

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF CAPITAL ONE
SERVICES, INC.

Docket No. C2008-3

**SECOND EMERGENCY MOTION TO CLARIFY RULING ESTABLISHING
PROCEDURES FOR THE DEPOSITION OF JESSICA DAUER LOWRANCE**

Although the deposition of Ms. Lowrance was scheduled to begin at 10:00 a.m. this morning, the actions of counsel for the U.S. Postal Service force Capital One Services, Inc. (Capital One) to seek further clarification of Rulings C2008-3/3 and C2008-3/4.

(1) Objections based on NDAs. The Postal Service is taking the position that requested information is subject to a mutual non-disclosure agreement (NDA) with Bank of America and that, as a result, the information is protected from disclosure, ignoring the fact that Capital One has its own NDA with the Postal Service (see attached). Accordingly, Capital One asks the Commission to rule that objections based on an NDA do not prevent Ms. Lowrance from answering questions.

(2) Counsel's ability to ask questions. Ruling C2008-3/4 clarified that counsel could be present, but did not specify that counsel could ask the follow up questions. This clarification is particularly important as the reporter present is recording the deposition electronically, and cannot read back questions during the portions of the proceeding that are under seal. Capital One asks the Commission to clarify that counsel may ask questions (including follow up questions) during the closed door proceedings.

(3) Relevancy objections. Counsel for the Postal Service has stated that the Postal Service will object to any inquiry that falls outside of matters specified in the original Application of Capital One Services, Inc. for Authorization to Depose Jessica Dauer Lowrance of the United States Postal Service (August 21, 2008). It appears that counsel may use a relevancy objection to instruct the witness not to testify.

Although the general subject matter described in that Application is quite broad,¹ the Application was not intended to define, for all intents and purposes, the scope of permissible questions. Counsel for Capital One should have the latitude to question the witness on all relevant matters, and relevancy objections should not stop the deposition from proceeding. Although such a ruling may not be necessary, Capital One feels compelled to seek further clarification on this point given the strict time limits of the deposition.

¹The application provides as follows:

Subject Matter of Testimony

Negotiations and decisions relating to a Capital One NSA that is similar to the Bank of America NSA and requests for NSAs similar to the Bank of America NSA; relevant conversations with Capital One representatives; knowledge relating to key issues, as specifically defined by the Postal Service: “whether or not Capital One is ‘similarly situated’ to Bank of America, or what constitutes a functionally equivalent agreement to the Bank of America NSA under current circumstances.”

Id. at 4.

Respectfully submitted,

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Capital One Services, Inc.*

MUTUAL NON-DISCLOSURE AGREEMENT

This agreement (the "Agreement") is made by and between the United States Postal Service, an independent establishment of the Executive Branch of the United States Government, (the "Postal Service") and Capital One Services, Inc., a corporation organized and existing under the laws of the State of Delaware and having a place of business at 1680 Capital One Drive, McLean, Virginia, 22102, and its subsidiaries and affiliates ("COSI").

WITNESSETH

WHEREAS, both parties for their mutual benefit desire to explore possible business relationships for current and expected future business needs, including business arrangements relating to COSI's debit card business and the Postal Service's ability and intent to meet COSI's business needs; and

WHEREAS, the parties desire that certain materials and information which is non-public, confidential or proprietary in nature, including but not limited to reports, analyses, studies, financial information, strategies, formulas, technical data, financial conditions and projections, business ventures, marketing programs, information about a party's suppliers or service providers, customers and prospective customers, statistical models about such customers or prospective customers and their behavior and the like, which may be revealed during the course of the exchange of information (including discussions and correspondence) remain confidential (hereinafter the "Confidential Information"). Furthermore, Confidential Information shall include all copies and reproductions, in whole or in part, of such information, all summaries, analyses, compilations, studies, notes or other records which contain, reflect, or are generated from such information.

NOW, THEREFORE, to protect the confidentiality of the information during and after the exchange of information, the Postal Service and COSI agree as follows:

1. The party providing Confidential Information (the "Disclosing Party") shall identify the information to which this Agreement applies as Confidential Information within twenty (20) days after disclosure. Confidential Information must be identified either by marking the information as "Confidential Information" or through verbal confirmation of its confidentiality by the Disclosing Party to the party being furnished Confidential Information (the "Receiving Party"). All such identified information revealed to the Receiving Party during any exchange of information shall be treated as Confidential Information and may not be released to third parties or used outside of the intended purposes, except to the extent paragraphs 7 and 8 are applicable, unless authorized in writing by an authorized representative of the Disclosing Party. Notwithstanding any failure by the Disclosing Party to identify information as Confidential Information in accordance with the terms of this Section 1, the Receiving Party shall not disclose any Confidential Information received during the term of this Agreement except as otherwise provided herein.

