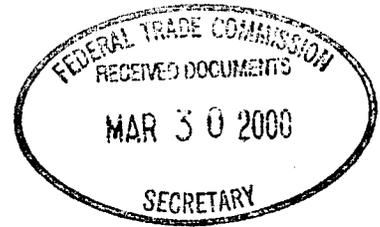




Associated Credit Bureaus, Inc.

1090 Vermont Avenue, N.W. Suite 200
Washington, D.C. 20005-4905



March 29, 2000

Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313 --Comment

Dear Mr. Secretary:

On behalf of the members of Associated Credit Bureaus, Inc, we offer the following comments on the proposed financial privacy rule under Title V of the Gramm-Leach-Bliley Act ("GLB Act"). ACB, as we are commonly known, is the international trade association representing over 500 consumer information companies that provide fraud prevention and risk management products, credit and mortgage reports, tenant and employment screening services, check fraud and verification services, as well as collection services.

ACB commends the Federal Trade Commission and the other federal agencies for their concerted effort to implement the important financial privacy provisions of the GLB Act. We appreciate the challenge of meeting consumers' valid financial privacy concerns while not impeding the legitimate use of information necessary to conduct commercial and government business. We also appreciate the challenge of developing final rules of uniform applicability to financial service providers. Uniformity is critical to preserving the competitive balance in the industry and to assuring that consumers reap the full benefit of these privacy protections no matter which financial institution is involved. ACB offers these comments to assist the agencies in meeting the challenge of promulgating uniform rules, consistent with the provisions of the GLB Act, in order to implement the important financial privacy protections of this Act.

Background

As consumer reporting agencies, ACB's members understand the need to protect the security and confidentiality of consumers' financial information. ACB members have operated for many years under the Fair Credit Reporting Act ("FCRA"), as implemented through federal and state court opinions and federal agency interpretations, including those of the Federal Trade Commission ("FTC"). The FCRA is the seminal federal act protecting the privacy of consumers' financial information held by third parties.

The FCRA provides for the dissemination of information from consumer reporting databases, including certain identifying information on consumers. This identifying information is often referred to as “header” information, because it is at the top of a consumer report. Header information is only identifying information and is devoid of any financial connotation. Examples of header information include name, address (including zip code), telephone number, year of birth, age, and any generational designation (e.g., “senior,” “junior”). For the past several years, in reliance on U.S. District Court orders and on federal agency interpretations under the FCRA, consumer reporting agencies have used header information to develop valuable products and services for their customers.

Although header information is generally available from other sources, including public sources, the information is especially reliable when it comes from consumer reporting agencies. For example, consumers’ addresses from header information are more likely to be current because they are based on regularly updated information from creditors, who in turn are more likely to receive timely change of address notices and otherwise know their customers’ current whereabouts. For that reason, consumer reporting agencies’ header information is used by law enforcement agencies to locate suspects, witnesses, and dead beat parents. The IRS uses this information for returned mail and/or to verify social security numbers. Banks use it to verify addresses when opening checking accounts, and banks and mutual funds use it to locate lost account holders.

Header information is also valuable for direct marketing purposes because of its accuracy and reliability. When this identifying information is combined with other demographic and non-consumer report information, the result is targeted solicitations -- those solicitations sent only to consumers’ current addresses and otherwise directed only to the intended recipient. The accuracy of this information thus renders direct marketing more cost-effective, and it increases the likelihood that consumers will receive *targeted* solicitations – aimed specifically at them. No one benefits when consumers receive misdirected solicitations, and accurate identifying information prevents this from happening.

General Concerns

As discussed below, consumer reporting agencies do not provide financial products and services to consumers and, therefore, would not be subject to the notice and opt-out provisions under the GLB Act or under the proposed rule. Moreover, because header information is only identifying information and not financial information, it is not the kind of information that Congress intended to include within the definition of “nonpublic personal information” under the GLB Act. However, the proposed rules would expand the definition of “nonpublic personal information” to include header information, by reading the word “financial” out of the definition of “nonpublic personal information.”

