



## **NATIONAL RETAIL FEDERATION**

March 31, 2000

Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

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

Dear Mr. Secretary:

This comment letter is filed on behalf of the National Retail Federation (the “NRF”) in response to the Notices of Proposed Rulemaking (“Proposal”) published by the Federal Trade Commission (the “FTC”), the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System (the “FRB”), the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of Thrift Supervision, and the Securities and Exchange Commission (the “SEC”) (collectively, the “Agencies”), to implement Subtitle A of Title V of the Gramm-Leach-Bliley Act (the “GLB Act”). The NRF is the world’s largest retail trade association with membership that comprises all retail formats and channels of distribution, including department, specialty, discount, catalog, Internet and independent stores. NRF members represent an industry that encompasses more than 1.4 million U.S. retail establishments, employs more than 20 million people—about 1 in 5 American workers—and registered sales of \$3 trillion. NRF’s international members operate stores in more than 50 nations. In its role as the retail industry’s umbrella group, NRF also represents 32 national and 50 state associations in the United States. Many NRF members have proprietary, private label or co-branded credit cards and/or engage in other activities which may bring them within the scope of the Proposal.

The NRF commends the Agencies for their efforts to provide helpful guidance on the GLB Act in an extremely short period of time. The Proposal sets forth a good basis for analyzing and discussing the important privacy provisions included in the GLB Act, and we greatly appreciate the opportunity to comment on the Proposal. We are deeply concerned, however, that the Proposal as drafted may unnecessarily increase the cost of complying with the GLB Act and could have other significant, unintended consequences for traditional retailers who

offer their customers credit (whether directly or through affiliated or unaffiliated financial institutions) to facilitate purchases of the retailer's goods and services. To provide a general understanding of the magnitude of the compliance cost imposed under the Proposal, we note that complying with just the most basic component of the Proposal—namely, mailing the initial notice to existing customers—will cost retailers well in excess of \$100 million. Of course, the full cost of complying with the Proposal would far exceed that amount. Ultimately a portion of these expenses will be passed on to consumers in the form of higher prices for merchandise and credit. This is particularly inappropriate since the provisions which create a great deal of the unintended consequences provide little or no benefit to consumers.

Although we recognize that some additional costs are inevitable, the Proposal would impose costs that go well beyond those intended by the drafters of the GLB Act who believed that the privacy provisions would be implemented efficiently. Congressman Oxley, the primary author of the privacy amendment, articulated that intent when he declared that the privacy provision is “not some statute that ties up these financial institutions, costs them millions and millions of dollars which is going to be passed on to the consumer ultimately and is going to be less efficient.” 145 Cong. Rec. H5315 (daily ed. July 1, 1999) (Statement by Rep. Oxley). In addition, Congressman David Dreier, Chairman of the House Rules Committee, noted that privacy “is what the American people want. But there are some other demands that they have. They also demand *low cost . . . financial products and services . . .* That is why I am convinced that [Title V of the GLB Act] is in fact the balance that is needed for us to deal with the issue of privacy as well as meeting consumer demands” for low cost services. (Emphasis added.) 145 Cong. Rec. H5315 (daily ed. July 1, 1999) (Statement by Rep. Dreier).

We believe the most significant task faced by the Agencies will be appropriately modifying the Proposal to develop a Final Rule that comes closer to implementing the Congressional intent of protecting consumer privacy while controlling the cost of compliance. As discussed in greater detail below, we believe that this objective largely could be accomplished if the Agencies were to adopt a Final Rule that adheres more closely to the plain language of the GLB Act. In our view, an approach such as that taken in the Proposal, which expands the focus and application of the GLB Act, cannot be fairly or effectively implemented in the short timeframe assigned by Congress. A simpler, more basic approach which better reflects the plain language of the GLB Act would appropriately implement the law while minimizing the significant, unintended consequences created by the Proposal. After the GLB Act is implemented, the Agencies will have the opportunity to study its impact more carefully and modify their rules if necessary.

In addition to adopting a basic framework that adheres more closely to the plain language of the GLB Act, we urge the Agencies to use their interpretive authority to provide flexibility to retailers and financial institutions in their efforts to facilitate more cost effective compliance with the provisions of the GLB Act. It is unrealistic to expect retailers and financial institutions to overhaul many of their practices and information systems within six months of the issuance of the Final Rule. Moreover, it would be extremely disruptive to retail business operations to require compliance with the Final Rule in the timeframe specified in the Proposal, which happens to fall right in the middle of the busiest time of the year for retailers: the holiday shopping season. We urge the Agencies to consider the fact that approximately 40 percent of all

retail business is conducted in the last quarter of each year. As a result, the demands on retail management and employees are enormous in the months leading up to and during the last quarter. In fact, because of the need to prepare for the last quarter, most retailers place a moratorium on data processing changes beginning in August, extending through the end of the year. Financial institutions that issue consumer credit also experience their heaviest demand during this time of year and must undergo similar extensive preparations.

November and December also happen to be the busiest time of the year for the U.S. Postal Service and for the private sector companies that assist retailers, financial institutions, and others in printing, sorting and delivering correspondence to their customers. This, of course, means that consumers receive an extremely high volume of mail during the holiday season and may be less likely to take note of these disclosures if mailed during this time period. We urge the Agencies to avoid such concern by using their discretion to provide flexibility that would enable retailers and financial institutions to comply with the provisions of the GLB Act without adding a deluge of privacy notices to the volume of correspondence sent in that timeframe. In order to address these issues, we request that the Agencies delay the effective date of the Final Rule until September 2001. We believe that, in light of the complex issues encompassed by the Proposal, it is essential that the Agencies consider the comments received and, in May 2000, issue an amended Proposal for additional public comment with a final rule to be issued in the late fall. If the Agencies feel constrained by the language of the GLB Act to issue something more than a Proposed Rule in May, we urge the Agencies to issue a Temporary Rule, compliance with which would be voluntary until September 2001. Under this approach, the Agencies could meet their statutorily imposed timeframe while also allowing sufficient time to gather and analyze the additional public comments we believe would be essential for crafting a carefully considered Final Rule. If the Agencies ultimately decide against issuing an amended Proposal, or even a Temporary Rule, a delayed compliance date would enable all affected parties to more fully and carefully develop their plans for implementing the Final Rule. In particular, it would allow retailers and financial institutions to carefully implement the substantial systems changes that must take place in order to comply with the Final Rule.

If the Agencies nevertheless choose to proceed under the current timetable, we urge that the Final Rule at least permit retailers and financial institutions to deliver the initial notices to existing customers on a “phased in” basis over at least six months. For example, with respect to open-end creditors, this could be achieved by making it clear that such creditors need not furnish initial notices to all of their customers within a month after the effective date, but may furnish those initial notices with periodic statements that are mailed to their customer base at any time during the six-month period. It may, in fact, be more helpful for consumers to receive disclosures with a periodic statement since consumers may be more likely to take note of the information sent with a billing statement.

## **§ \_\_.2 Rule of Construction**

We commend the Agencies for including examples in the Proposal, and we urge that they include them in the Final Rule. Section \_\_.2 of the Proposal sets forth the “Rule of Construction” applicable to the proposed examples and specifically states that: (i) the examples are not exclusive; and, with the exception of the SEC, (ii) compliance with an example

constitutes compliance with the Rule. This Rule of Construction is an important clarification, and we urge that it be retained in the Final Rule.

### § \_\_\_\_3 Definitions

Affiliate. The Proposal states that the term “affiliate means any company that controls, is controlled by, or is under common control with another company.” This accurately states the definition of “affiliate” set forth in the GLB Act and should be retained in the Final Rule.

Clear and Conspicuous. The disclosures required under the GLB Act must be made “clearly and conspicuously.” The Proposal states that a disclosure will be deemed to be “clear and conspicuous” if it is “reasonably understandable and designed to call attention to the nature and significance of the information contained in the notice.” We appreciate the Agencies’ desire to provide guidance on the meaning of “clear and conspicuous” under the Proposal. We are concerned, however, that the proposed definition could have a number of unintended consequences. Our most significant concerns derive from the fact that the Proposal fails to take into account that the phrase “clear and conspicuous” has been used for years as the standard for complying with many other federal consumer protection statutes. For example, the “clear and conspicuous” standard governs disclosures made under the Truth in Lending Act, Truth in Savings Act and the Expedited Funds Availability Act. The FRB, pursuant to its rulemaking authority under these statutes, has promulgated interpretations of the standard, and those interpretations have been relied upon by the thousands of financial institutions and others who are subject to the statutes. When Congress enacted the GLB Act, it did so with knowledge of these interpretations, and there is no indication that Congress intended to give the phrase any new or different meaning. As a result, we believe that any proposed definition of “clear and conspicuous” that varies from prior FRB interpretation of that same term is inconsistent with the GLB Act and the intent of Congress. We also are concerned that the Agencies’ attempt to set forth a different definition of “clear and conspicuous” under the Proposal will inappropriately create uncertainty as to whether disclosures designed in reliance on the FRB’s earlier interpretations of “clear and conspicuous” are still appropriate. In order to address these issues, we urge the Agencies to either delete the definition of “clear and conspicuous” or modify it to state that compliance with the standard as previously articulated by the FRB will be deemed to comply with the standard set forth in the GLB Act.

The Proposal also provides detailed examples of how a financial institution may comply with the “clear and conspicuous” standard. We are concerned that the examples would create significant uncertainty about whether a particular disclosure complies with the standard. For instance, whether a particular disclosure is drafted in “clear, concise sentences,” uses “definite, concrete, everyday words,” and avoids “legal and highly technical business terminology” would be subject to debate and create significant potential for litigation. In addition, each of these examples increases the differences between the proposed definition and the longstanding FRB interpretations on which financial institutions have been relying for years.

