CONSUMER MORTGAGE COALITION

March 31, 2000

ORIGINAL

FEDERAL TRADE COMMISSION
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SECRETARY

Donald S. Clark
Secretary
Federal Trade Commission
Room H-159, 600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Gramm-Leach-Bliley Act Privacy Rule, 16 C.F.R. Part 313–Comment

Dear Mr. Clark:

The Consumer Mortgage Coalition (the "CMC"), a trade group of national residential mortgage lenders and servicers, appreciates the opportunity to submit its views concerning the proposal (the "Proposal") of the Federal Trade Commission (the "Commission") to implement Title V (the "Privacy Provisions") of the Gramm-Leach-Bliley Act ("G-L-B"). See 65 Fed. Reg. 11173 (Mar. 1, 2000). This letter focuses on concerns specific to the residential mortgage industry.

The CMC commends the Commission for its outstanding performance in bringing the Proposal forward in the short time available since G-L-B was enacted. On the whole, the Proposal takes an appropriate approach in interpreting G-L-B, fairly balancing the concerns of consumers and industry. However, although we support the general thrust of the rule, we believe that there are a number of ways in which it can and should be improved. It is particularly important that the final regulations address the following concerns:

- That the definition of "nonpublic personal information" not be expanded to include publicly-available information that a financial institution happens to maintain in its files;
- That secondary market investors and other market participants who have little or no consumer contact not be considered to have a "customer" relationship based on their legal ownership of a loan or some right therein; and
- That limits on redisclosure and reuse of information allow businesses to share data regarding consumers who had not opted out when the information was shared, without reference to later actions by the consumer.

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Definition of "Non-Public Personal Information"

The Commission seeks comment on two alternative definitions of "nonpublic personal information." The definitions differ in their view of what constitutes the converse of "nonpublic personal information" – "publicly available information." Under Alternative A, the more restrictive definition of "publicly available information," an item of information would not be considered to be publicly available, even if it was a matter of public record, if the financial institution obtained the item from its own records of its relationship with the customer. To use the Commission's example, which is also a common situation for CMC members, when a mortgage is recorded in the real property records and the mortgage company is named in the original mortgage document or a recorded assignment of mortgage, the customer relationship becomes a matter of public record. Yet, a mortgage company that wished to share the fact of the customer relationship with other parties would have to treat this information as nonpublic personal information. The mortgage company would have to provide a disclosure of its privacy policy with respect to that information to all borrowers and an opt-out right if it planned to share it with unaffiliated third parties. The CMC strongly supports Alternative B, under which information that is publicly available would not be transformed into nonpublic information simply because a financial institution happened to generate the information from its own records, so long as the fact of the customer relationship could be determined from public records.

Alternative A would create a compliance burden on financial institutions and place obstacles in the way of marketers that wish to use public information, without providing an offsetting benefit to consumers. The disclosure and the opt-out right would be confusing to consumers because, regardless of the financial institution's privacy policy, the existence of the customer relationship is public information. We do not believe that consumers reasonably expect that financial institutions will, or could, maintain as private information that is publicly available, or that Congress, in enacting G-L-B, intended this result. A financial institution's records include both publicly available and nonpublic information, and the fact that public information is contained in a financial institution's records does not make the information nonpublic or derived from nonpublic information.

For example, home sales are routinely reported in general-circulation newspapers and, as the Commission is aware, by information brokers. See *In re Trans Union Corp. ("Trans Union"),* Docket No. 9255, Opinion of the Commission, slip op. at 45 (FTC Mar. 1, 2000). Particularly in the case of information brokers, those reports often identify the mortgagee as well as the purchaser or seller. A borrower who opted-out of having the mortgage company disclose the existence of the relationship could still receive solicitations from unaffiliated third parties who obtained the consumer's name from an information broker rather than from the mortgage company. Among other things, such a borrower might mistakenly believe that the mortgage company had failed to honor the borrower's opt-out request.

Commission Precedent and Constitutional Issues

In its recent *Trans Union* decision, the Commission recognized that a report of public record mortgage information does not raise the same privacy concerns as a report containing nonpublic details of the relationship between the borrower and the mortgage company. In that opinion, the Commission assumed that information brokers that report only public record mortgage information are not "consumer reporting agencies" as defined in the Fair Credit Reporting Act ("FCRA"). *Trans Union,* Opinion of the Commission, slip op. at 45. See 15 U.S.C. § 1681a(f). The Commission reached this result even though the definition of a "consumer report" – which is an element of the definition of a "consumer reporting agency" – arguably applies to a report of public record mortgage information. See 15 U.S.C. § 1681a(d).

Prohibiting a financial institution from "disclosing" public record information simply because it obtained it in the context of a customer relationship raises serious First Amendment concerns. In *Trans Union,* a consumer reporting agency contended that FCRA's restrictions on commercial speech violate the First Amendment of the United States Constitution. *Trans Union,* Opinion of the Commission, slip op. at 33; see generally *Central Hudson Gas & Electric Corp. v. Public Service Commission ("Central Hudson"),* 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). In rejecting the consumer reporting agency's arguments, the Commission suggested that the result might be different if only a single item of public record information from one source had been disclosed, rather than information about the consumer derived from "compilations of personal information in large databases." *Trans Union,* Opinion of the Commission, slip op. at 39, citing *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762-67 (1989). When a mortgage lender "discloses" the fact of the customer relationship and that relationship has been recorded in the public property records, the lender is, in effect, disclosing only a single item of information.

Additionally, as noted in a recent opinion of the United States Court of Appeals for the Tenth Circuit, an agency that has a choice between issuing a constitutionally safe and a constitutionally questionable regulation should choose the alternative that does not raise constitutional questions. *U.S. West v. FCC,* 182 F.3d 1224 (10th Cir. 1999).

It is important to note the limited nature of the information that would qualify as public information under Alternative B, which, we believe, would adequately protect consumers' private information. For example, a mortgage company would apparently not be able to provide a list of borrowers in a certain income range if that list relied on nonpublic information supplied by the borrower. Thus, information that consumers reasonably regard as nonpublic could not be shared unless the consumer received the protections of the Privacy Provisions. On other hand, as indicated in the preamble to the Proposal, a mortgage company should be able, under the Commission's proposed definition, to provide a list of borrowers who reside in zip codes with specified average incomes if the names of the borrowers were not derived from nonpublic information. See 65 Fed. Reg. at 11178 n. 9.

Conflict among Agencies

We note that the Board of Governors of the Federal Reserve System (the "Board") and the Securities and Exchange Commission (the "SEC") did not propose Alternative A, and the National Credit Union Administration did not propose Alternative B. As a result, it is possible that the Board and SEC would adopt Alternative B while the Commission and the other regulatory agencies adopted Alternative A. This outcome would be inconsistent with the statutory mandate to issue "to the extent possible, . . . regulations [that] are consistent and comparable." See Section 504(a)(2) of G-L-B. Such a result would present particular problems for mortgage companies that are subsidiaries of bank holding companies but have affiliates that are supervised by agencies other than the Board, because the affiliates would be subject to a different requirement. In addition, a problem of public perception would be created. Borrowers – who are unlikely to have any idea whether their mortgage is held by a bank holding company affiliate – would be treated differently depending on the nature of their mortgage lender's charter.

