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Mellon Financial Corporation

Michael E. Bleier
General Counsel

July 26, 2004

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal
Reserve System
20th Street and Constitution Ave., N.W.
Washington, DC 20551

Mr. Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 5th Street, N.W.
Washington, DC 20549-0609

Office of the Comptroller of the
Currency
250 E. Street, S.W.
Mail Stop 1-5
Washington, DC 20219

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex Q)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

RE: FACT Act Affiliate Marketing Rule
F.T.C. Matter No. R411006
O.C.C. Docket No. 04-16
F.R.B. Docket No. R-1203
S.E.C. File Number S7-29-04

Dear Sirs and Madams:

Mellon Financial Corporation, Pittsburgh, Pennsylvania, appreciates the opportunity to comment on these proposed regulations. We think that the various agencies involved have done an excellent job of bringing order to a complex statutory scheme. Our only concern relates to the definition of "affiliate." This definition is extremely significant to large, diversified financial institutions, because it profoundly affects the flow of information between affiliated legal entities that are jointly involved in providing products and services to customers.

It is important to understand that financial service enterprises often consist of large numbers of separate corporate entities, for a wide variety of reasons. The reasons may be legal, regulatory, historical, or tax-related, among others. But lines of business are often incongruent with legal structures. Functional business areas frequently cross the boundaries between corporate entities. Many financial products and services could not be offered without the involvement of multiple legal entities. Furthermore, customers generally understand themselves to be dealing with the functional business area, and tend to

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be largely unaware of the underlying patchwork of legal entities. We believe that public concern over affiliate information sharing is not directed toward information crossing corporate entity lines *per se*, but rather toward information sharing between unrelated and dissimilar areas of a large organization.

Recognition of this fact recently led the State of California to take a progressive approach in defining the concept of an "affiliate" in its recently enacted Financial Information Privacy Act. It is instructive that the California law places no restrictions on information sharing between affiliates so long as (1) they are regulated by the same *or similar* functional regulators; (2) they are involved in the same broad line of business, *i.e.*, insurance, banking, or securities; and (3) they share a common brand identity.*

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* California Financial Code §4053(c): "Nothing in this division shall restrict or prohibit the sharing of nonpublic personal information between a financial institution and its wholly owned financial institution subsidiaries; among financial institutions that are each wholly owned by the same financial institution; among financial institutions that are wholly owned by the same holding company; or among the insurance and management entities of a single insurance holding company system consisting of one or more reciprocal insurance exchanges which has a single corporation or its wholly owned subsidiaries providing management services to the reciprocal insurance exchanges, provided that in each case all of the following requirements are met:

"(1) The financial institution disclosing the nonpublic personal information and the financial institution receiving it are regulated by the same functional regulator; provided, however, that for purposes of this subdivision, financial institutions regulated by the Office of the Comptroller of the Currency, Office of Thrift Supervision, National Credit Union Administration, or a state regulator of depository institutions shall be deemed to be regulated by the same functional regulator; financial institutions regulated by the Securities and Exchange Commission, the United States Department of Labor, or a state securities regulator shall be deemed to be regulated by the same functional regulator; and insurers admitted in this state to transact insurance and licensed to write insurance policies shall be deemed to be in compliance with this paragraph.

"(2) The financial institution disclosing the nonpublic personal information and the financial institution receiving it are both principally engaged in the same line of business. For purposes of this subdivision, "same line of business" shall be one and only one of the following:

"(A) Insurance.

We strongly urge the introduction of a similar concept into the FCRA definition of "affiliate." The resulting removal of impediments to the normal movement of information would be beneficial to consumers and financial institutions alike, reducing costs while enabling organizations like Mellon, where products and services are sold by functional business areas that include segments of multiple legal entities, to better serve their customers.

We would also point out that we do not think such a regulatory definition of "affiliate" would be inconsistent with existing terminology in FCRA or in the FACT Act. Those acts simply refer to "persons" that are affiliated or related by common ownership or corporate control. FCRA defines the term "person" to mean "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." (15 U.S.C. §1681a(b).) The phrase "or other entity" suggests that there is no reason why the regulations must interpret "person" as equivalent to "legal entity," even in circumstances where multiple legal entities form one functional entity.

Nor do we see any insurmountable difficulties arising from a disparity in the definitions of "affiliate" in the Gramm-Leach-Bliley privacy regulations and the FCRA. It would be necessary to observe the more restrictive GLB definition of affiliate with respect to certain

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"(B) Banking.

"(C) Securities.

"(3) The financial institution disclosing the nonpublic personal information and the financial institution receiving it share a common brand, excluding a brand consisting solely of a graphic element or symbol, within their trademark, service mark, or trade name, which is used to identify the source of the products and services provided.

"A wholly owned subsidiary shall include a subsidiary wholly owned directly or wholly owned indirectly in a chain of wholly owned subsidiaries.

"Nothing in this subdivision shall permit the disclosure by a financial institution of medical record information, as defined in subdivision (q) of Section 791.02 of the Insurance Code, except in compliance with the requirements of this division, including the requirements set forth in subdivisions (a) and (b)."

disclosures, but substantive restrictions on information sharing would be determined by the FCRA definition.

If you would care to discuss the comments in this letter, please feel free to call the undersigned at 412-234-1537, or Charles F. Miller, Associate Counsel, at 412-234-0564.

Sincerely,

Michael E. Bleier
General Counsel