If “nonpublic personal information” included header information, the GLB Act restrictions on reuse of this information by non-affiliated third parties would undermine the ability of consumer reporting agencies to compete with other providers of this information, because consumer reporting agencies receive header information from their subscribers. These subscribers include “financial institutions,” who number in the thousands, and who update the header information electronically on a regular basis. Numerous other sources of identification data (e.g., court filings and other public record) are utilized. Consumer reporting agencies’ systems do not always track the source of identifying data, and so determining the source of a consumer’s address or other identifying information is essentially impossible.

Even if this information could be tracked back to its source, doing so would be meaningless, because in many instances there are multiple sources for the same information. Moreover, consumer reporting agencies have no means of monitoring financial institutions’ privacy notices and consumers’ opt-outs because the information is often based on multiple sources, and these subscribers furnish the identifying information pursuant to a specific exception under the GLB Act and the proposed rule. *See* section 502(e)(6) of the GLB Act; proposed Rule § 313.11(a)(5). More important, this process functions to create a “homogenized” set of identification data, not linked to any one source and which does not carry any connotation of a relationship with any financial institution. The FCRA operates to allow the use of this identifying data, and so too must the final rule.

If “nonpublic personal information” were to include header information, the result would be to remove from the marketplace the businesses with the most useful, reliable identifying information and to eliminate these vital products and services.

As discussed below, ACB believes that this result could be avoided if the final rule would:

- Assure that the GLB Act does not modify the operation of the FCRA.
- Define nonpublic personal information to exclude identifying information and any other information that is not financial in nature.
- Clarify the exception for information furnished to or provided by a consumer reporting agency.
- Define financial institution in a manner consistent with the purposes of the GLB Act.
- Honestly reflect the GLB Act provisions with respect to disclosure of account information.

Each of these suggestions is discussed below.

Effect of the GLB Act on the Fair Credit Reporting Act

Congress was concerned that the financial privacy provisions in the GLB Act could adversely affect the operation of the FCRA. For that reason, the GLB Act provides:

[N]othing in this title shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act, and no inference shall be drawn on the basis of the provisions of this title regarding whether information is transaction or experience information under section 603 of that Act.

The GLB Act section 506(c). Although the proposed rule repeats this provision, it contains other provisions that *would* modify, limit or supersede the operation of the FCRA. If a provision would interfere with the ability of consumer reporting agencies to disclose header information, that provision would “modify” and “limit” the operation of the FCRA, because the FCRA permits consumer reporting agencies to disclose this information. Section 506 of the GLB Act should be implemented by amending the proposed rule’s section 313.14 as follows:

Nothing in this part shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act or to prevent or impede any disclosure made by a consumer reporting agency that the Fair Credit Reporting Act would require or permit, and no inference shall be drawn on the basis of the provisions of this part regarding whether information is transaction or experience information under section 603 of that Act.

Although this amendment to the proposed rule would for the most part resolve consumer reporting agencies’ concerns, we believe that other changes are necessary to carry out the Congressional intent in the GLB Act.

Definition of Nonpublic Personal Information

The GLB Act defines “nonpublic personal information” to mean “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 GLB Act, § 509(4) (emphasis added). The GLB Act also provides that this term does not include “publicly available information.” *Id.* The GLB Act does not further define this term.

The proposed rule removes the word “financial” from the definition; its definition of nonpublic personal information would cover information that is not financial in nature, such as header information. “Nonpublic personal information” is defined as (i) personally identifiable financial information; and (ii) any list, description or other grouping of

consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information.” *See, e.g.*, proposed Rule § 313.3(n)(1).

“Personally identifiable financial information,” in turn, is defined by the proposed rules as information that is (1) provided by a consumer to obtain a financial product or service; (2) resulting from any transaction involving a financial product or service to that consumer; or (3) otherwise obtained about a consumer in connection with providing a financial product or service. *See* proposed Rule § 313.3(o)(1).

This proposed definition of “personally identifiable information” turns the meaning of “nonpublic personal information” under Section 509(4) of the GLB Act on its head: Under the GLB Act, the term “financial” limits the scope of the three types of information that make up “nonpublic personal information” (i.e., information provided, information resulting from, and information obtained), but under the proposed rule the three types of information define “financial” information. As a result, “nonpublic personal information” under the proposed rule includes everything that a financial institution obtains about a consumer, not just financial information, unless it is publicly available information, as defined in the two alternative proposals of that latter term. This proposed definition conflicts with the plain language of the GLB Act requiring that the nonpublic personal information be “financial information.”