Standard of Care

Although we strongly prefer Alternative B, the provision should be clarified so that it does not inadvertently impose a heavy burden on financial institutions. The regulation should make clear – as the SEC's version of the proposal does – that an institution need not have actual knowledge that the information is publicly available, but merely must "reasonably believe" that the information is public. See 65 Fed. Reg. 12353, 12372 (Mar. 8, 2000). For example, an institution should be able to rely on its normal business practice of having mortgage liens filed in the public records, and should not have to confirm that a particular lien was filed before it can treat the fact of a customer relationship as public information.

Such a standard is already implicit in the language of Alternative B. Otherwise, Alternative B, in this respect, would be no less cumbersome than Alternative A. However, for the sake of clarity and certainty, the "reasonably believe" standard should be made explicit.

The Commission also seeks comment on whether it should require a financial institution to establish "reasonable procedures to establish that information is, in fact, available from public sources before [treating it] as 'publicly available information.'" We do not believe that an additional requirement to establish new procedures is warranted. Financial institutions of all types have a strong incentive to establish appropriate compliance procedures. An agency's assertion that a financial institution's procedures are inadequate, with no evidence that any weaknesses in those procedures have led to violations of the law, should not in itself be the basis for an enforcement action.

Responsibilities of Investors and Others with No Direct Relationship with the Customer

Background

The Commission should clarify how the rule applies to situations in which the entities with financial interests in the loan differ from those that have, or are interested in having, direct contact with the consumer. Lenders sell most home mortgages today to secondary market investors, including the government-sponsored enterprises ("GSEs") and large private investors such as pension funds, insurance companies, and securities firms. A mortgage may be sold to a secondary market investor for cash, or securitized – placed in a pool of mortgages with interests in the pool sold to investors in the form of mortgage-backed securities. In either case, however, the loan will generally be serviced by an entity other than the investor. The entity that is actually servicing the loan may or may not own the servicing rights, and those rights may be transferred with or without the servicing function itself being transferred. The legal owner of the loan often is a trust established to facilitate the securitization. In some instances, the undivided ownership of a loan pool is shared among a large number of investors.

Regardless of the structure of the asset sold to investors at the end of the transaction, the borrower will generally deal only with the servicer and has no reason to know who owns the loan. In most cases, the investor takes a completely passive role and does not market goods or services to the borrower or share information about the borrower with third parties. The investor's only interest in nonpublic personal information about the borrower is to evaluate the financial risks, such as credit risk and prepayment risk, presented by the loan.

Problems Arising from the Proposal

Unfortunately, however, the Proposal as drafted could be read to create significant compliance obligations for secondary market investors who have no direct contact with borrowers and do not use or share their information for marketing purposes. The difficulty lies in the Proposal's definition of a "customer." A "financial institution"[1] must generally provide disclosures (and an opt-out right, if it plans to disclose information to unaffiliated third parties and no exception applies) to any "customer" before the creation of a "customer relationship." By contrast, a financial institution need not provide disclosures or the opt-out right to a "consumer" with whom it has no customer relationship, unless it wishes to disclose nonpublic personal information to an unaffiliated third party and an exception does not apply.

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[1] Secondary market investors are clearly "financial institutions" since they are engaged in an activity that is considered "financial in nature" under Section 4(k) of the Bank Holding Company Act ("BHCA"), as amended by G-L-B.

A "consumer" is defined as "an individual who obtains or has obtained a financial product or service[2] from [the financial institution] that is to be used primarily for personal, family or household purposes, and that individual's legal representative." Although the borrower never obtains a financial product directly from a secondary market investor, the Proposal indicates that an individual is a "consumer" even if the financial institution "[b]ought the account from the financial institution that originally extended credit." Therefore, a borrower would appear to be a "consumer" with respect to a secondary market investor.

Under the Proposal, a "consumer" becomes a "customer" when the financial institution and the consumer establish a "customer relationship," which occurs when they "enter into a "continuing relationship." Although the regulation itself is somewhat ambiguous on the issue, the preamble contains the following statement:

> "[A] consumer will have a customer relationship with a financial institution that makes a loan to the consumer and then sells the loan but retains the servicing rights. In that case, the person will be a customer of both the institution that sold the loan and the institution that bought it."

65 Fed. Reg. at 11176. This statement suggests that simple ownership of a loan is sufficient to create a "customer relationship," even when the entity with the ownership interest has no other relationship or interaction with the borrower.

Intent of Congress

Congress cannot have intended this result. To the contrary, in enacting the Privacy Provisions, Congress recognized that the activities of secondary market investors generally do not raise personal privacy concerns. The Privacy Provisions exempt from the disclosure and opt-out provisions any "disclosure of nonpublic personal information . . . in connection with . . . a proposed or actual securitization, secondary market sale (including sales of servicing rights), or similar transaction related to a transaction of the consumer." Section 502(e)(1)(C) of G-L-B. This exemption would be rendered meaningless if a secondary market investor were considered to have established a customer relationship as soon as it acquired ownership of a loan. Moreover, this exemption is consistent with numerous congressional actions over the past half century to encourage a secondary market in mortgage loans.[3] Congress has recognized the enormous value – in the form of lower prices and stable credit availability – that secondary market sales bring to all consumers. In G-L-B, Congress has indicated that it does not wish the Privacy Provisions to harm consumers by adding unnecessary costs to the purchase and sale of loans.

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[2] A "financial product or service," like "financial institution" (see note 1 above), is defined in terms of Section 4(k) of the BHCA, and a loan clearly qualifies as a "financial product or service."

[3] Such legislation includes the Secondary Mortgage Market Enhancement Act and tax legislation providing favored treatment for both Real Estate Mortgage Investment Conduits and Real Estate Investment Trusts.

In addition to the specific exemption for secondary market activities, the more general exception for disclosures "as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer" would also apply to most, if not all, disclosures of information to a secondary market investor. See Section 502(e)(1)(C) of G-L-B.

The preamble to the Proposal also recognizes that the Privacy Provisions are concerned only with retail activities. As the Commission notes,

> "[N]ot all financial institutions have 'consumers' or establish 'customer relationships.' For example, management consulting is a 'financial activity' but it is not likely that any individual obtains management consulting services for personal, family or household purposes."

65 Fed. Reg. at 11177. The Commission should similarly recognize that secondary market investors generally do not establish a customer relationship with the borrower.

The CMC's Proposal

The Commission should recognize the distinction between a secondary market investor and a financial institution that has a direct relationship with the borrower, by treating the borrower as a "consumer," and not a "customer," with regard to a passive secondary market investor. As noted, under the definition of "consumer," a financial institution need not provide initial disclosures or an opt-out right unless it shares nonpublic information with an unaffiliated third party and an exception does not apply. Under the CMC's proposal, borrowers would be fully protected because the investor would have to provide the disclosures and the opt-out right before it disclosed any nonpublic information to unaffiliated third parties.

For example, assume that Alpha Mortgage Company originates a loan on Day 1 and sells it to Gamma Mortgage on Day 8. Gamma Mortgage, in turn, sells the loan to Epsilon Mortgage on Day 11, which sells the loan to Zeta Mortgage on Day 25, which sells the loan into securitization trust Zeta Mortgage 2000-7, which sells interests of various sorts to investors. In our view, the only "customer" relationship the borrower has is with the servicer to whom the borrower sends payments, whoever that may be. All the remaining institutions along this chain are, in essence, purchasing a financial instrument rather than a customer relationship. However, treating the borrower as a "consumer" would mean that, before sharing nonpublic information with unaffiliated third parties (other than in conjunction with a sale of the loan to another secondary market investor), Epsilon would have to provide an initial privacy notice and the opt-out right.