We also note that the Proposal states that if a financial institution provides the GLB Act notices on the same form as “another notice,” the financial institution will be deemed

to have designed its GLB Act notice properly if it uses formatting such as “[l]arger type size(s), boldface or italics,” or uses “[w]ider margins and line-spacing,” or “[s]hading or sidelights to highlight the notice.” This interpretation appears to suggest that the notices required under the GLB Act are more important than other notices the consumer receives under other applicable federal law. If the GLB Act disclosures are included with a document setting forth the “initial disclosures” for open-end credit, for example, the Proposal appears to suggest that the GLB Act disclosures must be made more conspicuously. We believe that, in view of the significance of many other disclosures required under the federal TILA and other similar statutes, it would be inappropriate to require more conspicuous disclosure of the GLB Act requirements. In order to address these issues, we urge that the Agencies eliminate those examples from the Final Rule.

Collect. The word “collect” is defined in the Proposal to mean “obtain[ing] information that is organized or retrievable on a personally identifiable basis, irrespective of the source of the underlying information.” We are concerned that this definition could be inappropriately construed to cover an entity that briefly obtains information but passes it on to another without actually storing or capturing the information for its own use. For example, the definition could have the apparently unintended effect of covering a retailer who obtains from a consumer a credit card application which is then passed along to the card issuing bank for disposition. In order to address this issue, we urge the Agencies to clarify that an entity will not be deemed to “collect” information unless it both obtains the information and “records it for its own use to deliver a financial product or service.” Additionally, we recommend that the Agencies modify the definition of “collect” to more accurately reflect the language of the GLB Act. Specifically, the definition should be modified to make it clear that it relates only to collection of “nonpublic personal information” rather than any “information,” as contemplated by the Proposal.

Consumer. The Proposal defines “consumer” to mean “an individual who obtains or has obtained a financial product or service from the [financial institution] that is to be used primarily for personal, family or household purposes, and that individual’s legal representative.” The portion of the definition limiting its scope to individuals who obtain a financial product or service for “personal, family or household purposes” accurately reflects the language of the GLB Act and should be retained in the Final Rule. We urge, however, that the portion of the definition which would include the “individual’s legal representative” be modified. In particular, it is important to clarify that a financial institution does not have an obligation with respect to both the consumer and the consumer’s legal representative. Changing the word “and” in the definition to “or” would make this clarification.

With respect to the examples set forth in the Proposal clarifying when an individual will be deemed to be a “consumer of a financial service,” we offer the following comments. A number of the examples set forth in paragraph (e)(2) indicate that an individual who provides information to a financial institution in connection with applying for credit or another financial product or service will be deemed to be a “consumer” “regardless of whether the credit is extended” or the other financial service is granted to the consumer. Although one might argue that considering a consumer’s application for a financial product is itself a financial service, we believe that it is not. In our view, any such interpretation conflicts with the plain language of the GLB Act, which states that a “consumer” is “an individual who *obtains*” certain

financial products or services from a financial institution. Accordingly, we believe the Proposal is inconsistent with the plain language of the statute and should be revised to make clear that an individual does not become a consumer when the individual applies for, but does not obtain, a financial product or service.

The examples set forth in clauses (ii) and (iii) exacerbate a significant problem with the definition of “nonpublic personal information” which is discussed below. The two examples state that an individual who provides “nonpublic personal information” to obtain a financial service is a “consumer” regardless of whether the consumer ultimately receives the product or service the consumer is seeking. Because of the breadth of the definition of “nonpublic personal information,” the two examples could have the unintended effect of providing that an individual becomes a “consumer” if the individual provides *any* personally identifiable information to a financial institution to obtain a financial product or service. For example, the two examples could cover a situation where the consumer merely provides his or her name and address to a financial institution to provide a financial product or service so the financial institution can determine whether or not the consumer resides in the geographic area it serves.

With regard to the Proposal issued by the banking agencies, clause (v) indicates that an individual who has a loan from a financial institution is the financial institution’s consumer even if the financial institution hires an agent to collect on the loan. If this example is included in the Final Rule, we urge that the Agencies make it clear in the Supplementary Information that the agent does not have independent obligations under the Rule. In this regard, it should be made clear that the agent does not have “consumers” and is not a nonaffiliated third party when it acts on behalf of the financial institution.

The example in (vi) of the banking agencies’ proposal indicates that an individual is not a financial institution’s consumer “solely because the [financial institution] processes information about the individual on behalf of a financial institution that extended the loan to the individual.” We believe this is a helpful clarification, and we urge that it be retained in the Final Rule adopted by all of the Agencies.

We also urge the Agencies to include in the Final Rule examples clarifying the circumstances under which an individual will **not** be deemed to be a “consumer.” In particular, we urge the Agencies to incorporate into the Final Rule a clarification to the definition of “consumer” which is consistent with the helpful guidance the FTC has provided in the context of the definition of “financial institution” (discussed below). In this regard, the FTC states that the definition of “financial institution” would not include a business that only accepts payments by check or cash, or through credit cards issued by others, or through deferred payment or ‘lay-away’ plans.” In order to define the term “consumer” consistently with that FTC guidance, we urge that the Agencies include the following example in the Final Rule:

“An individual does not become a retailer’s consumer by presenting a credit card, debit card, check or other payment device to the retailer. However, the individual would be a consumer of

the bank that issued the card or other payment device or that holds the individual's checking account.”

Control. We believe that the definition of “control” set forth in the Proposal is consistent with the definition of “control” in other federal financial services statutes (*e.g.*, the Bank Holding Company Act), and we urge that it be retained in the Final Rule with one modification. We would urge the Agencies to recognize that the definition of “control” applicable to traditional financial services may not adequately cover other practices affected by the Proposal. Specifically, the term should extend to so-called “leased department” arrangements commonly used in the retail business, such as when a retailer contracts with a company that has special expertise to sell products and services to customers of the retailer in the name of the retailer. Under these arrangements, a retailer will contract with a third party to sell the third party's goods or services as if they were a department or division of the retailer. The third party generally holds itself out as doing business as the retailer. Under these arrangements, for example, a cosmetics company typically will occupy counter space on the premises of a retail department store. Although the personnel who sell the cosmetics are employed by the cosmetics company, all purchases made are treated the same way as any other purchase made at the department store. The purchase receipt is issued in the name of the department store and if the consumer later returns the merchandise, the procedure is the same as for any other goods purchased from the department store. The leased department's activities also are subject to control by the retailer. For example, the leased department must comply with the operational rules and regulations mandated by the retailer (*e.g.*, hours of operation, overall dress code and other similar rules). In addition, the retailer determines which products may be sold by the leased department. In short, the “leased department” actually becomes an integral part of the retail operations. Since these relationships are so closely integrated and are controlled by the retailer, we would urge the Agencies to clarify that a retailer “controls” the other entity, for purposes of the Proposal under such circumstances.

Customer. The Proposal defines “customer” as any consumer who has a “customer relationship” with a particular financial institution. Although the definition set forth in the Proposal does not require modification, we urge the Agencies to revise the Supplementary Information to the Final Rule to more accurately reflect the intent of the GLB Act. In particular, we note that the Supplementary Information states that a consumer would become a customer “at the time the consumer executes the documents needed to open a deposit account or borrow money from a financial institution.” In practice, however, a consumer does not become a customer of a financial institution simply by executing documents—the financial institution must agree to accept the responsibility of serving the consumer as a customer. For example, when a consumer completes a credit card application, the consumer may have “executed the documents” needed to open the account, but the consumer does not become a customer unless the financial institution actually determines that the consumer qualifies and opens the account. Thus, we urge that the Supplementary Information to the Proposal on this point be modified to indicate that a consumer does not become a customer unless the consumer has “taken the steps necessary to open an account, or borrow money, and the account is opened or the credit is extended by the financial institution.”

Customer Relationship. Under the Proposal, the definition of “customer relationship” is the key element in determining whether a “consumer” has become a “customer.” As a result, it is important that the definition of “customer relationship” establish a bright line differentiation from the definition of “consumer.” Although the Proposal attempts to provide helpful guidance on this point, we are concerned that the approach taken in the Proposal unnecessarily creates ambiguity on this point.

The Proposal states that “customer relationship” means “a continuing relationship between a consumer and a financial institution under which the financial institution provides one or more financial products or services to the consumer that are to be used primarily for personal, family or household purposes.” This definition is extremely important because, as the Supplementary Information to the Proposal notes, the obligations of a financial institution vary depending upon whether an individual is a consumer or a customer. We are concerned, however, that the definition as proposed creates ambiguity particularly as to the circumstances under which a “continuing relationship” will be deemed to exist. For example, although the Proposal clarifies that “an isolated transaction, such as withdrawing cash from the financial institution’s ATM” does not create a customer relationship, it later states that an individual’s repeated use of the financial institution’s ATM would not “necessarily” create such a relationship. In addition, the Supplementary Information suggests that even with respect to isolated transactions, a consumer may become a customer if “it is reasonable to expect further contact about the transaction between” the financial institution and consumer afterwards.

The net effect of this approach is that the Proposal fails to adequately distinguish between a “consumer” and a “customer.” The ambiguity created under the Proposal appears to be the result of the attempt to distinguish between “consumer” and “customer” based on the amount of “contact about that transaction” between the financial institution and the individual. At a minimum, the Final Rule should clarify that an individual is not a customer of the financial institution unless the financial institution has enough information to contact that individual. For example, if the financial institution does not have an address for an individual, the individual is not a customer of the financial institution. In addition, the Final Rule should clarify that it is not repeated contact with the financial institution that establishes a customer relationship, it is an agreement between the consumer and the financial institution that creates the continuing relationship. Although this concept is not articulated in the definition of “customer relationship,” it appears to be embodied in the examples set forth in the Proposal. In this regard, every one of the examples of a “customer” or “customer relationship” involves an arrangement in which the individual and the financial institution necessarily have entered into a mutual agreement to maintain a continuing relationship.

