¹⁶

C. RESORT TO LEGISLATIVE HISTORY IS UNNECESSARY AND DOES NOT CONTRADICT THE FTC'S READING OF THE STATUTES IN ANY EVENT

Resort to legislative history is unnecessary where the language of the statute is clear. As the Supreme Court stated in *Ex parte Collett*, 337 U.S. 55 (1949):

[T]here is no need to refer to the legislative history where the statutory language is clear. The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. This canon of construction has received consistent adherence in our decisions.

Id. at 61 (internal quotations and citations omitted). Petitioner, nevertheless, seeks to overcome the plain meaning of the statutes by discussing the legislative history of the FCRA, the BSCA, the Truth in Lending Act ("TILA") 15 U.S.C. §§ 1601-1667(f) (2000), and the Gramm-Leach-Bliley Act, Pub. L. No. 106-1021; 113 Stat. 1338. As discussed below, the legislative history cited by petitioner is consistent with the Commission's holding here.

Petitioner, while recognizing that the legislative history of the FCRA is sparse, cites language summarizing the enforcement authority under the statute: "Compliance on the part of financial institutions or common carriers regulated by another Federal agency would be enforced by that agency, using its existing enforcement authorities to bring about compliance." Petition at 8 *citing* 116 Cong. Rec. H10052 (daily ed. Oct. 13, 1970) (statement of Rep. Sullivan). Petitioner reads this language as dictating that anyone made subject to another agency's jurisdiction under any other law is thereby excluded from the FTC's FCRA jurisdiction. Such a gloss is simply not supported by the text of the FCRA. The quoted passage is no more than a short-hand description of the FCRA's enforcement allocation provisions enacted in Section 1681s. This history is consistent with the Commission's interpretation of that Section as discussed above.

¹⁶ Indeed, the BSCA itself did not initially grant jurisdiction over these non-bank entities to the banking agencies. Rather, it simply provided that banks could only obtain certain services from entities that provided assurances that they would submit those services for banking agency examination and regulation. Congress did not grant the banking agencies authority over non-bank services as a matter of law until 1978, eight years after the FCRA was enacted. Thus, Congress in 1970 could hardly have viewed the BSCA as having created exclusive banking agency jurisdiction over non-bank service providers. *See* Pub. L. 87-856, § 5, 1962 U.S.C.C.A.N. (76 Stat.) 1333; Pub. L. 95-630, § 308, 1978 U.S.C.C.A.N. (92 Stat.) 3641.

Petitioner next looks to the legislative history of the TILA as instructive in interpreting the FCRA. Petition at 8-10. As with the FCRA history, the TILA passages recognize that the banking agencies will enforce the statute against “national banks,” “savings and loan institutions,” and other banking institutions in accordance with their “existing lines of responsibility.” This simply echoes the exclusions contained in the FTC Act.¹⁷ Entities that are not banks, on the other hand, were traditionally, and remain, within the FTC’s existing lines of responsibility.

Enactment of laws such as the BSCA that expand the banking agencies’ authority to reach non-bank firms outside their traditional missions in order to further those missions did not remove those non-bank firms from the FTC’s authority. Neither the text nor the legislative history of the BSCA provides any hint that the BSCA impliedly amended the FTC Act to remove authority from the Commission. Indeed, in discussing the BSCA legislative history, Petitioner cites nothing to support its contention that when banking agencies can reach a service provider’s activities, those activities are automatically placed beyond the reach of other federal agencies with jurisdiction under another statute.

In sum, none of the legislative history cited by Federated supports its contention that Congress intended the banking agencies to have exclusive FCRA jurisdiction over contractors providing services to banks.

D. SECTION 133(A) OF THE GRAMM-LEACH-BLILEY ACT REMOVES ANY UNCERTAINTY REGARDING THE COMMISSION’S AUTHORITY

The recently enacted Gramm-Leach-Bliley Act (“GLBA”) is aimed at allowing banking institutions and other types of financial services companies to affiliate. Section 133(a) of the Act, provides, in relevant part, that

Any person . . . that is directly or indirectly under common control with any bank or savings association . . . and not itself a bank or savings association shall not be deemed to be a bank or savings association for purposes of any provisions applied by the Federal Trade Commission under the Federal Trade Commission Act.

15 U.S.C. § 41 note (a) (2000) (Clarification of Federal Trade Commission Jurisdiction). The FCRA provisions are applied under the FTC Act. *See* p. 3 above. Here, Federated exercises common control over FACS Group and the FDS Bank, and FACS Group, itself, controls the FDS Bank. Petition at Ex. 3, Attachment 1 (chart of Federated corporate structure). FACS Group is not a bank or savings association, and the GLBA dictates that FACS Group “shall not be deemed a bank or savings association” for purposes of the FCRA.