If the Proposal is not revised along the lines that we are suggesting, then there is a real possibility that consumers will be subject to a barrage of meaningless privacy notices from the successive owners of the loan. A privacy disclosure from an entity that never has any direct contact with the borrower, never plans to share the borrower's nonpublic personal information with unaffiliated third parties, and may only own the loan for a few days or weeks, is of no value to the borrower.

Our concern is not only with the forests that will be felled to provide multiple disclosures. From a consumer perspective, multiple disclosures will significantly detract from the disclosures by institutions with which the borrower has a genuine customer relationship. From an industry perspective, they will create the initial burden of preparing and sending the policies – and the much larger and more expensive burden for servicers of responding to inquiries from confused borrowers who have received a number of privacy policies from companies they have never heard of.

The treatment of secondary market investors is consistent with the exemption in G-L-B for the GSEs from the definition of a "financial institution" so long as they "do not sell or transfer nonpublic personal information to a nonaffiliated third party." See Section 509(3)(D) of G-L-B. The CMC's proposed approach is designed to accommodate secondary market investors who play the same role in the market as do the GSEs, but with respect to nonconforming loans.

The SEC has similarly recognized that the Privacy Provisions were not intended to apply to market participants that do not deal directly with consumers. The SEC's proposed rules to implement G-L-B clarify that the Privacy Provisions would not apply, for example, to a clearing broker that has no direct relationship with the consumer. See 65 Fed. Reg. 12353, 12356 (Mar. 8, 2000).

The CMC's proposed treatment of investors contemplates that the mortgage servicer – which is the entity that the borrower regards as the "lender," regardless of who actually owns the loan – would have a customer relationship with the borrower. The servicer would have to make initial and annual disclosures of its own privacy policy and provide an opt-out right where applicable.

Legal Authority

The Privacy Provisions explicitly give the regulatory agencies the power to define when a "customer relationship" is established. Section 509(11) of G-L-B states:

> "CUSTOMER RELATIONSHIP – The term 'time of establishing a customer relationship' shall be defined by the regulations prescribed under section 504, and shall, in the case of a financial institution engaged in extending credit *directly* to consumers *to finance purchases of goods or services,* mean the time of establishing the credit relationship with the consumer."

(Emphasis added.) An investor in the secondary mortgage market is not "extending credit directly" to the borrower. Furthermore, the transaction involves the purchase (or refinancing of the purchase) of real property, not the purchase of goods or services. Therefore, the Commission and the other agencies have the explicit power to define the term "time of establishing a customer relationship."[4] Even without that power, the

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[4] Since an investor in sales finance paper is not extending credit *directly* to the consumer, CMC's proposal could apply even in the sales finance context.

Commission could modify the coverage of investors under its broad authority to grant additional exceptions beyond those listed in the statute. See Section 504(b) of G-L-B.

Timing of Initial Notice

The Proposal requires financial institutions to provide the initial notice *before* a customer relationship is established. By contrast, G-L-B requires disclosures "[a]t the time of establishing a customer relationship." Although we do not believe that the Commission intended any difference in meaning, if the regulation were interpreted to require that the disclosures be made separate from and before closing, it would create severe operational problems for our members. To avoid any confusion on this point, the regulation should require disclosures "at the time" the relationship is created, if that is practicable.

On a related issue, we support the statement in the preamble that "the [privacy] notices may be provided at the same time a financial institution is required to give other notices" such as those required by the Truth in Lending Act ("TILA"). 65 Fed. Reg. 11179. To ensure that there is no ambiguity on this point, this language should be included in the body of the regulation.

Issues Involving Loan Servicers

Subservicing Arrangements

The Commission should recognize that there are subservicing arrangements in which the loan is actually serviced by one or more entities other than the owner of the servicing rights. As noted, the CMC believes that secondary market investors should not have to treat borrowers as customers unless the investor shares information about the borrower with unaffiliated third parties. Similarly, the choice of which entity in the servicing arrangement must provide a privacy statement should follow a common-sense understanding of who has the customer relationship rather than who owns the legal rights.

In addressing the responsibilities of servicers, the Proposal consistently refers to the transfer or retention of "servicing rights," stating that:

> "An individual who makes payments to you [the financial institution] on a loan where you own the servicing rights is a consumer. An individual is not your consumer, however, solely because you service the individual's loan on behalf of a financial institution that made the loan to the individual."

Proposed 16 C.F.R. § 313.3(e)(2)(v), 65 Fed. Reg. at 11189.

In the mortgage industry, there are a plethora of different arrangements under which mortgage loans are serviced, many of them involving several entities. In general, one entity owns the servicing rights. The owner of the servicing rights has a right to the servicing compensation (typically 25-50 basis points of the interest component of each borrower's payment) along with a duty to ensure that the loans are serviced in accordance with the investor's requirements. In many circumstances, the owner of the servicing rights also has an obligation, in the event of a borrower default, to advance delinquent payments to investors.

The owner of the servicing rights may service the loan itself, or may subcontract out to a subservicer some or all of the core servicing operations (making the owner of the servicing rights a "Master Servicer"):

- Cash operations to handle and credit borrower payments;
- Investor payment and reporting to ensure that investors receive payments to which they are entitled;
- Escrow operations to ensure that each borrower pays property taxes and maintains hazard and flood (if applicable) insurance;
- Customer service to take borrower calls and correspondence;
- Payoff processing including calculating borrower payoff amounts, issuing payoff statements and releasing security interests after payoff, and
- Default management to handle delinquent borrowers, including collections staff, loss mitigation staff, and foreclosure staff.

As a legal matter, the subservicer has not bought the "servicing rights" but rather is paid as a subcontractor, and subservicers rarely take on the responsibility for advancing delinquent payments to investors. Issues such as which party has the right to cross-market products to the borrowers or which party has the right to retain ancillary fee income tend to be negotiated on a case-by-case basis between the servicer and the subservicer. In most subservicing arrangements, the consumer makes payments to the order of the subservicer, and has no knowledge of the existence of the owner of the servicing rights.

For example, assume that a loan is owned by a securitization trust. Alpha Mortgage owns the servicing rights but Zeta Mortgage performs the actual servicing functions as subservicer. The borrower makes payments to the order of Zeta and calls Zeta's "800" number with questions about the loan. All of the borrower's contact is with Zeta. Unless Alpha enters into another customer relationship with the borrower (or shares nonpublic personal information with an unaffiliated third party), there is no reason for Alpha to provide its privacy policy and an opt-out right. Only Zeta should do so. Servicing rights are, in essence, financial instruments representing an interest-only strip off of the mortgage loan. The treatment of Alpha, as the owner of a financial instrument (the servicing rights) that has no direct relationship with the borrower, should parallel the treatment of a passive investor discussed above.