2. The substance of discussions and correspondence between the parties shall be deemed Confidential Information of both parties under this Agreement.
3. Neither this Agreement, nor the disclosure of Confidential Information under this Agreement, nor the ongoing discussions and correspondence by the parties, shall constitute or imply any promise or intention to make any purchase or use of products, facilities, or services by either party or any commitment by either party with respect to any other present or future transaction. If, in the future, the parties elect to enter into binding commitments relating to the stated purpose of this Agreement, such commitments will be explicitly stated in a separate written agreement executed by both parties.
4. This Agreement to exchange information shall terminate upon the expiration of five (5) years from the Effective Date. Separate and apart from this Agreement period, the parties agree that the information obtained shall be held in confidence five (5) years from the Effective Date of this Agreement. For that period, no Confidential Information may be disclosed or used outside of the intended purposes unless written consent is obtained from the Disclosing Party or the Receiving Party is no longer obligated to hold in confidence the information for the reasons specified in paragraphs 7 and 8 below. All employees or agents within the Receiving Party who are required to come into contact with the Confidential Information shall be notified of its confidential nature and shall use the same degree of care as they employ with their own proprietary information, but in all events shall use at least a reasonable degree of care.
5. The parties shall provide the same care to avoid disclosure or unauthorized use of the Confidential Information as it would provide to maintain the confidentiality of its own information, but in no event less than reasonable and prudent care. The Confidential Information shall not be reproduced in any form except as required in conjunction with the contemplated contractual agreement, or otherwise distributed or sold by the parties in any manner whatsoever. Each party shall retain all such Confidential Information in a secure place with access limited only to such of its co-workers, agents, or consultants who need to know such information for purposes of this Agreement.
6. The Confidential Information shall be deemed the property of the Disclosing Party, and upon demand by the Disclosing Party, the Receiving Party shall promptly return or provide evidence of destruction of all Confidential Information and copies thereof. One copy may be retained for record purposes by the Receiving Party at the option of the Disclosing Party.
7. The Receiving Party shall be under no obligation to hold in confidence any Confidential Information which:
 - a. is or becomes public through no fault of the Receiving Party;
 - b. was known to the Receiving Party prior to the time of the disclosure by the Disclosing Party;
 - c. is properly received by the Receiving Party on a non-confidential basis from any third party who is lawfully entitled to make such disclosure;

d. is required by a final court order to be disclosed because of an express determination that the information is not a trade secret, or privileged or confidential commercial or financial information; or

e. is independently developed by the Receiving Party without breach of this Agreement

8. The Receiving Party may release Confidential Information requested by any federal, state, or local governmental body in the proper exercise of its oversight or investigatory jurisdiction. In addition, the Postal Service may release Confidential Information if such release is required by the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") and is not otherwise exempt from disclosure pursuant to the FOIA. The Receiving Party shall notify the Disclosing Party of any requests for the Disclosing Party's Confidential Information by any third party pursuant to the FOIA as soon as reasonably possible after receipt of the request.

9. The Receiving Party shall include the terms of this Agreement in each subcontract whereunder there is any possibility of disclosure of the Confidential Information.

10. COSI and the Postal Service shall protect, indemnify, save harmless, and defend each other from and against all liabilities, obligations, claims, penalties, costs, and expenses (including, without limitation, reasonable attorneys' fees and expenses) arising to one party in connection with the use by the other party of Confidential Information for purposes other than those specified in this Agreement.

11. The Receiving Party shall not be obligated to compensate the Disclosing Party for Confidential Information and the Receiving Party acknowledges and understands that no representations or warranties of any kind, including, without limitation, fitness for a particular purpose, merchantability, and non-infringement, are given by the Disclosing Party with respect to the Confidential Information.

12. Nothing in this Agreement shall be deemed to create, either express or implied, the power in either party to bind the other. Neither party shall be bound by the actions of the other, shall be liable for the debts of the other, or shall have a right to share in the profits of the other. This Agreement is not intended to be a joint venture, partnership, or other formal business organization, and neither party is under any obligation to enter into any further agreement with or make any additional compensation to the other party.

13. This Agreement shall be construed under and governed by the Federal laws of the United States, including the Contract Disputes Act.

14. If any provision of this Agreement is determined to be violative of the laws of the place where it is to be performed, then such provision shall be void and the other provisions of this Agreement shall remain in full force and effect.

15. The United States securities laws prohibit any person who has received from an issuer of publicly traded securities material, non-public information concerning the matters which are the subject of this Agreement from purchasing or selling securities of such issuer or from communicating such information to any other person under

circumstances in which it is reasonably foreseeable that such person is likely to purchase or sell such securities.

16. This Agreement expresses the entire agreement and understanding of the parties with respect to the subject matter hereof and supersedes all prior oral or written agreements, commitments, and understandings pertaining to the subject matter thereof. This Agreement shall not be modified or changed in any manner except in writing and signed by both parties.

17. Each party represents that it has caused this Agreement to be executed on its behalf as of the date written below by a representative empowered to bind that party with respect to the undertakings and obligations contained herein. The effective date of this Agreement is March 27, 2007 ("Effective Date").

In WITNESS WHEREOF, the Postal Service and COSI have executed this Agreement effective as of the date in paragraph 17 above.

CAPITAL ONE SERVICES, INC.

UNITED STATES POSTAL SERVICE

Lynne Laube
Signature

Tina M. Lance
Signature

Lynne Laube
Name

Tina M. Lance
Name

VP
Title

Manager, Retail Marketing
Title

May 17, 2007
Date

6-4-07
Date