In order to address this issue, we urge that the definition be modified to clarify that a customer relationship will be deemed to exist only where the financial institution and the consumer mutually agree to enter into the relationship. We believe that such an approach would provide a more fair, effective and workable distinction between “consumers” and “customers.” Perhaps even more importantly, such a distinction would implement better policy for consumers. To illustrate this point, we urge the Agencies to consider the practical effects of any interpretation which leaves open the possibility that a consumer could become a customer through repeated transactions that do not involve a mutual agreement with the financial

institution. Under such an approach, the financial institution would be placed in the unworkable position of designing systems to monitor its dealings with any and all consumers to determine whether those consumers had become “customers” by using its facilities on an ongoing basis. Such a result would not only be extremely costly, it would be entirely inconsistent with the general intent of the GLB Act since it would essentially *require* a financial institution to gather personal information on all consumers with whom it does business.

It is also extremely important that the Final Rule make clear that an individual does not have a customer relationship with a retailer except to the extent that the retailer becomes a financial institution and agrees to provide financial products or services to the individual on an ongoing basis. The Agencies should also clarify that a customer relationship would exist only with respect to the financial products or services provided and not with respect to any retail services provided to the individual (this was the Congressional intent behind Section 509(11) of the GLB Act). For example, although a retailer may be deemed to have a “customer relationship” with a consumer to whom the retailer itself has issued a credit card, it does not have a customer relationship, under the GLB Act, with respect to retail goods or services sold to the same individual.

Financial Institution. The Proposal states that a “financial institution” is any institution “the business of which is engaging in activities that are financial in nature or incidental to such financial activities as described in section 4(k) of the Bank Holding Company Act.” Additional guidance interpreting the definition of “financial institution” would be helpful. For example, the FTC provides extremely helpful guidance on this point when it states in the Supplementary Information that an entity will be deemed to be a “financial institution” only if it is “significantly engaged” in financial activities.

We applaud the FTC for including this guidance in its Proposal, and we urge the FTC and the other Agencies to include this same guidance in the Final Rule. In our view, the “significantly engaged” standard articulated by the FTC is the minimum standard necessary to implement Congressional intent. In this regard, it is important to note that Congress defined “financial institution” as an institution “the business of which” is engaging in financial activities. By using this language, Congress made clear that merely “engaging” in financial activities is not sufficient to cause an entity to be deemed a “financial institution.” Such financial activities must be “the business of” an institution before that institution will be deemed to be a “financial institution.” We agree with the FTC that an institution must at least be “significantly engaged” in financial activities in order to sustain a finding that the financial activities are “the business of” the institution.

We also urge the Agencies to provide further guidance on what it means to be “significantly engaged” in financial activities. In our view, the Final Rule should clarify that an institution will be deemed to be “significantly engaged” in financial activities only if those activities constitute one of its “core businesses.” In addition, it is especially important that the Agencies clarify that a retailer would not be deemed to be “significantly engaged” in financial activities by regularly accepting credit card applications from consumers and passing them on to an affiliated or nonaffiliated credit card bank.

We also applaud the FTC for including in its Proposal the example (at (j)(3)(iv)) stating that a “financial institution” would not include a “business that only accepts payment by check or cash, or through credit cards issued by others, or through deferred payment or ‘lay-away’ plans.” We believe, however, that a clarification is necessary to avoid confusion about the significance of accepting a credit card issued by the retailer itself. In this regard, the example set forth in the Proposal indicates that a retailer would not be covered if it accepted credit cards “issued by others.” In our view, the act of accepting credit cards (or any other forms of payment) should never cause an entity to become a financial institution regardless of who issued the payment device. Thus, even a retailer who itself extends credit through its proprietary credit card program should not be deemed to be a financial institution merely by virtue of accepting the card. Of course, the retailer *would* become a financial institution by virtue of being significantly engaged in operating its credit card program. To implement this clarification, we urge the FTC to modify the example in (j)(3)(iv) to read as follows:

“(iv) A business that accepts payment by check or cash or through credit cards, deferred payment or lay-away plans, or any other payment method is not a financial institution by virtue of such payment acceptance.”

In addition, we request that the Agencies clarify that a retailer who accepts a payment from a consumer on behalf of a bank does not thereby become a financial institution. This clarification is needed to address circumstances where, as an accommodation, a retailer will allow a consumer to present a check to personnel at the retail location as payment for amounts owed to the creditor (*e.g.*, an affiliated or nonaffiliated credit card bank, financial institution or finance company). Some consumers prefer to make their payments in this fashion because it allows them to present the check to an individual in a face-to-face interaction rather than sending the payment by mail. Retailers would like to continue to provide this accommodation, but would be unlikely to do so if it were to create the risk that a retailer could become a “financial institution” subject to the full range of GLB Act burdens.

Financial Product or Service. The definition of “financial product or service” covers “any product or service that a financial holding company could offer by engaging in an activity that is financial in nature under section 4(k) of the Bank Holding Company Act.” The FTC, in its Supplementary Information to the Proposal, clarifies that a “product or service that does not result from a financial activity is not within the definition, even if the business is a financial institution.” This makes it clear that, for example, a retailer who becomes a “financial institution” by “significantly engaging” in financial activities is not covered under the GLB Act with respect to its non-financial activities, such as its retail operations. This is an extremely important clarification, and we strongly urge the FTC and the other Agencies to include it in the Final Rule.

On the other hand, we urge the Agencies to exclude from the Final Rule the interpretation set forth in paragraph (k)(2) of the Proposal. That interpretation provides that a “financial service” includes the “evaluation . . . or distribution of information that you collect in connection with a request or an application from a consumer for a financial product or service.”

In our view, this interpretation is not supported by the plain language of the GLB Act and would create significant, unintended consequences impacting virtually any type of business that facilitates the transmission of applications for financial products or services. For example, under this interpretation, a retailer apparently could become a financial institution by routinely taking credit card applications from consumers and transmitting them to an affiliated or nonaffiliated credit card bank. In essence, this would mean that even the smallest retailer could become a “financial institution” by transmitting credit card applications even though the retailer itself never made a single loan or otherwise provided a financial product or service of any kind to a consumer. We are not aware of any indication in the legislative history of the GLB Act suggesting that Congress intended that the meaning of “financial service” should be stretched so broadly. In our view, if Congress truly intended to impose the substantial burdens of the GLB Act on those who merely facilitate the transmission of applications, Congress would have done so explicitly. Since Congress did not extend the provisions of the GLB Act in this fashion, the Agencies should not do so through the rulemaking process.

We also note that the apparently unintended consequences of the Proposal’s definition of “financial service” would reach well beyond the retail community. For example, civic and community groups, churches and other organizations frequently assist individuals in connection with their financial affairs. If such organizations were to assist consumers by evaluating or distributing applications for financial products or services, those organizations would be deemed to be providing a financial service under the Proposal. Similarly, nonprofit consumer credit counseling services also apparently would be included under this definition when they assist consumers in restructuring their obligations to creditors. Once again, we do not believe that Congress intended such a result. In order to address this issue, we urge that the Agencies revise the example set forth in (k)(2) to make it clear that: “The mere forwarding of information that a person collects in connection with a request or an application from a consumer for a financial product or service is not a financial product or service.”

As a final clarification on this issue, we would urge the Agencies to note that products such as gift cards and gift certificates are not “financial products or services” as defined within the Proposal. We believe that these items are simply another type of retail product and clearly are not what Congress intended to cover when it enacted the GLB Act.

Nonaffiliated Third Party. The Proposal defines “nonaffiliated third party” as any entity other than an affiliate or a joint employee. This definition is important because the GLB Act provisions are intended to protect consumers with respect to disclosures of information that financial institutions make to other entities who are independent from the financial institution itself. As a result, unless the definition of “nonaffiliated third party” is precisely crafted, it will cause the GLB Act to cover practices and entities that do not raise the privacy concerns the GLB Act was intended to address. To appropriately implement Congressional intent with respect to this issue, we urge two modifications to the definition.

First, the definition should be modified to exclude any entity who receives information from a financial institution solely for the purpose of acting as agent for or on behalf of the financial institution. Under such circumstances, the recipient of the information may not use or disclose the information to any greater extent than could the financial institution. In

particular, the recipient of the information may not use it for its independent interests. Any acts carried out by the recipient would be done so solely on behalf of the financial institution. As a result, the disclosure of information between a financial institution and its agent, or other party acting on behalf of the financial institution, simply does not raise any privacy concerns of the type intended to be addressed in the GLB Act. We note that this concept has long been recognized in relevant precedent found under the Fair Credit Reporting Act (“FCRA”) which provides that communications between a principal and its agent are not treated as communications to a third party. We urge the Agencies to incorporate guidance into the Final Rule consistent with the FCRA precedent on this point.

Second, for the reasons given in discussion of “control” above, we urge the Agencies to clarify that the definition of “nonaffiliated third party” does not cover the personnel operating “leased department” arrangements used in department stores and other retail operations. Since these relationships are so closely integrated and are controlled by the retailer, the personnel operating the “leased department” should not be considered as “nonaffiliated third parties” under the Proposal.

Nonpublic Personal Information and Personally Identifiable Information. The definition of “nonpublic personal information” is extremely important because it largely determines the scope of the GLB Act provisions. Although Congress set forth a fairly explicit definition of “nonpublic personal information,” the Proposal takes a different approach and defines “nonpublic personal information” and “personally identifiable information” much more expansively than we believe was intended by the drafters of the GLB Act.