Private Label Servicing Arrangements

There are also "private label" servicing arrangements in which the entity that performs the servicing does so in the name of another company. For example, suppose Zenith Financial Services is a nationally-known brand-name company that believes that borrowers will prefer not only to get a loan from Zenith, but also to have all of their dealings with Zenith because of Zenith's reputation for scrupulous fair dealing. Zenith, however, does not have the operational capabilities to service a loan – to perform in an integrated way the six functions listed above. Zenith may contract with a servicer to provide private label servicing. Zenith may retain ownership of the servicing rights and the financial rights and obligations they entail, or it may sell the servicing rights to the private label servicer, or they may be sold to yet another third party. Thus, the private label servicer could be the owner of the servicing rights, or a subservicer for Zenith, or a subservicer for some other entity.

All of the private label servicer's actions will be taken in Zenith's name – the customer will make a check out to Zenith, and the customer service 800 number will be answered as Zenith. Not surprisingly, in these arrangements, private labelers such as Zenith consider the borrowers to be their customers. They almost never allow the private-label servicer to share consumer data with anyone other than Zenith (except as necessary for the servicing operations, such as credit reporting and the like) and do not allow the private-label servicer to attempt any cross-selling of services or products. In this case, the borrower should receive a copy of Zenith's privacy policy and opt-out, because Zenith controls the use and sharing of any borrower information. The policies of the private-label provider of services are of no consequence to the borrower, as the private-label provider is only able to do what Zenith allows it to.

CMC Proposal

These complex arrangements have evolved over time as this market developed. Instead of focusing on ownership of servicing rights (or, for that matter, on ownership of the loan), the focus should be on the entity or entities that have the contractual right to share nonpublic personal information about the consumers with unaffiliated third parties. It may be the servicer, or the subservicer, or the private labeler, but the rule should allow the market to sort out whose "customer" the borrower is for purposes of the G-L-B rather than mandating an answer. In each case, the borrower will be the "customer" of the appropriate party in light of the contractual arrangements among the parties responsible for servicing the loan, and will receive the appropriate privacy policy or policies based on the contractual determination. The borrower will not receive multiple privacy policies from entities that do not have a true customer relationship with the borrower. As the default, for existing contracts and contracts that do not specifically address the issue, the entity to which the borrower makes payments should be treated as the loan servicer.

Notice by Servicer

The timing rules in the Proposal would create serious difficulties for mortgage loan servicers. A financial institution must provide initial disclosures and the right to opt-out before a customer relationship is established. See Proposed 16 C.F.R. § 313.4(a)(1). A consumer becomes the customer of a loan servicer when the consumer "[m]akes his or her first payment to you [the financial institution] on a loan account for which you have obtained the servicing rights." Proposed 16 C.F.R. § 313.4(c)(2)(vi), 65 Fed. Reg. at 11191.

As discussed above, a loan may be serviced by a different entity from the owner of the loan servicing rights, and we recommend that the Commission allow the various parties to the subservicing arrangements to determine which should comply. However, even if the Commission were to make such a change, basing the timing on when the loan servicer receives its first payment would create severe difficulties. With respect to mortgages subject to RESPA, both the transferor servicer and the transferee servicer are obligated to notify the borrower of the change of servicer. See 24 C.F.R. § 3500.21(d). The transferor servicer's notice must generally be sent at least fifteen days *before* the effective date of the transfer (as defined in Section 6 of RESPA), while the transferee servicer's notice must be sent no later than fifteen days *after* the effective date.

HUD's Regulation X also requires the notices to state the date that the transferor servicer will cease to accept payments and the date that the transferee servicer will begin to accept them. However, despite that disclosure, it is entirely possible if not likely that the transferee will *receive* some payments prematurely. Since the privacy disclosures must be made before receipt of the first payment, the Proposal would effectively require the transferee servicer to send a privacy disclosure at some time before the effective date of the transfer, probably at the same time as the transferor's disclosure. This change in requirements would disrupt longstanding practices in the mortgage industry.

As long as the transferee servicer does not plan to share information about the borrower with nonaffiliated third parties, there is no reason to require a disclosure before RESPA would require the transferee to make disclosures. In any case, if the transferee servicer wants to share information in a manner not covered by an exception, it must provide the opt-out notice and a reasonable time to opt out before doing so.

The Commission has recognized the limited value of a disclosure by a transferee in another context – the transfer of ownership of the loan as opposed to ownership of the servicing rights. In that situation, the rule provides that the disclosure may be provided

> "within a reasonable time after you [the financial institution] establish a customer relationship if:
>
> > "(i) You purchase a loan from another financial institution and the customer of that loan does not have a choice about your purchase . . . ."

Proposed 16 C.F.R. § 313.4(d)(2)(i).

Although, as noted, we do not believe that purchase of a loan by itself should trigger a disclosure requirement, we support the timing principle behind the Proposal, and urge the Commission to apply it to transfers of servicing. Specifically, the transferee servicer should be given a reasonable time *after* the transfer to provide disclosures, and the time limits in Regulation X for the transferee servicer's disclosures should be a safe harbor (whether or not the transaction is subject to RESPA).

Transferability of Opt-Out

A related question is whether a borrower's opt-out with respect to one lender or servicer should be effective against a subsequent lender or servicer. The Proposal implies that the opt-out applies only to the current financial institution, since otherwise it would make no sense for the successor financial institution to provide new disclosures and a new opportunity to opt-out. The CMC supports this interpretation and urges the Commission to make it explicit in the final rule.

Issues Involving Mortgage Brokers

Because over 50% of residential mortgage loans are now originated by or through mortgage brokers, the Commission should also clarify when in the mortgage loan origination process a mortgage broker's customer becomes a customer of the ultimate lender. It should recognize that the lender may either close the loan in its own name or provide funds for the broker to close the loan in the broker's name. In brokered-loan situations, the broker typically sends customer data to one or more wholesale lenders to see if the applicant fits the lender's guidelines. In this situation, several lenders will have the applicant's data, but none is assured of having a customer relationship with the applicant.

On the other hand, the mortgage broker does have a customer relationship with the applicant. The Proposal states that a mortgage broker establishes a continuing relationship with the consumer, and the consumer, therefore, becomes the broker's customer, when consumer "[e]nters into an agreement or understanding with you [the broker] whereby you undertake to arrange or broker a home mortgage loan . . . for the consumer." Proposed 16 C.F.R. § 313.3(h)(2)(i)(D), 65 Fed. Reg. at 11189-90.

Although we support this position, we believe that the rule should explicitly state what is implicit in the language of the Proposal: An agreement or understanding exists as soon as the consumer provides nonpublic personal information to the mortgage broker. Since the broker has a customer relationship with the applicant, it is logical to conclude, as the Proposal does, that the applicant does not become a customer of any of the lenders until the loan closes (that is, unless one or more of the wholesale lenders takes additional actions that would make the applicant its customer). As the Commission recognizes, while the loan is being shopped, none of the lenders has established a continuing relationship with the applicant. As an added clarification, the final regulation should also state that the wholesale lender that eventually funds the loan does not have a "customer" relationship with the applicant at the closing of the loan unless the loan closes in that wholesale lender's name. When the loan closes in the broker's name – known in the industry as a table-funded loan – the wholesale lender funds the loan and purchases it after closing. In this case, the principles that apply generally to investors and servicers set forth above should apply. In some cases, the wholesale lender plans to treat the borrower as a customer and will provide a privacy policy upon purchasing the loan obligation. At other times, the wholesale lender will, in turn, intend to sell the loan immediately or very soon to another investor. The wholesale lender will have no interest in, and will not share, any nonpublic consumer information to which it may have access other than as may be needed in order to sell the loan to the next investor. In those situations, the borrower will not benefit by receiving the wholesale lender's privacy policy, and the cost of having each investor in the chain make a disclosure could be substantial.