The Congressional intent that the privacy provisions be limited to financial information is supported by the legislative history to the privacy provisions. In a colloquy between Senators Gramm and Allard, Senator Gramm confirmed that “nonpublic personal information” was intended to apply to information that “describes an individual’s financial condition.” *See* Cong. Rec., Nov. 4, 1999, p. S13902. Similarly, in his comments in support of the GLB Act, Senator Hagel noted that the Act’s privacy provisions “protect[] the privacy of customers’ financial information.” *See* Cong. Rec., Nov. 4, 1999 p. S13876). The legislative history and the purpose of Title V of the GLB Act make clear that “nonpublic personal information” should include only information that is intrinsically financial.

Thus, to determine what is “nonpublic personal information,” the starting point must be whether the information is *financial* in nature. Because of the expanded bank powers under the GLB Act, financial information may include information about a consumer’s insurance and securities account information, as well as deposit, credit and transactions accounts held by banks and similar financial institutions. The rule should list categories of information that is financial in nature, such as information involving income, debts, financial assets, credit accounts, debit accounts, other financial transaction accounts, account payment histories, etc. However, any category of information that is not intrinsically financial in nature or does not pertain to consumers’ insurance or securities’ accounts should not be within the scope of “financial information.”

Once it is determined that certain information is “financial,” the next question is whether it is personally identifiable. This means simply whether the consumer to whom the financial information pertains can be identified. For example, a financial profile of a consumer whose identity is encrypted is not *personally identifiable* financial information.

If information is personally identifiable financial information, the next inquiry under the GLB Act is whether the information is *publicly available*. The proposed definition of “publicly available” is adequate to cover the kinds of financial information that are available to the general public. (For example, the term will include bankruptcies, legal judgements, real estate holdings, and similar matters of public record.)

When the term “financial” information is included in the definition of nonpublic personal information, there is no need for the convoluted choice created by the proposed rule in Alternatives A and B. That is because other laws and general use will determine whether court records, media reports and similar financial information is publicly available. Therefore, no further inquiry would be necessary to determine whether the financial institution obtained the information from that public source or from its own experience.

Thus, when the rule’s definition of nonpublic personal information includes all of its statutory components, including whether the information is *financial*, the result is a definition that flows logically and consistently under the language of the GLB Act.

The result also is that the header information held by consumer reporting agencies is not nonpublic personal information, because header information is devoid of any connotation as to an individual’s finances or financial condition. (If this information did communicate information about an individual’s finances or financial condition, it might bear on a consumer’s credit worthiness, credit capacity or credit standing, and when provided from a consumer reporting database, would be a consumer report.)

Although that should be the end of the inquiry, it should also be noted that consumer reporting agencies’ header information is generally publicly available information and, for that reason also, is *not* nonpublic personal information. For example, names, including generational designation, and addresses are available from telephone directories and similar public sources. Zip codes are provided by the post office. Birth certificates are matters of public record, and contain date of birth.¹ In fact, the proliferation of public databases on the Internet and other public electronic sources has made it quite easy to obtain data similar to header type information. No public benefit could be gained by denying consumer reporting agencies the legitimate use of publicly available information when Congress does not seek to prevent the unfettered use of this information by others.

¹ We note that the FTC’s recent decision in the Trans Union case indicated that a consumer’s age could be a consumer report when provided by a consumer reporting agency. We recognize that the courts will be the final arbiter of this question, but believe it appropriate to observe that the Commission appears to have based its conclusion on a misunderstanding of “credit capacity.” The FTC in this case interprets this term to mean whether an individual is old enough to enter into a binding contract. Credit capacity does not mean an individual’s *capability* to contract, but rather the *amount* of debt the individual can incur based on debt to income and payment to income ratios.