Congress’ definition of “nonpublic personal information” is found in Section 509(4) of the GLB Act. Sections 509(4)(A) and (B) provide as follows:

- “(A) The term “nonpublic personal information” means 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.”
- “(B) Such term does not include publicly available information, as such term is defined by the regulations prescribed under Section 504.”

Based on this language, it seems clear that there are three distinct elements of the definition. First, the information must be “personally identifiable.” Second, the information must be “financial.” Third, the information must have been obtained in one of the ways specified in the statute.

The GLB Act also makes it clear that information will not be deemed to be “nonpublic personal information” if it is “publicly available” as defined by the Agencies. In our view, the definitions included in the Proposal would not accurately implement the definitions set forth by Congress in the GLB Act, and we offer the following comments which we urge the Agencies to consider in preparing the Final Rule.

As a fundamental matter, the Final Rule must make it clear that information will not be considered “nonpublic personal information” unless it meets the definition of that term as enacted by Congress. In order to accomplish this, the Final Rule should define “nonpublic personal information” as “information that is personally identifiable, financial, [obtained by a financial institution as described in the statute,] and not otherwise publicly available.” Unless this change is made, the Final Rule simply cannot be viewed as implementing Congress’ intent. In addition, we urge the Agencies to provide interpretive guidance in the Final Rule to assist in implementing that Congressional intent. In particular, we believe that the Agencies should provide guidance on each of the specific elements of the definition of “nonpublic personal information” and the meaning of the term “publicly available.”

### **Personally Identifiable**

We urge the Agencies to clarify that “personally identifiable” information does not include any information about an individual if the identity of the individual is not revealed. Specifically, if information is disclosed in a manner that excludes, codes or encrypts an individual’s identity, it does not reveal any sensitive information about a consumer and thus, is not “personally identifiable.”

### **Financial Information**

Limiting the coverage of “nonpublic personal information” to information that is “financial” is important since the GLB Act is intended to address “financial,” not general, privacy issues. The Proposal, however, essentially eliminates this element of the definition. In fact, the Agencies explicitly recognize that the Proposal would not require information to be “financial” at all in order to be covered by the definition of “nonpublic personal information.”

In our view, this approach is not supported by the plain language of the GLB Act which, as discussed above, clearly requires that information must be “financial information” in order to be covered. Moreover, the legislative history of the GLB Act highlights the significance of the plain language chosen by Congress and appears to preclude the approach taken by the Proposal. In this regard, it is important to note that, like the Proposal, earlier versions of the GLB Act did not require information to be “financial” in order to be covered under the definition “nonpublic personal information.” For example, the House Commerce Committee adopted an earlier version of the privacy requirements that eventually became part of the GLB Act and defined “nonpublic personal information” as “personally identifiable information other than publicly available directory information pertaining to an individual’s transactions with a financial institution.” This definition was rejected by Congress, however, when the House adopted a substantially revised definition on the House floor. One of the key changes incorporated into the new definition was a modification limiting its scope to “financial information.” This scope limitation was retained in the GLB Act as signed by the President.

In our view, the intent of Congress is clear from the plain language of the statute—information must be “financial” in order for it to be “nonpublic personal information.” Moreover, any lingering questions on this issue appear to have been answered during the Senate’s consideration of the GLB Act when Senator Gramm, in a colloquy with Senator Allard,

stated that “nonpublic personal information” is “information that describes an individual’s financial condition.”

The NRF urges the Agencies to make clear in the Final Rule that in order to be “nonpublic personal information,” the information itself must “describe an individual’s financial condition.” The circumstances surrounding how a financial institution received the information are not a consideration if the information is not financial. We also urge the Agencies to state in the Final Rule that items such as names, addresses and telephone numbers are not covered by the definition since they do not “describe an individual’s financial condition.”

### **Publicly Available**

Congress excluded personally identifiable financial information from the definition of “nonpublic personal information” if such information is “publicly available.” The NRF urges the Agencies to modify the Proposal to accurately reflect this exclusion. Specifically, “Alternative A” should be rejected since it would require financial institutions to actually *obtain* the information from a public source. Had Congress intended to exclude only information *actually obtained* from a public source, we believe it would have done so. Instead, Congress excluded information “available” to the public, and we believe the Agencies should do so as well. Therefore, the NRF would recommend adopting a modified version of Alternative B. In particular, “publicly available information” should be defined as “any type of information that is generally made available to the general public.” This language would accurately define the meaning of “publicly available.” The other portions of the proposed definition which would limit the definition to information available only through specified sources should be deleted. The portion of the definition suggesting that information will be treated as publicly available if it is obtainable through “widely distributed media” is particularly troublesome. It opens the door to significant potential for litigation over whether a particular source of information was sufficiently “widely available.” Accordingly, we urge the Agencies to make it clear in the Final Rule that information will be treated as publicly available if it is lawfully made available to the general public.

As a final matter with regard to the definition of “nonpublic personal information,” we urge the Agencies to refine their guidance with respect to the types of lists that will be excluded from this definition. In particular, we urge the Agencies to more precisely reflect the distinction manifested in the plain language of the GLB Act. In this regard, Section 509(4)(C)(ii) makes it clear that the term “nonpublic personal information” does “not include any list, description or other grouping of *consumers* (and any publicly available information pertaining to them) that is derived without using any nonpublic personal information.” (Emphasis added.) Since the term “consumer” is defined as an individual who obtains a financial product or service from a financial institution, this portion of the definition clearly recognizes that certain lists of individuals who obtain financial products or services from financial institutions do not fall within the definition of “nonpublic personal information.” This exception was intended to allow a financial institution to provide a list of names and addresses of its customers without that information being deemed to be “nonpublic personal information” and the Proposal should be modified to clarify this point. Of course, if the list were to include

financial information such as the account balances or payment history of those individuals on the list, the list would be covered under the definition of “nonpublic personal information.”

## **§ \_\_\_\_4 Initial Notice**

### When Initial Notice is Required

The Proposal states that the “initial” privacy notice must be furnished to “customers” “prior to the time” that the customer relationship is established. The GLB Act, on the other hand, states that the initial notice must be furnished “at the time of” establishing the customer relationship. We urge the Agencies to revise the Proposal to accommodate both of these standards. Specifically, we urge that the Final Rule make it clear that the initial notice may be furnished to a customer “no later than at the time” the customer relationship is established. This would permit a financial institution to make the disclosure when the individual becomes a customer or at any point prior to that time. Furthermore, we would urge the Agencies to retain the clarification in the Supplementary Information which states that the initial notice may be provided at the same time as other notices, such as those required under TILA. Also, please see below for the discussion of “When a Customer Relationship Begins.”

The Proposal also expressly provides clarification that, with respect to a “consumer,” an initial notice is not required if the financial institution does not disclose information about the consumer to a nonaffiliated third party. This is a helpful clarification, and we urge that it be retained in the Final Rule. We also urge the Agencies to expand this concept to permit financial institutions to delay initial notices to their “customers” so long as the financial institution does not disclose any nonpublic personal information about the customers until after the initial notice is furnished. In our view, customer privacy interests would be protected since nonpublic personal information about the customers could not be disclosed unless the customers receive the initial notice and an opportunity to opt out. At the same time, this approach would provide much needed flexibility to financial institutions to allow them to time the disclosures to coincide with other mailings or to otherwise arrange for more efficient delivery of the disclosures.

### When a Customer Relationship Begins

For purposes of determining when the initial notices must be provided to “customers,” the Proposal states that a financial institution will be deemed to establish a customer relationship “at the time the [financial institution] and the consumer enter into a continuing relationship.” As discussed above, it is important that the Agencies establish precise guidelines for determining when a “consumer” has become a “customer.” We believe that this can be achieved by making it clear in the Final Rule that a customer relationship will begin to exist when there is a mutual agreement between the consumer and the financial institution that obligates the financial institution to provide financial products or services. We believe that this approach achieves the intent and purposes of the GLB Act in a manner which can be implemented more efficiently than the approach articulated in the Proposal.

The Proposal also sets forth several examples of when a “customer” relationship will be deemed to begin. The example set forth in clause (i) states that a consumer becomes a customer when the consumer “[o]pens a credit card account” with the financial institution. On this point, the Agencies have provided helpful clarification in the Supplementary Information which states that a consumer will be deemed to “open” a credit card account “when he or she becomes obligated on the account, such as when he or she makes the first purchase, receives the first advance, or becomes obligated for any fee or charge under the account other than an application fee or refundable membership fee.” We commend the Agencies for including this clarification, and we urge that it be included in the Final Rule itself. This clarification is much more instructive than is the statement included in the Proposal that the customer relationship begins when the consumer “opens” the account.

### How to Give Notice

The Proposal states that a financial institution must provide the initial notice so that “each consumer can reasonably be expected to receive actual notice in writing or, if the consumer agrees, in electronic form.” We are concerned that the Proposal is creating some kind of special standard for the delivery of the GLB Act disclosures. In this regard, the GLB Act simply requires that a financial institution “provide” disclosures to its consumers and customers. The Proposal, on the other hand, suggests that a financial institution must determine whether, for a particular consumer, the disclosure has been delivered in a way so that the particular consumer “can reasonably be expected to receive actual notice.” Although it is unclear how such a standard would be implemented or enforced, it does appear to suggest that something beyond merely “providing” disclosures is required. In our view, the GLB Act standard would most clearly be implemented if the Final Rule simply stated that the required notices must be “provided” or “delivered” to consumers. This approach also would be consistent with the standards typically found under other similar federal statutes. In addition, this approach would avoid the potential litigation risk created by the Proposal which will invite disputes about whether the method used for delivering a disclosure to a particular consumer created a “reasonable” expectation that the consumer would receive “actual” notice.