The rule should also make clear that a broker may make privacy disclosures, and provide an opt-out right, on behalf of a number of prospective wholesale lenders, and that those lenders may then rely on those disclosures in sharing information. For example, this issue could arise if the broker wishes to offer the applicant the option of buying a home warranty through whichever lender ultimately funds the loan. The broker will ask each prospective lender to have a home-warranty company mail a solicitation to the applicant. In order to do so, each prospective lender must share nonpublic personal information – the fact that the applicant has applied for credit – with the home-warranty company. The prospective lenders should be able to rely on the broker's representation that the applicant received the broker's privacy disclosures and an opportunity to opt-out, and did not opt-out.

Limits on Redisclosure and Reuse of Information

Timing

The Commission notes that, under Section 502(c) of G-L-B, a nonaffiliated third party may not redisclose nonpublic personal information that it received from a financial institution, "unless the disclosure would be lawful if made directly by the financial institution." The Commission states that this requirement may effectively preclude a nonaffiliated third party from ever redisclosing information except under one of the exceptions to the disclosure and opt-out requirements, because the consumer may opt-out at any time. The Commission requests comment on the interpretation that, since it would be unlawful for the first financial institution to disclose the information once it had received the opt-out notice, it is also unlawful for a non-affiliated third party to do so.

Such an interpretation could significantly reduce the value of information that financial institutions may provide to third parties. For example, assume that on Day 1, Alpha, a mortgage lender, sells a list of borrowers who have at least $20,000 available on their home equity lines of credit ("HELOCs") to the Beta hardware chain. Alpha may lawfully disclose the lists on Day 1 – in other words, Alpha has made all required disclosures and offered all the borrowers an opportunity to opt-out, which they have not done. Beta falls within "the categories of affiliates and nonaffiliated third parties to whom [Alpha] disclose[s] nonpublic personal information" that Alpha described in its disclosure of its privacy policies. See Proposed 16 C.F.R. § 313.6(a)(3). On Day 15, Beta, in turn, wishes to provide the information to unaffiliated home improvement contractor Gamma in order for Gamma to evaluate which customers it wants to solicit in a joint solicitation. Alpha could also lawfully have disclosed the lists to Gamma on Day 1 because Gamma falls within the disclosed categories of potential recipients. The suggested interpretation would make it impossible for Beta to give Gamma the list it obtained from Alpha, because of the possibility that some of the customers on the list have opted-out in the meantime, *i.e.,* between Day 1 and Day 15.

Instead, the "lawfulness" of the disclosure by Beta should be evaluated as of the time that Alpha disclosed the information to Beta. In other words, if it would have been lawful for Alpha to disclose the information to Gamma at the same time that it disclosed it to Beta, then Beta may disclose it to Gamma at any time. The purpose of Section 502(c) appears to be to prevent a financial institution from "laundering" personal nonpublic information. The concern is that a financial institution could lawfully disclose information to a third party that is not subject to the Privacy Provisions, and, thereafter, have such third party disclose such information to anyone, including persons ("the indirect recipient") to which the financial institution could *not* lawfully disclose such information.[5] The goal of the provision would be met by prohibiting Beta from disclosing information to Gamma unless Alpha could have disclosed that information to Gamma when it disclosed it to Beta. On the other hand, a later opt-out by the borrower would prevent Alpha from disclosing any new nonpublic information to either Beta or Gamma – such as the current balance on the HELOC.

As the Commission notes, an interpretation that Beta cannot disclose information to Gamma because of the possibility of an opt-out would effectively limit Beta – and, effectively, Alpha – to disclosures that are exempt from the Privacy Provisions. However, Congress could easily have imposed such a limit, by stating as much in the statute. The Commission should not now read in additional restrictions where Congress did not act.

New Disclosure of Privacy Policy by Third Party

As noted, Beta should be able to disclose information it received from Alpha to any unaffiliated third party to whom Alpha could have disclosed the information when it disclosed the information to Beta. However, there may be another unaffiliated third party (Kappa) who had not been listed in a category of potential recipients of information in Alpha's privacy disclosure. If Alpha wishes to disclose nonpublic information to Kappa, it may do so by revising its privacy policy, disclosing the new policy to its customers, and giving them a reasonable opportunity to opt-out before disclosing the information. As the Commission notes, "The Act appears to place the institution that receives the information

[5] The direct disclosure of such information by the final institution to the indirect recipient may not be lawful, for example, because the indirect recipient is not covered by the categories of recipients of nonpublic personal information set forth in the financial institution's privacy policy.

into the shoes of the institution that disclosed the information for purposes of determining whether redisclosures by the receiving institution are 'lawful.'" 65 Fed. Reg. at 11184. Therefore, if Beta wants to disclose information to Kappa that is not covered by Alpha's privacy policy, Beta should be able to stand in Alpha's shoes. Beta should be able to give the customers on the list it received from Alpha a Beta privacy policy that includes Kappa in the categories of potential recipients. If Beta does so, then, after giving customers a reasonable opportunity to opt-out, Beta should be able to disclose information to Kappa that it obtained from Alpha.

Joint Accounts and Multiple Accounts Held by the Same Customer

Disclosures to Multiple Customers

The Commission seeks comment on "whether, when there is more than one party to an account, there are instances where all parties to the account need not receive the notice." 65 Fed. Reg. at 11180. The CMC believes that the Commission should adopt a rule that requires notices only to one of the joint account holders. This is almost universally the rule under other federal consumer protection laws. For example, the Official Staff Commentary to Regulation Z provides as follows:

> "MULTIPLE CONSUMERS. When two consumers are joint obligors with primary liability on an obligation, the disclosures may be given to either one of them. If one consumer is merely a surety or guarantor, the disclosures must be given to the principal debtor."

Official Staff Commentary to Regulation Z, ¶ 17(d)-2. *See also, e.g.,* Regulation B, 12 C.F.R. § 202.9(f); Regulation E, 12 C.F.R. § 205.4(d)(2); HUD's Regulation X, 24 C.F.R. § 3500.6(a). The single-notice rule applies even though either party can individually exercise his or her rights. For example, either joint applicant can request a statement of reasons for adverse action under Regulation B, even though the notice of adverse action need be sent to only one applicant. See 12 C.F.R. § 202.2(e) ("Applicant means *any* person who requests or who has received an extension of credit from a creditor") (emphasis added).

The major exception to the rule that only one party to a joint account need receive a disclosure is the right of rescission. In that case, in light of the swift expiration of the consumer's rights and the perceived significance of the transaction, which places the consumer's home at risk, the Board apparently believed that it was important for all joint owners of the property to receive the notice. By contrast, the opt-out right continues through the life of the loan (and for twelve months thereafter, under the Proposal), and a joint account-holder can always opt-out, even if he or she did not receive the initial notice.

Requiring separate notices to each joint account holder would be extremely burdensome for mortgage lenders, particularly with regard to the annual statement of the financial institution's privacy policies and procedures. Although joint borrowers most often both live in the residence that is the subject of a mortgage loan when the loan is closed, that is not always the case, and they may separate or divorce later without informing the lender. Lenders and other financial institutions should be able to send disclosures, including the opt-out right, to the address that the borrowers provide for receipt of billing statements and other information about the account.