The proposal offers two alternative definitions of “publicly available” information (Alternatives A and B). Under Alternative A, information is “publicly available information” only if the financial institution actually obtains the information from a public source. Thus, header information would only be publicly available information, and thus not nonpublic personal information, if it was actually obtained from a public source. Under Alternative B, information is “publicly available” if it could be obtained from a public source regardless of whether it actually was obtained from a public source. See proposed Rule §313.3(p)

Alternative A would mean that everything a financial institution received from a consumer would be “nonpublic personal information.” This result is clearly inconsistent with the GLB Act. If Congress had intended for the privacy provisions to apply to all information a financial institution receives from a consumer, it would have said just that and not bothered to define the term “nonpublic personal information.” Therefore, Alternative A is so far beyond the scope of the GLB Act that it would not withstand judicial scrutiny.

Alternative B needs to be clarified, however. The FTC comments on the proposal indicate that Alternative B may be interpreted to mean that the item of information in question (such as a consumer’s telephone number) must actually be available from a public source. In that case, the financial institution would have to ascertain in advance that the item of information is available. Because of the difficulty in doing so, a financial institution could find it more expeditious to obtain the information from the public source in the first place – thus the same result as under Alternative A. At the very least, any definition of “nonpublic personal information” should exclude information of a type that is publicly available, such as in telephone books, from the Internet, etc., and that a financial institution need not determine whether any item of information is, in fact, individually publicly available.

We have a final concern with the proposed rule’s definition of “nonpublic personal information.” Under the proposal, the definition would include a financial institution’s list of consumers. Proposed Rule § 313.3(n)(1)(ii). The GLB Act definition of nonpublic personal information includes “any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any nonpublic personal information other than publicly available information.” The GLB Act section 509(4)(c)(i). However, the definition excludes “any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any nonpublic personal information other than publicly available information.” The GLB Act section 509(4)(c)(ii).

Under the statutory definition, the test for whether or not a list of consumers is nonpublic personal information depends on whether or not the list was created using “nonpublic personal information other than publicly available information.” Therefore, the inquiry is the same as in other instances where the question is whether the information is “nonpublic personal information.” As seen above, an integral component of the definition is that it be “personally identifiable financial information.” If so, the inquiry is whether the list was derived using “publicly available information.” Name, address and telephone number and other identifying data are publicly available information.

Nonetheless, the proposed rule's definition of nonpublic personal information would include financial institutions' customer lists. This result is inconsistent with the GLB Act's definition of nonpublic personal information, which clearly excludes lists derived from publicly available information, such as name, address and telephone number.

Exception for Consumer Reporting Agency Information

As noted above, the GLB Act makes clear that nothing in Title V is to modify or interfere with the operation of the Fair Credit Reporting Act. The GLB Act section 506(c). In addition to this general rule, the GLB Act provides a specific exception to the notice and opt-out provisions for nonpublic personal information disclosed to a consumer reporting agency. The Act also excepts the disclosure of this information from a consumer report by consumer reporting agencies. The GLB Act section 502(e)(6). Accordingly, the proposed rule exempts from the notice and opt out requirements, a financial institution's disclosure "to a consumer reporting agency in accordance with the Fair Credit Reporting Act [cite], or from a consumer report reported by a consumer reporting agency." Proposed Rule § 313.11(a)(5).

The proposed rule also states that a nonaffiliated third party may use nonpublic personal information about a consumer that it receives from a financial institution in accordance with the exception for information reported to a consumer reporting agency or by a consumer reporting agency in a consumer report only for the purpose of that exception. Proposed Rule § 313.12(b).

Under the clear language of the Act and the proposed rule, the notice and opt-out provisions do not apply to information furnished to a consumer reporting agency. For that reason, financial institutions need not notify consumers that they furnish nonpublic personal information to consumer reporting agencies, and consumers do not have the right to direct that this information not be furnished. It is unclear from the proposed rule whether the portion of the exception for information "from a consumer report reported by a consumer reporting agency" would include the header information described above.

We believe that the exception in the GLB Act includes header information. We base this conclusion on the language of the exception, which states that the notice and opt out provisions do not apply to the disclosure of nonpublic personal information . . . "from a consumer report reported by a consumer reporting agency." If the exception were limited to non-identifying information from consumer reports, it would have stated that the notice and opt out provisions would not apply when the financial institution disclosed nonpublic personal information . . . "which is a consumer report."² However, we also believe that the scope of this exception should be clarified in the rule, so that the exemption would include header information provided by a consumer reporting agency.