The Proposal acknowledges the permissibility of delivering the initial disclosure in electronic form. We applaud the Agencies for confirming that the GLB Act disclosures may be made electronically, and we urge the Agencies to include this language in the Final Rule with one modification. In this regard, the Proposal states that the disclosures may be delivered to the consumer electronically only if the consumer “agrees.” There is no such “agreement” requirement in the GLB Act, and we urge the Agencies to refrain from creating one in the Final Rule. The GLB Act expressly states that the required disclosures may be made “in writing or in electronic form” and does not impose different requirements on the two forms of delivery. We do not believe that this plain language supports the approach set forth in the Proposal which would impose additional requirements on the electronic form of delivery. Accordingly, we urge that the Final Rule simply clarify that the disclosures may be made in writing or in electronic form.

We recognize that there may be concerns regarding whether electronic disclosures warrant additional consumer protections. We believe these concerns are unfounded, but realize

that the Agencies may want to provide additional guidance in this area. Should this be the case, we urge that any suggestion that a consumer must “agree” to electronic disclosure be deleted. We are concerned that a question of whether a particular consumer has “agreed” to the disclosures will be subject to the vagaries of state law which would dramatically increase the compliance burdens associated with making such disclosures. This issue would more appropriately be addressed by permitting a financial institution to electronically deliver the disclosures with the consumer’s “consent.”

The Agencies should also clarify that a financial institution may furnish disclosures electronically whenever a consumer chooses to apply for a financial product or service electronically. Under such circumstances, consumers expect to communicate with the financial institution via electronic means. As a result, requiring the financial institution to demonstrate that it established an agreement with the consumer to receive such electronic disclosures would provide no incremental consumer protection, but would create substantial compliance burdens. Therefore, there should be no “agreement” or “consent” requirements imposed when the consumer has chosen to communicate with the financial institution electronically.

Furthermore, the Agencies suggest that it would not suffice to post an electronic notice on a web page unless that web page must be accessed in order to obtain the financial product or service in question. We believe this requirement is not consistent with the requirements for delivering paper notices and should be modified. A financial institution should be considered to have delivered a notice if it includes, on a web page that is accessed to obtain the financial product or service, a clearly and conspicuously labeled hypertext link to the notice. It will have fulfilled its obligation as though it were a paper notice, *i.e.*, it will have made it clearly and conspicuously available to the consumer.

The Agencies request specific comment as to how notice should be provided in connection with joint accounts, and we applaud the Agencies for seeking guidance on this important issue. We recommend that the Agencies adopt an approach which preserves flexibility for financial institutions to adopt different procedures depending upon their operational capabilities and the preferences of their consumers and customers. Specifically, we urge that the Agencies adopt a Final Rule which provides that, with respect to a joint account, a financial institution will satisfy its notice obligation if the notice is sent to the individual to whom other required correspondence about the account is addressed. For example, the Final Rule should make it clear that an open-end creditor may satisfy the notice requirement by providing the GLB Act notices to the individual to whom periodic statements for the account are addressed.

#### Exceptions to Allow Subsequent Delivery of Notice

The Proposal allows a financial institution to delay the initial notice to a customer for “a reasonable time” after the customer relationship is established if: (i) the [financial institution] purchased the customer’s loan or assumed the customer’s deposit liability from another [financial institution] and the customer does not have a choice about the [financial institution’s] purchase or assumption; or (ii) the [financial institution] and the consumer orally agree to enter into a customer relationship “and the consumer agrees to receive the notice

thereafter.” We applaud the Agencies for providing these two clarifications, and we urge that they be incorporated into the Final Rule with two modifications. First, with respect to loan purchases, we urge that the Agencies delete the language indicating that the notice may be delayed only if the customer “does not have a choice” about the purchase. We are concerned that the language referring to consumer choice creates unnecessary uncertainty about the circumstances under which the exception will apply. For example, in practice, a customer invariably will have the choice to terminate the customer relationship by repaying the loan or withdrawing the deposit. In addition, the consumer choice language does not provide any appreciable benefit to consumers that would outweigh the problem (including potential litigation) that would be created by inclusion of the language.

Second, we urge the Agencies to reconsider the requirement that, with respect to oral contracts, the consumer must “agree” to receive the required disclosures at a later time. In this regard, requiring the consumer to “agree” to subsequent disclosures appears to be unnecessary for purposes of protecting the consumer’s privacy since information may not be disclosed to nonaffiliated third parties unless and until the disclosures are delivered. Moreover, any flexibility provided by this exception would be eliminated if a consumer orally agrees to establish the customer relationship but refuses to agree to subsequent disclosures. Under such circumstances, the financial institution may have no choice but to refuse to establish the customer agreement despite the consumer’s express wishes.

#### **§ \_\_\_\_ .5 Annual Notice to Customers Required**

The Proposal states that a financial institution must provide a privacy notice to its customers “not less than annually” during the continuation of the customer relationship. This annual notice requirement will account for a substantial portion of the potentially staggering costs of complying with the new GLB Act provisions. Based on the Proposal, companies have estimated that the required notice will be several pages in length. With a number of modest changes to this requirement, however, the Agencies could provide substantial cost savings to the industry (and ultimately consumers) while still protecting the privacy interests of financial institution customers, and we urge the Agencies to give careful consideration to providing flexibility in this area to that end.

For example, we urge the Agencies to define the term “annually” to allow financial institutions the flexibility to time the delivery of the annual notice to coincide with other mailings to their customer base, the timing of which may vary with fluctuations in the business cycle. As noted above, financial institutions can derive substantial cost savings if they are able to include the required notice with other mailings already being sent to the customer base but the timing of these mailings may differ from year to year. To provide flexibility in this area, we urge that the Agencies define the term “annually” to allow for the delivery of the disclosures at any time during each calendar year. This would allow a financial institution to deliver the annual notices in one month during a particular calendar year and a different month during a subsequent calendar year if the timing was appropriate based on other scheduled mailings during that timeframe. This approach would also allow a financial institution to vary the cycle on which it makes the required disclosures if, for example, it purchased a large portfolio of accounts which are on a different cycle than the one the financial institution had

previously used. Although in some situations, this approach could reduce the frequency of the annual disclosures temporarily, customers would still be protected since they would, in any event, receive an annual notice in every calendar year.

We also urge that the Agencies use their rulemaking discretion to exempt from the annual notice requirement, financial institutions that do not share nonpublic personal information with nonaffiliated third parties. Under such an approach, once the financial institution has furnished the initial privacy notice, it would not be required to furnish an annual notice unless the information disclosed in the initial notice had been changed. Customers would be protected because they would have been informed of the financial institution's practices in the initial notice and no nonpublic personal information about the customers may be furnished to third parties unless the financial institution provides to those customers a new notice and an opportunity to opt out.

The Agencies could allow financial institutions to save a substantial amount if financial institutions, after having making the initial disclosures, were permitted to forego providing annual notices unless there has been a change in privacy practices. This would ensure that customers are informed of the relevant privacy practices without requiring financial institutions to wastefully provide the same information to customers year after year. It also would reduce the volume of notices that consumers must deal with and will increase the likelihood that consumers will be able to focus on the most important information—the changes to the disclosures. Of course, under this approach, customers could always obtain a copy of the privacy policies upon request.

As an alternative approach, we urge the Agencies to at least allow financial institutions who have provided the initial notice to their customers to provide an annual “clear and conspicuous” reminder to those customers that they may obtain the current version of the privacy policies upon request. Under such an approach, the cost of compliance would be reduced by ensuring that a financial institution need only print and deliver annual privacy disclosures to those customers who truly want them. The approach articulated in the Proposal, on the other hand, will result in a significant waste of resources since privacy notices, several pages in length, must be sent to all customers every year whether they wish to receive them or not.

#### Termination of Customer Relationship

The Proposal accurately states that a financial institution is not required to provide an annual notice to a customer with whom the financial institution no longer has a “continuing relationship.” We urge that this provision be retained in the Final Rule. The Proposal also sets forth examples of the circumstances under which a financial institution will be deemed to no longer have a continuing relationship with an individual. With respect to a deposit account, the Proposal states that there is no continuing relationship with the account holder if the account is “dormant” under the financial institution's policies. We agree with the general intent of this interpretation, and, as discussed below, we urge that it be included in the Final Rule for credit accounts as well. However, we urge the Agencies to modify the example by replacing the word “dormant” with the word “inactive.” We are concerned that if the word “dormant” is used, it

will create unnecessary uncertainty in view of the complex state law issues that come into play with respect to the meaning of that word. We believe that the word “inactive” achieves the result intended by the Agencies without creating such confusion.

Clause (iii) sets forth an example of when an open-end credit relationship will no longer be deemed to be a “continuing relationship.” The example states that the financial institution will not have a continuing relationship with an individual if the financial institution “no longer provides any statements or notices to the consumer concerning that relationship” or the financial institution “sells the credit card receivables without retaining servicing rights.” This example provides helpful clarification and should be retained in the Final Rule. In addition, we urge the Agencies to clarify that a “continuing relationship” will not exist if the customer’s account is deemed to be “inactive” under the financial institution’s policies. This would provide greater certainty to a financial institution with respect to when a continuing relationship for an open-end credit account has ceased to exist and would treat such accounts consistent with the treatment provided in the earlier example for deposit accounts.

Clause (iv) states that “for other types of relationships” a “continuing relationship” will no longer be deemed to exist where the financial institution “has not communicated with the consumer about the relationship for a period of 12 consecutive months, other than to provide annual notices of privacy policies and practices.” This helpful clarification should be expanded to cover any type of customer relationship including a closed-end loan or open-end credit relationship such as those described in the earlier examples. In addition, the example should be modified to make it clear that any marketing materials sent to a customer during the 12-month period would not cause the relationship with that customer to be deemed to be a “continuing relationship.” Marketing materials may be sent to customers as well as non-customers, and the fact that marketing materials are delivered to an individual is not relevant to the determination of whether there is a continuing relationship.