Opt-Outs

The Commission solicits comment on how the right to opt out should apply to joint accounts. It asks whether all parties should have to agree before an opt-out becomes effective. If not, then the Commission asks whether, if one party opts out, the opt-out should apply to the whole account or only to information about that party.
In analyzing this question it is important to distinguish between what the Privacy Provisions require and what they permit. The Privacy Provisions do not *require* any financial institution to share nonpublic information with anyone. If a financial institution wishes to stop sharing information about a particular consumer or about its entire customer base with unaffiliated third parties, the Privacy Provisions do not prevent it from doing so. Indeed, many financial institutions, including CMC members, have instituted their own voluntary privacy policies that limit the ways in which they share information.

The Privacy Provisions *do* require a financial institution to honor a request from a consumer not to disclose "nonpublic personal information" to unaffiliated third parties. The Act defines a consumer as:

> "*an individual* who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes . . ."

Section 509(9) of G-L-B (emphasis added). The Act defines "nonpublic personal information," in part, as:

> "personally identifiable financial information–
>
> > "(i) provided by *a consumer* to a financial institution;
> >
> > "(ii) resulting from any transaction with *the consumer* or any service performed for the consumer; or
> >
> > "(iii) otherwise obtained by the financial institution."

The first two examples of "nonpublic personal information" refer to the singular form of "consumer," which is additional evidence that the ability to opt-out applies to each individual consumer and only to that consumer's information. Thus, if Borrower A on a joint mortgage loan opts out, and it is technologically feasible to continue to share information on Borrower B without sharing any nonpublic personal information on A, the lender *may* do so. Either requiring the institution to continue to share information on B or requiring that both A and B act before an opt-out is effective would impose a burden on both financial institutions and consumers. Financial institutions do not want to share information on B if there is any possibility that the information could be tied to A and they could be accused of failing to honor an opt-out. As discussed above, requiring both parties to a joint account to opt out is problematic in view of the language of the statute and could create operational problems on accounts, such as HELOCs, for which institutions routinely honor requests from either party. Most financial institutions today maintain their records on an account-by-account, rather than customer-by-customer, basis and would find it difficult to comply with an opt-out request with respect to only one account-holder.

Multiple Accounts

On a related matter, diversified financial organizations should have the *option* of making a single disclosure, and providing a single opt-out right, applicable to all account relationships with the customer of any financial institutions within the organization. Allowing such a procedure would reduce the paperwork burden on both the consumer and the financial institution. However, allowing an opt out to apply to all existing account relationships creates the problem of determining the customer's intentions if the customer who previously opted out later opens a new account with another affiliate of the organization, and does not opt-out of disclosures in connection with opening that account.

If the customer does not elect to opt-out of information sharing in connection with opening the new account, it will be unclear whether the customer intended to keep the opt-out in effect as to his or her other accounts. To address this issue, the CMC proposes that financial institutions that apply the opt-out to all or a group of account relationships be permitted to maintain the customer's opt-out status across all the accounts. Specifically, a financial institution should be able to indicate, clearly and conspicuously, to a customer who opens a new account that failure to opt out as to that account will revoke the opt-out as to previous accounts.

For example, assume that Charlie Consumer obtains a mortgage loan from Edgar Mortgage. Charlie is offered, and chooses to, opt out from all information-sharing by Edgar and its affiliates. The consumer and his accounts are flagged as opt-outs. Charlie then opens a brokerage account at Edgar Securities, an affiliate of Edgar. Edgar Securities again offers an enterprise-wide opt-out, and Charlie chooses not to opt out. We believe that as long as the opt-out clearly discloses that it will supersede prior opt-outs, Edgar should be able to treat the later failure to opt-out as a written choice by Charlie to revoke the prior opt-out. If Edgar cannot do so, then it will be very difficult to administer an opt-out on an enterprise-wide basis – an approach that is to the advantage of both Edgar, which need maintain only one customer record, and the customer, who does not need to keep track of multiple opt-outs.

Other Issues Involving the Opt-Out

Reasonable Means to Opt Out

The Proposal would require a financial institution to offer one of several "reasonable" means to opt out of having nonpublic personal information shared with nonaffiliated third parties, including a check-off box, a toll-free number, or a business reply envelope. Although, as discussed below, we believe that writing a letter to a specified address is also a "reasonable" means to opt out, we appreciate the flexibility that the Commission has shown in providing a range of alternative methods of opting-out that financial institutions may provide. That approach reflects a recognition that the methods by which financial institutions communicate with their customers differ widely and are changing rapidly due to technological developments.

The Commission seeks comment on "whether financial institutions should be required to accept opt outs through any means the institution has already established to communicate with consumers." For example, the Commission suggests that a financial institution that has established toll-free customer service numbers – as CMC members have done – could be required to accept opt-outs at that number.

Although financial institutions should have the option of providing a toll-free number to honor opt-out requests, requiring them to accept opt-outs at every toll-free number would create serious compliance problems. Because of the complexities of mortgage lending and servicing, many of our members maintain a variety of customer service numbers staffed by specialists in various functions. In order to honor opt-outs at all customer service locations, mortgage companies and other financial institutions would have to train all of those customer service employees in the subtleties of complying with the rule. All of those employees would have to be able to modify the "opt-out" field in the borrowers' records, which raises systems and data integrity issues. Therefore, financial institutions should be able to specify reasonable limits to the avenues by which a consumer may opt out.

Letter as Reasonable Means

In addition, the regulation should provide that a requiring the consumer to send a letter to a specific address is a reasonable means of opting out. As drafted, the Proposal would not permit a financial institution to require this method. The Commission offers no legal basis for this interpretation, and we do not believe that the language of G-L-B justifies it. Section 502(b)(1) of G-L-B provides:

> "A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless–
>
> > "(A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 504, that such information may be disclosed to such third party;
> >
> > "(B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and

> "(C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option."

The statute is silent as to the nature of the "opportunity" to opt out. However, the plain meaning of "opportunity" does not exclude requiring the consumer to write a simple letter requesting that nonpublic information not be disclosed. Subparagraph (C) requires that the consumer be given an explanation of how to exercise the right, but does not place any restrictions on the methods that a financial institution may offer to exercise the opt-out. There is no indication that the regulatory agencies may impose specific requirements for how the opt-out is to be exercised. In fact, the reference in subparagraph (A) to regulatory authority to permit disclosures other than in writing or in electronic form suggests that Congress did not intend to give the agencies authority to impose specific requirements as to the form that the opt-out right may take.

Other consumer legislation includes specific requirements for the form of consumer notices, suggesting that Congress knew how to impose such requirements and did not do so in the Privacy Provisions. TILA directs the Board to prescribe forms for consumers to use to exercise the right to rescind. See 15 U.S.C. § 1635(a). The provision in FCRA allowing consumers to opt out of being subject to credit bureau prescreening specifies two methods for a consumer to opt out – a nationwide toll-free number or a form to be supplied by the consumer reporting agency. See 15 U.S.C. § 1681b(e)(3). The Fair Credit Billing Act requires the consumer to submit a detailed written notice in order to assert a billing error. See 15 U.S.C. § 1666(a).
In addition, subparagraphs (A) and (B) of G-L-B's opt-out provision are virtually identical to another opt-out provision in FCRA. Under FCRA's affiliate information-sharing provision, there is an exception to the definition of a "consumer report" for:

> "communication of . . . information [other than transaction and experience information] among persons related by common ownership or affiliated by corporate control, *if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons.*"

15 U.S.C. § 1681a(d)(2)(A)(iii) (emphasis added). Companies that wish to take advantage of this exception have routinely been requiring consumers to mail a letter requesting an opt-out, with no apparent ill effect. This practice is so non-controversial that the Commission has apparently never rendered an opinion as to whether it is consistent with FCRA.