² This interpretation is also supported by the recent FTC opinion in the Trans Union case, which describes name, address and other header information as information that is contained in a consumer report but is not a "consumer report" under the FCRA. (*In the Matter of Trans Union Corporation, Inc.*, Docket No. 9255, <http://www.ftc.gov>, at 3, n.4 (Feb.10, 2000).)

As discussed above, the communication of personally identifiable financial information in a consumer report would be subject to the FCRA and thus outside the scope of the GLB Act. For that reason, clarifying the exception for header information would not affect the GLB Act provisions protecting personally identifiable financial information, but it would eliminate ambiguity as to the scope of this exception.

For these reasons, ACB urges the following language to clarify the exception in proposed Rule § 313.11(a)(5):

- (i) to a consumer reporting agency in accordance with the Fair Credit Reporting Act [cite], or
- (ii) from information provided by a consumer reporting agency.

Definition of Financial Institution

Under the GLB Act, the definition of “financial institution” is relevant for determining who gives notice and opt-out to consumers, because only financial institutions are subject to those requirements. In addition, Section 501 requires that financial institutions protect the security and confidentiality of their customers’ nonpublic personal information. The other provisions of Title V, concerning limitations on reuse and use of account numbers, apply to disclosures to or by nonaffiliated third parties, as well as by financial institutions.

The GLB Act defines “financial institution” as “any institution the business of which is engaging in financial activities described in section 4(k) of the Bank Holding Company Act of 1956.” The GLB Act, Section 509(3)(A). Under this section, the Federal Reserve Board has determined that financial activities include credit bureau services: “Maintaining information related to the credit history of consumers and providing the information to a credit grantor who is considering a borrower’s application for credit or who has extended credit to the borrower.” *See* BHCA, section 103(a)(k)(4)(F); 12 C.F.R. § 225.28; *see also* FTC comments to § 313.1 at fn. 2. Debt collection activities of banks are also included. *See* 12 C.F.R. § 225.28.

The proposed rule adopts verbatim the GLB Act definition of financial institution. As a result, the proposed definition may include entities that only engage in commercial financial activities, such as debt collectors and credit bureaus. (However, not all consumer reporting agencies would be financial institutions; the definition would apply only to those whose business included credit reporting activities for creditors).

Moreover, under the proposal a debt collector may or may not be subject to the GLB Act notice and opt-out requirements for financial institutions -- depending on the nature of its business relationship with the creditor whose debts it collects. If the debts were assigned to the debt collector, the debt collector would stand in the shoes of the creditor as to these debts and would be subject to those requirements. However, if the creditor retained ownership of the debts and the debt collector collected the debts on its behalf, only the creditor would need to comply with the notice and opt-out requirements.

Thus, under the proposed rule, when debt collectors collect on assigned consumer debts, they are subject to the notice and opt-out provisions as “financial institutions,” even though they offer no financial products or services to “consumers.” Moreover, under the proposal, the debtors from whom they collect are their “customers” to whom they must give initial notice and opt out and also give annual financial privacy notices. Neither debt collectors nor debtors believe that theirs is a “customer relationship.” Thus, the proposal creates the curious result that a “financial institution” could have “customers” who are not “consumers.” The FTC’s comments on the proposal appear to recognize that the definition of financial institution creates strange results, and they seek public comment on it.

The consumer’s interest in the privacy of information held by a debt collector should not turn on whether the debt collector owns legal title to the debt. In either case, there is no evidence that Congress was concerned about debt collectors or similar entities making inappropriate disclosure of individuals’ nonpublic personal information.

We suggest that the problem arises because, as seen above, financial activities under the Bank Holding Company Act are not limited to those that involve consumers; many of the activities involve *commercial* banking. However, the privacy provisions of the GLB Act are limited to *consumers’* private financial information collected and disclosed by banks and other financial institutions. If a financial institution does not provide financial products or services to consumers, the GLB Act provisions should not apply unless they relate to the *redisclosure* of nonpublic personal information or account numbers received *from* a financial institution. The limitations on redisclosure of nonpublic personal information and on use of account number already apply to “nonaffiliated third parties.” For this reason, it would be entirely consistent with the GLB Act if the definition of financial institution were limited to those institutions that provide financial products or services to consumers. Thus, the definition of financial institution could be:

“Any institution the business of which is providing financial products or services to consumers by engaging in activities that are financial in nature as described in section 4(k) of the Bank Holding Company Act of 1956.”