## **§ \_\_\_\_.6 Information to Be Included in Initial and Annual Notices**

Information Included. The Proposal provides that the initial and annual notices must include several items of information, including the categories of nonpublic personal information collected, the categories of nonpublic personal information disclosed, the categories of affiliates and nonaffiliated third parties to whom the financial institution discloses nonpublic personal information (other than those permissible by §§ \_\_\_\_.10 and \_\_\_\_.11), disclosures made pursuant to § \_\_\_\_.9, an explanation of the right to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, FCRA disclosures (if any), and the financial institution’s policies and practices with respect to protecting the “confidentiality, security, and integrity of nonpublic personal information.”

In developing the Final Rule, one of the most significant challenges the Agencies will face is attempting to implement this requirement in a manner which is likely to be helpful to consumers. In this regard, disclosures that are lengthy and detailed are not likely to be meaningful to consumers nor are they likely to be read by consumers. Accordingly, we urge the Agencies to articulate standards for the disclosures included in the initial and annual notices that will enable financial institutions to make those disclosures clearly and concisely. In this regard,

we commend the Agencies for their approach with respect to the disclosure of categories of nonpublic personal information collected. The Proposal makes it clear that such information may be categorized by sources such as application information, information relating to the consumer's transactions with the financial institution and consumer reports. However, in some instances, a financial institution may not be able to determine the precise source of particular pieces of information. For example, portfolio acquisitions, mergers and other business combinations can make it difficult to determine the sources of information, particularly since financial institutions were not required to record those sources up until now. To address this issue, we urge the Agencies to permit financial institutions to list examples of sources that they are aware of, and include in that list an indication that the information is obtained "from other sources" as well.

We also urge the Agencies to consider the fact that, prior to the GLB Act, financial institutions were not required to develop systems to identify the sources of information included in their existing databases. Therefore, as a practical matter, financial institutions simply may not be able to comply with any requirement that they identify sources of information collected prior to the GLB Act and the Proposal should be modified accordingly.

In addition, we urge the Agencies to use a similar approach with respect to describing the categories of information that may be disclosed. The initial and annual notices can be substantially shortened in many cases if the financial institution is permitted to categorize identifiable sources without setting forth examples. Moreover, we note that the plain language of the GLB Act does not require disclosure of such examples.

Furthermore, the Proposal states that the "categories of affiliates" to whom the financial institution discloses nonpublic personal information must be described in the initial and annual notices. This is not required by the language of the GLB Act and should not be a required component of the proposed initial and annual notices. Section 503(a) provides a general description of the contents of the initial and annual disclosures. Section 503(a)(1) states that a financial institution must disclose its policies and practices with respect to "disclosing nonpublic personal information to affiliates and nonaffiliated third parties." The GLB Act does not, at any point, state that the initial and/or annual disclosure must include any description of the categories of *affiliates* with whom a financial institution may share nonpublic personal information. Indeed, the only reference in Section 503(b) to affiliate sharing is the specific statement that the initial and annual disclosures must include "the disclosures required, if any, under Section 603(d)(2)(A)(iii) of the [FCRA]." As the OCC has recognized in its [bulletin on effective practices for complying with the affiliate sharing notice requirements] the FCRA does not require any disclosure of the categories of affiliates with whom information is shared. (The OCC simply indicated that making such disclosures is one example of an "effective practice.") Therefore, any suggestion that the initial and/or annual notice must include the categories of affiliates is beyond the requirement of the statute and should not be required.

The Proposal also appears to suggest that the initial and annual disclosures must describe information disclosed to all nonaffiliated third parties and must describe the categories of such third parties. The plain language of the GLB Act, however, makes it clear that the initial and annual disclosures cover only those nonaffiliated third parties who are "other than agents of

the [financial] institution.” As a result, the Final Rule should clarify that information disclosed to third parties who are agents of the financial institution need not be described in the initial or annual disclosures. In addition, any such agents of the financial institution need not be described in the “categories of nonaffiliated third parties” to whom information is disclosed.

We also urge the Agencies to permit financial institutions to use more general descriptions of the categories of nonaffiliated third parties to whom nonpublic personal information is disclosed. In our view, the most important information included in the disclosure will be the fact that information may be disclosed to nonaffiliated third parties and that fact should be communicated as clearly and simply as possible. If the disclosure also includes lengthy descriptions of the categories of those entities, it will be difficult to convey the key information to consumers in a meaningful fashion. One approach that we urge the Agencies to seriously consider is to allow financial institutions to distinguish between third parties who may receive nonpublic personal information for their independent use in determining whether the consumer may be eligible for a particular financial product or service and third parties who would receive the information for marketing purposes. In this regard, information furnished for marketing purposes is not used to provide or deny any particular benefit to a consumer. Instead, the information is used to determine whether a consumer might be interested in a particular product or service. In light of the benign purposes for which information is used when shared for marketing purposes, consumers may not be as sensitive as they could be with respect to other uses of the information. Accordingly, we urge the Agencies to consider a simplified disclosure with respect to information that is furnished for marketing purposes only. In particular, we urge that the Agencies make it clear that where information is shared for marketing purposes only, a financial institution need not disclose the categories of nonaffiliated third parties with whom the information is shared. Under this approach, the financial institution would disclose the categories of information collected and disclosed and would disclose the fact that the information is disclosed for marketing purposes. Of course, the disclosure would also include the notice and opt out provisions as well.

Disclosures Permitted By Law. The Proposal provides that if a financial institution discloses nonpublic personal information to third parties as authorized by §§ \_\_.10 and \_\_.11, the financial institution would not be required to list those exceptions in the initial or annual notice. When describing the categories with respect to such third parties, the financial institution would be only required to state that it makes disclosures “as permitted by law.” This is an important clarification, and we urge that it be retained in the Final Rule.

Additionally, the NRF suggests that the Agencies clarify that the Fair Credit Reporting Act (the “FCRA”) disclosure is required, if applicable, only on the initial notice. The Proposal states that the notice is to include “[a]ny disclosures that [a financial institution] make[s] under Section 603(d)(2)(A)(iii)” of the FCRA. Financial institutions are required to make an FCRA disclosure only once (if they are required to do so at all). The Proposal should not change this requirement absent specific direction from Congress to do so. In fact, the language in the statute which states that none of the privacy provisions are to “modify, limit or supercede” the FCRA strongly suggests Congress did not intend to make the FCRA notice an annual requirement. We urge the Agencies to provide the appropriate clarification.

Finally, we would urge the Agencies to permit financial institutions to make general disclosures with regard to the “policies and practices” to protect the “confidentiality, security and integrity of nonpublic personal information.” The Proposal would require a financial institution to disclose who has access to nonpublic personal information and the circumstances under which the information may be accessed. Without further guidance, this could require a financial institution to give a long list of the types of people who have access and an even longer list of circumstances under which the information could be accessed. In addition to the exception provided under the GLB Act, we would urge the Agencies to allow financial institutions to disclose simply that the information will be accessed only by those with a legitimate business need for the information or by those who are performing tasks related to the disclosures included elsewhere in the notice. Similarly, the financial institution should be able to describe in general terms the measures it takes to protect the information. Listing types of protection (*e.g.*, encryption, network security devices, etc.) used company-wide (regardless of whether it applies to each piece of nonpublic personal information) should suffice. To require more of the “policies and practices” disclosure adds little value to the disclosure while making it less likely to be read.

#### **§ \_\_\_\_ .7 Limitation of Disclosure to Nonaffiliated Third Parties**

Conditions for Disclosure. The Proposal states that a financial institution may not, “directly or through an affiliate,” disclose any nonpublic personal information about a consumer to a nonaffiliated third party unless the financial institution has provided an initial privacy notice, provided an opt out notice, given the consumer a reasonable opportunity before disclosing any nonpublic personal information to opt out, and the consumer has not opted out.

We urge the Agencies to include a number of modifications to this approach. First, it is important that the Agencies state in the Final Rule that a consumer who has opted out has the authority to withdraw that opt out subsequently. The Agencies also have requested comment on how the right to opt out should apply in the case of joint accounts. As indicated above, we urge that the Final Rule provide flexibility to financial institutions to enable them to handle joint accounts in the manner most appropriate in light of the financial institution’s operational capabilities and customer preferences. In particular, the Final Rule should make it clear that a financial institution has the flexibility to either treat an opt-out request from one party to the joint account to apply to all information with respect to that account or to allow each party to a joint account to exercise his or her own choice with respect to the opt-out. In our view, either approach would appropriately implement the intent of the GLB Act provisions. Accordingly, financial institutions should have the flexibility to implement either approach.

The Proposal also provides examples of what would be deemed a “reasonable opportunity” to opt out. One example states that it is a reasonable approach for a financial institution to mail the initial notice and the opt-out notice to the consumer and allow the consumer a “reasonable period of time, such as 30 days,” to opt out. We agree that under the GLB Act, it would be permissible for a financial institution to furnish the notice and opportunity to opt out by mail. However, we urge the Agencies to avoid suggesting that a financial institution must wait 30 days for a consumer to respond. Such a waiting period would not be appropriate in at least some instances. For example, if a financial institution has furnished to a

consumer an offer for a product or service which must be accepted within a shorter timeframe (e.g., 15 days) the financial institution also should be permitted to specify that if the consumer wishes to opt out, the consumer must do so in the timeframe established for responding to the offer.