Both of the FCRA opt-outs were added in the 1996 FCRA reform legislation, P.L. 104-208. If Congress had wished to specify the specific method of opting-out in the Privacy Provisions, it could easily have used as a model the FCRA prescreening opt-out, rather than the FCRA affiliate information-sharing opt-out.

Relationship to FCRA

The conflict between the Commission's interpretation of the opt-out provision in the Privacy Provisions and the nearly identical provision in FCRA is particularly troublesome because G-L-B also requires the privacy disclosures to include "the disclosures required, if any, under" the FCRA affiliate information-sharing provision. See Section 503(b)(4) of G-L-B. The FCRA provision does not, strictly speaking, require any disclosures if a company does not wish to share information other than transaction and experience information with affiliates. However, the apparent intent of the requirement in G-L-B is to require a financial institution that wishes to take advantage of the FCRA exception to combine the FCRA disclosure with the privacy disclosure.

The Commission's interpretation of the Privacy Provisions would make it very difficult for a company to require written notice for the FCRA opt-out in a manner that is not confusing to the consumer. In effect, the proposed interpretation would change an existing FCRA requirement, which would be inconsistent with Section 506(c) of G-L-B, which provides that "nothing in [the Privacy Provisions] shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act."

The final rule should also clarify two related points:

- Since FCRA does not require any annual disclosures, the annual privacy disclosure need not include any FCRA-specific content. In particular, the privacy regulations should make clear that G-L-B did not create an annual opt-out right under FCRA.

- A company that does not provide the FCRA affiliate information-sharing opt-out in its initial privacy disclosure may do so later by sending a revised privacy disclosure under Proposed 16 C.F.R. 313.8(c).

Categories of Recipients

Under the Proposal, an institution could use general terms to describe the types of businesses to which it discloses information only if it "use[s] illustrative examples of significant lines of business. For example, you [the financial institution] may use the term 'financial products or services' if you include appropriate examples of significant lines of businesses, such as consumer banking, mortgage lending, life insurance or securities brokerage." See Proposed 16 C.F.R. § 313.6(d)(3). The requirement to provide illustrative examples goes significantly beyond G-L-B, which only requires a disclosure of "the categories of persons to whom the information is or may be disclosed." See Section 503(b)(1)(A) of G-L-B. "Financial products or services [providers]" by itself clearly refers to a "categor[y] of persons to whom information is or may be disclosed," and appropriately informs the borrower of the financial institution's privacy policies.

Nevertheless, the Proposal would be a better alternative than a requirement to disclose all the specific types of business that might receive information from the financial institution. Such a requirement could result in a financial institution having to provide a new privacy policy almost every time that it entered into a new marketing arrangement.

Clear and Conspicuous

A side effect of the requirement to provide representative examples of the categories of recipients (as well as examples associated with the other disclosures) will be that the disclosures will be quite lengthy. The rule should make clear that the length of a disclosure does not affect whether the disclosure is "clear and conspicuous," so long as it relates only to the collection, disclosure, and maintenance of a consumer's nonpublic personal information.

Disclosures of Account Numbers

The Proposal would implement Section 502(d) of G-L-B, which prohibits disclosing the account number of a consumer's "credit card account, deposit account, or transaction account," by essentially repeating the statute.

Coverage of Closed-End Loans

We note that the prohibition on disclosing account numbers, on its face, does not apply to typical closed-end loans, since they do not represent "transaction accounts." Although the term "transaction account" is not defined in the Privacy Provisions, it is defined in the Federal Reserve Act in a way that excludes a closed-end loan "account":

> "The term 'transaction account' means a deposit or account on which the depositor or account holder is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone transfers, or other similar items for the purpose of making payments or transfers to third persons or others."

12 U.S.C. § 461(b)(1)(C). See also 12 C.F.R. § 204.2(e) (similar language in implementing regulation). Since a closed-end loan account cannot be accessed to carry out new transactions, it is not a "transaction account" and is not subject to Section 502(d) of G-L-B.

This interpretation makes sense in light of the purpose of the G-L-B provision, which appears to be to reduce the risk of fraud due to a misuse of an account number after it is provided to a third-party marketer. There is very little risk to a consumer in disclosing closed-end loan numbers, because that number cannot be used by itself to purchase goods or services or receive an advance.

To avoid any confusion on this point, the Commission should clarify that closed-end loans are not covered by this provision.

Exception for Covered Accounts

Although the closed-end loans that make up the majority of our members' activities are not subject to the G-L-B provision, HELOCs would appear to be covered if they are accessible by a check, credit or debit card, or similar instrument. The Commission seeks comment on whether there should be an exception to the prohibition that would allow encrypted numbers to be transmitted.

The CMC strongly supports such an exception. In addition, the Commission should recognize that there are situations in which it is appropriate to disclose the unencrypted account number.

As the Commission notes, "[t]he Statement of Managers contained in the Conference Report to S. 900 encourages the Commission and Agencies to adopt an exception to section 502(d) to permit disclosures of account numbers in limited instances." Specifically, the Managers advocated permitting the disclosure of encrypted account numbers "where the disclosure is expressly authorized by the customer and is necessary to service or process a transaction expressly requested or authorized by the customer."

A blanket prohibition on disclosing account numbers would indeed "unintentionally disrupt certain routine practices," including routine marketing through a service provider that mails monthly statements for the financial institution. For example, assume that Alpha Mortgage Company outsources the printing and mailing of its monthly HELOC statements to Kappa Service Provider. Alpha periodically includes statement-stuffers aimed at customers who appear to be good prospects for purchasing other Alpha products, and wishes to give Kappa a list of such customers.

It is inconceivable that the prohibition on sharing account numbers was intended to reach this situation. The consumer's privacy is not compromised in any way by Alpha giving Kappa a list of account numbers, since Kappa already knows the account numbers. Moreover, Kappa in all likelihood has received the account numbers and other nonpublic personal information under one of the exceptions to the general limits on disclosing nonpublic personal information, which means that Kappa may not redisclose them.

The Commission should also clarify that the prohibition against sharing account numbers does not apply once the consumer has decided to purchase goods or services from a financial institution's unaffiliated marketing partner. At that point, marketing activities have ceased and the next steps relate to billing, shipping, and other servicing activities. Disclosures by the financial institution to the marketing partner of account numbers, like other nonpublic personal information, should generally be exempt under other provisions of G-L-B. A simple way to implement this clarification would be to specify that the exceptions in Proposed 16 C.F.R. §§ 313.9, 313.10, and 313.11 also apply to the prohibition against sharing account numbers.

The Commission also requests comment on whether disclosure of an encrypted account number to a marketer, without supplying the key, violates Section 502(d) of G-L-B. We do not believe that it does, since a properly encrypted account number gives the marketer no more information that would providing some other arbitrary number. In addition, the purpose of the provision appears to be to prevent the marketer from using the account number to compromise the privacy or security of the account, which cannot happen with an encrypted number.