This definition eliminates the need for the additional, duplicative definition of “financial product and service” in Section 313.3(k)(1).³ It also eliminates the curious result under the proposed definition of “financial institution” whereby certain non-financial institutions would be subject to the GLB Act but not to the notice and opt-out provisions because they offer only commercial products and services related to the business of banking. (Again, it should be emphasized that the provisions concerning reuse of nonpublic personal information and the use of account numbers already apply to nonaffiliated third parties.)

³ We believe that the definition of “financial service” in Section 313.3(k)(2) is beyond the scope of the GLB Act because it adds new definitions outside the Bank Holding Company Act definitions that must be the only basis for “financial services” under the plain language of the GLB Act. Moreover, there is nothing in the GLB Act that would extend its coverage to applicants or information received from applicants, and the proposed definition would expand the coverage to include applicants.

If this alternative definition of financial institution is adopted, the final rule should make clear that it excludes institutions that provide information or products to consumers in order to comply with other federal, state or local laws, rules or other applicable legal requirements under the exception in the GLB Act section 502(e)(8).⁴ Thus, the term “financial institution” would not cover consumer reporting agencies that provide consumers with copies of their consumer reports under the FCRA or debt collectors that verify debts for consumers under the Fair Debt Collection Practices Act. Although this result is implicit in section 502(e)(8), it should be made clear in the definition of “financial institution.”

Limits on Sharing of Account Number Information

Under the GLB Act, a financial institution:

may not disclose, other than to a consumer reporting agency, an account number or similar form of access number or access code for a credit card account, deposit account, or transaction account of a consumer to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer.

The GLB Act section 502(d). The proposed rule applies this provision to disclosures made directly or indirectly by a financial institution. Although Congress specifically encouraged the federal agencies to permit disclosures of account numbers in limited instances, they have declined to do so, but invite comment on whether exceptions might be appropriate.

The FTC’s comments to the proposed rule also indicate that they intend to interpret the prohibition on disclosing this kind of information to include account numbers, etc. in an encrypted form, even if the recipient of this information lacks the key to decrypt this information. The FTC does seek comment on whether an exception in this instance would be appropriate.

The purpose of Section 502(d) is to prevent account numbers and similar account access codes to be used to access a consumer’s account without the consumer’s knowledge or permission. If the consumer consents to the disclosure of this information to third parties for use in marketing to the consumer, the rule should not prohibit it. Similarly, if the account number cannot be used by the third party to access the consumer’s account, there is no need to prohibit its use. For these reasons, in order to implement the Congressional intent, the final rule should provide for exceptions under these kinds of circumstances.

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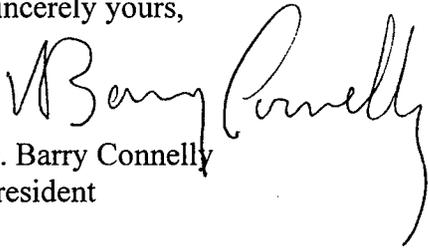
This section of the GLB Act is implemented in Section 313.11(a)(7) of the proposed regulation.

Conclusion

ACB's members have a long history of protecting and safeguarding the confidentiality of consumers' financial and other sensitive information, and we support the federal agencies' efforts to implement the important financial privacy provisions of the GLB Act. Our concern is that the rule not interfere with the ability of government officials and others to use information that is outside the scope of the GLB Act because it is not financial in nature. We also believe that the rule should provide that it does not modify the operation of the Fair Credit Reporting Act and that it permits the disclosure of information by consumer reporting agencies that would be allowed under that Act. In addition, we believe that the scope of the exception for information provided by consumer reporting agencies should be clarified, and we believe that the definition of "financial institution" should be modified to avoid unnecessary ambiguity.

Thank you for your consideration of these comments.

Sincerely yours,

A handwritten signature in cursive script that reads "D. Barry Connelly". The signature is written in black ink and is positioned to the right of the typed name.

D. Barry Connelly
President