The Proposal also includes an example of an “isolated transaction” such as the purchase of a cashier’s check, where the financial institution provides the consumer with the initial notice and the opt out notice at the time of the transaction and requests that the consumer decide, “as a necessary part of the transaction,” whether he or she wants to opt out. We applaud the Agencies for including this clarification in the Proposal and we request that it be retained in the Final Rule with one modification. Specifically, we are concerned that the phrase “as a necessary part of the transaction” will create unnecessary ambiguity about the application of this example. In our view, so long as the financial institution requests that the consumer decide before completing the transaction, the method of providing the notice and opt out should be viewed as reasonable. We also urge the Agencies to expand this clarification to cover any transaction, not just an isolated transaction. Once again, so long as the consumer is requested to decide whether to opt out before completing the transaction, the consumer would be adequately protected.

Partial Opt Out. The Proposal clarifies that a financial institution may allow a consumer the option of selecting certain nonpublic personal information or certain nonaffiliated third parties with respect to opting out. This is a helpful clarification which should be retained in the Final Rule.

#### **§ \_\_.8 Form and Method of Providing Opt Out Notice**

The Proposal sets forth several examples of how a financial institution may provide consumers and customers a “reasonable means” of opting out. These include designated check-off boxes, a reply form, or electronic means “if the consumer agrees to the electronic delivery of information.” As a general matter, we believe that the examples provide helpful guidance for implementing the opt out requirement. The Agencies’ use of multiple examples recognizes that there is not a “one size fits all” approach to providing a “reasonable means” to opt out. We urge the Agencies to keep this general approach in the Final Rule since there may not be one method that is appropriate for all financial institutions to use. However, we believe that a number of modifications must be made to the examples in order to more precisely reflect Congressional intent. In particular, we disagree with the statement in the Proposal that a financial institution does not provide a reasonable method of opting out if the consumer must write a letter on a form provided by the financial institution to do so. There is nothing in the plain language of the GLB Act or its legislative history that suggests that this is not a reasonable means of communicating with a financial institution. Moreover, in other contexts, such as the billing error provisions under the federal TILA, it is expressly acknowledged that a consumer may be required to write in order to preserve his or her rights. Accordingly, we urge that the Agencies specifically make it clear that requesting that a consumer write a letter is a reasonable means of opting out.

In addition to permitting financial institutions to require a written opt out, the Agencies should also specify that a financial institution could provide a toll-free number for consumers to use in order to opt out. This was included as an option by the FTC and we would urge the other Agencies to adopt it as a convenient method for consumers to opt out. This could, for example, also be an option that would allow for person-to-person interaction with individuals trained to answer consumer questions who can also ensure that consumers give all the information necessary to effectuate their decision to opt out.

Moreover, it is critically important that in order to enable financial institutions to adequately control their legal risks, financial institutions are permitted to establish reasonable procedures for allowing a consumer to opt out and are not responsible for administering opt out requests that do not comply with those procedures. This is a particularly important issue for retailers, many of whom have thousands of locations throughout the country and could not effectively implement opt out requests if consumers were permitted to submit them at any of those locations. Furthermore, a financial institution should be permitted to require consumers to specify their account numbers when making their opt out requests. In many systems the account number is the most reliable unique identifier and financial institutions must have the flexibility to use those numbers to ensure that a person's opt out is implemented correctly. Accordingly, we urge the Agencies to utilize the precedent established under the TILA and FCRA which permits financial institutions to specify the reasonable procedures consumers must use to exercise their rights.

We applaud the Agencies for recognizing that Congress intended to permit consumers to exercise their opt out rights under the GLB Act electronically. As discussed above, however, we urge the Agencies to delete any suggestion that consumers must "agree" before disclosures can be delivered electronically. The GLB Act does not impose such a requirement, and the Agencies should not create one through the rulemaking process.

Oral Description of Opt Out Right. The Proposal indicates that a financial institution may not provide the opt out notice solely by orally explaining, either in person or over the telephone, the consumer's right to opt out. We urge the Agencies to reconsider this position. In many cases, communicating with a consumer orally may be more effective than providing the detailed written disclosures that would be required under the Proposal. A discussion with a consumer on the telephone affords an opportunity to respond to any questions a consumer might have and provides a more than adequate mechanism for conveying the information required under the GLB Act. In fact, under the Proposal, the notice and opt out disclosure could not even be provided orally to a consumer if the consumer affirmatively requested disclosure in that form. We urge the Agencies to delete this provision and to instead clarify that for financial products or services in which a customer relationship is established by telephone, the financial institution may provide the opt out notice orally.

(c) Change in Terms. The Proposal provides that a financial institution may not disclose nonpublic personal information to a nonaffiliated third party other than as described in the initial notice unless the financial institution has provided the consumer a revised privacy notice, a new opt out notice and a reasonable opportunity to opt out. We urge the Agencies to modify this provision to make it clear that a change in terms notice furnished in a particular year

takes the place of the annual notice for that year. Any changes in information practices that have occurred since the initial notice (or the most recent prior annual notice) can more than adequately be conveyed through the change in terms notice and an annual notice should not be required.

(d) Continuing Right to Opt Out. The Proposal expressly states that a consumer may opt out at any time. Furthermore, a financial institution receiving a consumer's opt out must comply with that direction "as soon as reasonably practicable." We commend the Agencies for the reference in the Supplementary Information which notes that the "disclosures [are to] stop as soon as reasonably practicable" once a consumer opts out. As a practical matter, it is not always feasible to implement a consumer's opt out request after a particular marketing program has been initiated. For example, a financial institution may prepare a batch of information, including data on thousands of consumers, to be disclosed pursuant to its stated privacy policy. If a consumer opts out after the disclosure is made and the process of preparing the marketing materials has begun, there typically is no practicable way to remove the consumer's information from the prepared materials in progress. Accordingly, we urge that the Agencies make clear that, after the reasonable period required after the initial notice, a consumer's opt out should apply only to batches of information prepared after the consumer's opt out request has been received and recorded by the financial institution.

#### **§ \_\_.9 Exception to Opt Out Requirements for Service Providers and Joint Marketing**

The Proposal provides that the opt out requirements with regard to disclosing nonpublic personal information do not apply when a financial institution provides nonpublic personal information to a nonaffiliated third party to perform services for the financial institution or functions on the financial institution's behalf. In order to qualify for this exception, the financial institution must provide the consumer with the initial notice and enter into a contractual agreement with the third party that requires the third party to maintain the "confidentiality" of the information "to at least the same extent" that the financial institution must maintain. The contract with the third party must also limit the third party's "use" of information disclosed by the financial institution "solely to the purposes for which the information is disclosed" or as otherwise permitted by law.

We urge the Agencies to clarify that these provisions do not apply to disclosures made to entities that are acting as agent, or otherwise on behalf of, the financial institution. As noted above, such entities do not use the information in any independent capacity but use it only for purposes that would be permissible for the financial institution itself. Accordingly, the Final Rule should indicate that disclosures made to an agent or other party acting on behalf of the financial institution are not subject to the notice and opt out provisions and need not be described in the initial or annual disclosures.

#### **§ \_\_.10 Exceptions to Notice and Opt Out Requirements for Processing and Servicing**

Exceptions for Processing Transactions. The Proposal provides that the provisions pertaining to the initial notice to consumers, the consumer's opt out notice, the consumer's right to opt out, and service provider/joint marketing do not apply if the financial institution discloses nonpublic personal information in a limited number of circumstances.

These include when the disclosure is necessary to “effect, administer, or enforce” a transaction requested or authorized by the consumer, to “service or process” a financial product or service requested or authorized by the consumer, to maintain or service the consumer’s account with the financial institution or with another entity as part of a private label credit card program or other extension of credit on behalf of such entity, or in connection with a proposed or actual securitization or similar transaction.

We urge the Agencies clarify the language with respect to “private label” credit card programs. In this regard, it is important to note that consumers expect a collaborative effort between the retailer named on the card and the bank that issued the card. Accordingly, when consumers have questions, complaints or requests for additional services in connection with their accounts, they expect both the bank and the retailer to be responsive to their needs. Accordingly, Congress recognized that it is critically important that the parties to a private label credit card program be able to share freely among themselves information regarding the private label accounts. We urge the Agencies to clarify in the Final Rule that in connection with a private label program, the GLB Act does not restrict communications of nonpublic personal information between the retailer and the bank that are offering the private label account to the consumer.

#### **§ \_\_\_\_.12 Limits on Redisdisclosure and Reuse of Information**

Limits on a Financial Institution’s Redisdisclosure and Reuse. The Proposal states that a party who receives nonpublic personal information from a nonaffiliated financial institution may not, directly or through an affiliate, disclose the information to any nonaffiliated third party unless it would have been “lawful” for the financial institution to do so. The Agencies requested comment as to whether this should be enforced as a virtual prohibition on redisdisclosure by a third party since the consumer’s right to opt out is permanent. The Agencies suggest that, given the fact that a consumer may opt out at any time, the third party may not know whether it would be “lawful” for the financial institution to make a disclosure directly. We believe this approach is too broad and contrary to the intent of Congress. Had Congress intended to prohibit all redisdisclosures by third parties, which is the practical effect of the Agencies’ suggestion, it would have done so. A more reasonable reading of the statute would allow a third party to redisdisclose nonpublic personal information if it would have been lawful for the financial institution to do so “at the time it had been originally disclosed by the financial institution.”