Effective Date; Transition Rule

The Commission seeks comment on whether an effective date six months after adoption of the rule in final will give financial institutions sufficient time to come into compliance. Compliance with the rule will require mortgage lenders to review their existing policies and procedures and implement extensive changes in systems, forms, and training. Although we commend the Commission for its commitment to allow at least six months before the final rule goes into effect, that period is inadequate to allow our members to come into compliance. It would be more appropriate to allow at least a year after the final rule is published before compliance becomes mandatory.

Thereafter, the Commission and the other agencies should consider adopting the rule of Section 105(d) of the Truth in Lending Act, under which any changes to the regulation become effective on the October 1 that follows the date of issuance by at least six months. Coordination with Truth in Lending would simplify compliance for mortgage lenders and other creditors under that Act.

The Commission also seeks comment on whether a thirty-day transition period after the effective date of the rule for existing customers is appropriate. Such a rule would mean that the disclosure would have to be included in the first monthly statement after the effective date – for lenders that send monthly statements. A more reasonable period would be ninety days, or up to one year if the financial institution has not otherwise communicated with the borrower (as may be the case with HELOC accounts on which there is no balance).

Joint Marketing and Outsourcing

Apart from the deadlines for making disclosures, the rule should also accommodate existing relationships between financial institutions and third-party outsourcers and marketing partners. Under Section 313.9 of the Proposal, a financial institution may share nonpublic personal information with a nonaffiliated third party that uses the information to perform services for the financial institution or to conduct a joint marketing campaign. As one condition to taking advantage of this exception, the financial institution must contract with the third party to maintain the confidentiality of the information.

The Proposal does not address contracts in existence as of the effective date of the rule. Many contracts with outsourcers were originally written for a short term such as a year, and have been renewed without change since then. Although such contracts generally require the outsourcer to maintain the confidentiality of the information, they do not, of course, refer specifically to the Privacy Provisions. Financial institutions are reluctant to renegotiate these contracts to reflect the Privacy Provisions for fear that doing so would give the outsourcer an opportunity to increase its prices. Since renegotiating the contracts would not provide a consumer benefit, the rule should provide that contracts in existence as of the effective date, or renewals of such contracts, which include a confidentiality provision, are deemed to comply with the confidentiality requirement.

Other Questions for Public Comment

The following are the CMC's comments on a number of issues raised by the Commission and not addressed above:

Should the term "financial in nature" be interpreted narrowly?

Given the language of the statute, we do not understand the argument that entities that are not part of a larger financial institution should be exempt from compliance with the Privacy Provisions when they engage in 4(k) activities. For example, for the same reasons that consumers might want a bank-affiliated travel agency to maintain the confidentiality of their nonpublic personal information, they would desire a standalone travel agency to similarly maintain their confidentiality. The Commission should recognize the competitive implications of imposing differing requirements on organizations that happen to have a bank affiliation than are applied to their non-bank competitors.

Should the Commission impose additional requirements on financial institutions that take advantage of the service provider/joint marketing exception to the opt-out requirement in Section 502(b)(2) of G-L-B?

The G-L-B provision requires a financial institution that wishes to take advantage of this exception to:

> "fully disclose . . . the providing of such information and enter . . . into a contractual agreement with the third party that requires the third party to maintain the confidentiality of such information."

Assuming that the Commission has the power to impose additional requirements, we see no reason why it should do so. A financial institution that is exempt from the opt-out requirement pursuant to Section 502(b)(2) must provide the initial privacy disclosures as well as the specific disclosure that it is providing information under a servicing or joint marketing agreement. There seems to be little to be gained from imposing even more requirements.

Should "control" be defined more "flexibly" than in the Bank Holding Company Act?

The CMC supports the use of the Bank Holding Company Act definition, which is a test of "control" that is well understood in the financial services industry.

What methods of delivering the initial notice are acceptable to ensure that the financial institution reasonably expects that the consumer will receive actual notice of the institution's privacy policy?

The CMC commends the Commission for suggesting that a variety of alternative methods would be acceptable.

When one of the exceptions in Proposed 16 C.F.R. §§ 313.10 and 313.11 applies, the Proposal would only require a financial institution to state that it makes disclosures "to other nonaffiliated third parties as permitted by law." Is such a notice adequate?

The CMC supports the Proposal as drafted. Requiring a more detailed disclosure of the nature of such disclosures would defeat the purpose of the exceptions. A disclosure of the details of information that is disclosed or of the recipients of the information could adversely affect the security of the information. It could also require a new disclosure of the institution's privacy policy every time the institution made a change in its outsourcing arrangements.

Should there be a specific deadline for honoring an opt-out request?

The CMC agrees with the Commission that "the wide variety of practices of financial institutions [makes a single time] limit inappropriate." We support the proposed standard that third-party "disclosures stop as soon as reasonably practicable." For example, a financial institution should not have to contact third parties to which it has already transmitted a mailing list and remove the names of customers who have opted-out since the institution transmitted the list.

Should there be specific provisions allowing third-party contractors to use nonpublic personal information they obtained under an exception "to improve credit scoring models or analyze marketing trends, as long as the third parties do not maintain the information in a way that would permit identification of a particular consumer"?

We support a clarification to the regulation that would allow a third party to use information in this manner. For example, Beta Contract Underwriting Company may wish to aggregate information it obtains from mortgage lenders about particular borrowers as input into its credit scoring systems. Such a use of information about consumers does not compromise their privacy in any way and ultimately benefits the public by making credit more widely available. The Commission should also confirm that such a use of the information does not violate FCRA in any way.

Should there be additional "safeguards" to the exception for consent in order to minimize the potential for customer confusion?

We do not believe that additional safeguards, such as a requirement for written consent, are necessary or would be helpful. Even as drafted, the regulation could make it difficult to conduct routine activities such as verifying information supplied by a telephone applicant for a mortgage loan. The Commission should clarify the regulation to indicate that the consumer should be deemed to have consented to the disclosure of nonpublic personal information when a consumer has initiated a transaction and the financial institution is asked to verify information supplied by the consumer.

Should financial institutions have to develop "develop policies and procedures to ensure that third part[ies to whom information is disclosed] compl[y] with . . . the limits on redisclosure of that information"?

Although we recognize that the Commission may wish to recommend such procedures in compliance or enforcement guidelines, we do not believe that such an additional requirement is warranted as part of the regulation itself. Even in the absence of any regulation, mortgage lenders and other financial institutions have a strong incentive to preserve the confidentiality of the valuable customer information that they supply to third-party vendors. In addition, a third party would be in violation of G-L-B and subject to sanctions if it were to redisclose information in a manner that is not permitted by the regulation or Act.

Finally, we question whether there is legal basis for the Commission to impose such a requirement. The limits on redisclosure by third parties are contained in Section 502 of G-L-B. That provision also specifically states that a financial institution that discloses information under the servicer/joint marketing exception must enter into a contractual agreement with the third party that requires the third party to maintain the confidentiality of the information. By implication, Congress did not intend to impose additional requirements on a financial institution that discloses nonpublic personal information pursuant to other exceptions.

The CMC appreciates the opportunity to comment on the Proposal.

Very truly yours,

Anne C. Canfield