¹⁷ *See supra* note 5.

Petitioner attempts to escape the plain language of the GLBA in precisely the same way it attempts to escape the plain language of the FCRA: by pointing to the BSCA. Petitioner argues that it is not relying on FACS Group's affiliate status to avoid the FTC's jurisdiction under the FCRA, but rather its status as a contractor subject to banking agency jurisdiction under the BSCA. As shown above, the BSCA neither affects the allocation of jurisdiction established in the FCRA nor commits exclusive law enforcement jurisdiction over third-party bank service providers to the banking agencies.

E. CONCURRENT JURISDICTION DOES NOT POSE A CONFLICT

Ultimately, petitioner suggests that statutes extending banking agency authority to reach certain non-banking entities or activities would necessarily conflict with a view that the FCRA grants similar authority to the FTC. In essence, petitioner presumes that, wherever a banking agency has authority, that authority is exclusive. That is an unsupported and unsupportable presumption, merely imported from banking agencies' exclusive jurisdiction over national banks and other chartered banking institutions, themselves. The GLBA expressly negates any general inference that banking agency jurisdiction is exclusive, by expressly preserving FTC jurisdiction over non-bank parents, subsidiaries, and other affiliates of banking institutions notwithstanding extensive banking agency powers over such entities.¹⁸ And nothing in the statutes or legislative history here supports a specific inference of exclusive jurisdiction with respect to bank service providers. To the contrary, the FCRA itself appoints the Commission to enforce that statute in such circumstances, while the BSCA apparently grants that authority to the OCC. We read two federal statutes consistently if possible, *see, e.g., U.S. v. Borden Co.*, 308 U.S. 188, 198 (1939), and we find the FCRA and BSCA are consistent; they simply create an area of concurrent jurisdiction.¹⁹

While we conclude that the FTC has FCRA jurisdiction over bank service providers like FACS Group, we are also mindful that potential complications exist in areas of concurrent jurisdiction. The FTC routinely communicates with the banking agencies to ensure the fair and consistent application of the consumer credit laws to bank service providers. As the D.C. Circuit Court explained in *Municipal Intervenors Group v. Federal Power Commission*, 473 F.2d 84 (D.C. Cir. 1972):

¹⁸ *See, e.g.*, 12 U.S.C. § 1818(b)(3) and (9) (2000).

¹⁹ Indeed, courts have often recognized that both the FTC and a specialized regulatory agency may have overlapping authority under different statutory schemes. *See, e.g., FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir. 1977); *see also Thompson Medical Co. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986) (FTC can regulate drug-related advertising regardless of Food and Drug Administration's authority to regulate advertisers; "[n]owhere in the case law or in the FTC's grant of authority is there even a hint that the FTC's jurisdiction is so constricted").

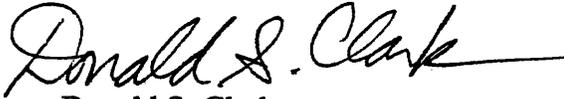
The law takes into account the necessities of government regulation, and in particular the needs of cooperation and coordination at the joints of jurisdiction where two or more agencies of the government are involved. . . . The law presumes implied power in a government agency - unless precluded by a contrary provision expressed or clearly discernable in its organic statute - to cooperate with other government agencies concerning intermesh of jurisdiction or other matters of mutual concern.

Id. at 90. FCRA authority over contractors providing services to a bank is just such a "joint of jurisdiction," and is an area where the FTC and the banking agencies cooperate to avoid duplication of efforts and inconsistent remedies. The Commission's acknowledgment of the value of such interagency cooperation, however, in no way affects or diminishes Federated's obligation to comply with lawful process.²⁰

III. CONCLUSION

The Commission's CID is proper and statutorily authorized. The petition is denied, and pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), petitioner is directed to respond to, and otherwise comply with, the CID by producing the requested documents and submitting its interrogatory answers on or before March 12, 2001, and appearing for a testimonial hearing at 9:00 a.m. on March 23, 2001.

By direction of the Commission.


Donald S. Clark
Secretary

²⁰ Furthermore, under the *Oklahoma Press* doctrine, as a general matter, jurisdictional challenges to an agency's authority cannot properly be asserted at the investigatory phase, and need not be fully addressed before litigation. See *Oklahoma Press Publishing, Co. v. Walling*, 327 U.S. 186, 214 (1946).