Furthermore, the Proposal states that a person may “use” nonpublic personal information that it receives from a nonaffiliated financial institution pursuant to an exception under §§ \_\_\_\_.9, \_\_\_\_.10 or \_\_\_\_.11 “only for the purpose of that exception.” Although Congress explicitly imposed a “redisdisclosure” restriction under the GLB Act, it did not impose any restriction on further use of information that a person has received from a nonaffiliated financial institution. Once again, we urge the Agencies to refrain from expanding the scope of the GLB Act beyond its statutory language. As noted above, the Proposal as drafted creates significant potential for unintended consequences which could be mitigated by more closely adhering to the plain language in the statute. Of course, once the Final Rule is in effect, the Agencies will have the opportunity to review its application and, if necessary, promulgate rules to address special concerns. In view of the significant burdens created by the Proposal, however, we urge the Agencies to refrain from doing so at this time.

The Agencies invite comment as to whether the Final Rule should “require a financial institution that discloses nonpublic personal information to a nonaffiliated third party to develop policies and procedures to ensure that the third party complies with the limits on redisclosure of that information.” Typically, financial institutions already bind third parties to contractual provisions limiting the third party’s disclosure of nonpublic personal information. Moreover, nonaffiliated third parties who disclose information for impermissible purposes will have committed a violation of the GLB Act and will be subject to enforcement actions on that basis. Financial institutions should not also have the obligation of policing compliance with the federal law. In particular, financial institutions should not be responsible for examining or auditing a third party’s compliance with the GLB Act provisions. It simply would not be feasible for financial institutions to do so with respect to every third party to whom information is furnished.

### **§ \_\_\_\_ .13 Limits on Sharing of Account Number Information for Marketing Purposes**

The Proposal prohibits a financial institution, directly or through an affiliate, from disclosing an account number or similar form of access number or code for a credit card, deposit 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. In addition, the Proposal accurately sets forth the exception to the provision which allows a financial institution to disclose account numbers to a consumer reporting agency. This exception was included in the GLB Act because Congress recognized that certain marketing activities which are important to financial institutions require that those financial institutions furnish account numbers to consumer reporting agencies. Congress specifically preserved those activities, and we urge the Agencies to ensure that this exception is accurately reflected in the Final Rule.

The broad application of the Proposal raises several concerns. For example, this could prevent a creditor from enclosing promotional material in a periodic statement if the mailing is handled by a third party agent. This cannot be what Congress intended. We urge the Agencies to provide guidance, either in the Supplementary Information or in the Final Rule itself, to clarify that account numbers can be disclosed to third party agents so long as the third party is acting solely as agent of the financial institution.

Another issue the Agencies should consider is the use of encrypted or coded account numbers. The Statement of Managers included with the conference report to the GLB Act specifically notes that the Agencies may find it consistent with the purposes of the GLB Act to permit the disclosure of account numbers in an encrypted or coded form. We argue that the Agencies would not even have to rely on any exemptive authority. In reality, an account number which is encrypted or coded is not an account number as intended by the statute. Encrypting or coding an account number renders it useless to all but those with the “key.” Therefore, if a financial institution disclosed encrypted or coded account numbers to nonaffiliated third parties, it would be disclosing nothing but a random string of numbers with no significance to anyone but the financial institution itself. Only if the financial institution actually disclosed the “key” to the third party would it have disclosed the account numbers.

By allowing financial institutions to disclose encrypted or coded account numbers, the Agencies would ensure a more accurate billing system should a given customer authorize a product to be billed to his or her account. Without attaching an encrypted account number to a given name, creditors would not be able to guarantee they are billing the appropriate account. A marketer may report that an individual authorized an account to be charged, the creditor would not know for sure that it has debited the correct account. The only way to ensure the correct account is debited, absent an encrypted account number attached to a given name, is to have the marketer ask the consumer to divulge the account number. This appears to defeat the purpose of preventing marketers from having access to raw account data.

#### **§ \_\_\_\_.14 Protection of Fair Credit Reporting Act**

In the GLB Act, Congress made it clear that nothing in the Act “shall be construed to modify, limit, or supersede the operation of the [FCRA].” This provision was intended to ensure that any entity’s obligations, duties or rights under the FCRA are not disturbed. For example, the activities of consumer reporting agencies are unaffected by the privacy provisions in the GLB Act. Consumer reporting agencies furnish important information in the form of consumer reports and other information services, and Congress recognized that the regulation of consumer reporting agency activities should be determined under the FCRA and not the GLB Act. In addition, the rights and obligations of those who furnish information to and receive information from consumer reporting agencies under the FCRA also remain unaffected by the GLB Act. We urge that the Agencies clarify in the Final Rule that the GLB Act has no effect on any rights or obligations under the FCRA.

#### **§ \_\_\_\_.16 Effective Date**

The Supplementary Information notes that “if a financial institution intends to disclose nonpublic personal information about someone who was a consumer before the effective date, the institution must provide” the initial notice and the opt out notice and provide a reasonable opportunity to opt out prior to the effective date. This provision should be deleted. Imposing any notice and opt out requirements prior to the effective date of the Final Rule cannot be supported under the GLB Act. Moreover, we urge the Agencies to consider the practical impediments to providing an initial disclosure to existing consumers (who are not also customers) as discussed in our comments on the initial notice. Since financial institutions have not been required to gather, and have not gathered, source information prior to the enactment of the GLB Act, they cannot be required to disclose the sources with respect to the information.

The Agencies intend to publish the Final Rule by May 13, 2000. Furthermore, the Agencies have proposed an effective date for the Final Rule of November 13, 2000. Financial institutions would have 30 days to provide initial notices to consumers who were customers as of November 13, 2000. The Agencies have specifically requested comment as to whether six months is an appropriate amount of time to allow financial institutions to come into compliance with the Final Rule.

As noted above, due to the complex nature of this Proposal, and the potential for significant unintended consequences, we would urge the Agencies to release an amended

Proposal for additional public comment. Short of this, the Agencies may wish to consider releasing a Temporary Rule, the compliance with which would be voluntary until September 2001. The Temporary Rule would allow the Agencies to meet their statutory deadline while also allowing them to solicit and review additional public comments we believe would be essential to crafting a carefully considered Final Rule. If the Agencies ultimately decide against issuing an amended Proposal, or even a Temporary Rule, the Agencies should at least make use of their statutory authority to delay the effective date of the Final Rule until September 2001.

The Proposal will require financial institutions to evaluate their current and future practices with regard to information privacy. This process has already begun, but it is not a simple task. Furthermore, financial institutions will need to evaluate their current information systems capacity and determine what changes will need to be made. This could include significant reprogramming requirements or even the acquisition of new information systems in order to comply with the Final Rule. Six months is simply not enough time to ensure adequate compliance with minimal error, especially since most retailers do not make any systems changes beginning in August due to the demands of the holiday season. Even if changes could be made as late as November, the last quarter is exceptionally busy for many financial institutions, especially retailers. Requiring them to finalize their compliance procedures in the middle of peak holiday shopping season is a burden which simply cannot be justified.

Furthermore, assuming internal processes and information systems are brought into compliance by November 13, 2000, the Agencies would require retailers and financial institutions to mail each of their customers an initial privacy notice by December 13, 2000. Again, to require retailers to mail hundreds of millions of customers in addition to the holiday mailings that are part of the holiday shopping season is an *exceptionally* heavy burden. This becomes problematic when literally billions of notices are being sent within a 30-day timeframe. Outside mailing service providers are already overloaded during the holiday season and it would be extremely difficult to imagine a successful privacy mailing being added to the volume of mail being processed.

The timing is also less than optimal from a consumer's point of view. December is a high-volume mail month. Consumers are already receiving many pieces of mail each day during the holiday season, including promotional material from retailers. While a well targeted consumer is likely to read a catalog during the shopping season, he or she is unlikely to read a detailed privacy disclosure if already inundated with mail. The initial disclosure simply will not be as meaningful if sent during the holiday rush.

We respect the Agencies' task in balancing the need to implement the GLB Act in an efficient manner. We would urge the Agencies to make use of the flexibility granted them by Congress to "minimize costs and logistical difficulties" incurred by affected parties. *See* H. REP. NO. 106-74, Part 3, at 203. It is no overstatement to claim that making the Final Rule's effective date November 13, 2000, is simply a logistical disaster waiting to happen. The NRF would strongly urge the Agencies to note the issues raised above and delay the effective date until September 2001. Not only would this give retailers an opportunity to come into compliance, but it would also alleviate the immeasurable problems associated with requiring a massive mailing to be done during the peak holiday season.

Furthermore, the NRF strongly urges the Agencies to modify the Proposal with respect to providing an initial notice to all consumers who were customers on the effective date of this part. A financial institution should be permitted to provide an initial notice as part of the first billing statement mailed to a consumer after the effective date.

Not only is this approach consistent with TILA, such a modification is consistent with Congress' intent to minimize costs, ultimately paid by consumers, in implementing the Final Rule. As was indicated, an informal survey of NRF retail members suggests that it will cost many of them millions of dollars each *just to pay for additional postage* (to cover the increased size and weight of the mailing) to mail notices only to all customers who were already going to receive a periodic statement. Of course, that does not include the other costs associated with providing a notice (*e.g.*, printing, stuffing, etc.) or the cost of contacting the far larger number of customers who are not charging on their accounts.

In reviewing the recommended effective date modifications, we urge the Agencies to keep a statement made by Representative Oxley, the primary author of the privacy amendment eventually included in the GLB Act, in mind. During consideration of the privacy provisions, Representative Oxley noted that it was "not some statute that ties up these financial institutions, costs them millions and millions of dollars which is going to be passed on to the consumer ultimately and is going to be less efficient." *See* 145 Cong. Rec. H5315 (daily ed. July 1, 1999) (Statement of Rep. Oxley).

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Once again, the NRF appreciates the opportunity to comment on the Proposal. If you have any questions on this comment letter or if we can otherwise be of assistance in connection with the Proposal, please do not hesitate to call me at (202) 783-7971.

Respectfully submitted,

Mallory B. Duncan