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March 31, 2000

**Via Hand Delivery**

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Attention: Docket No. R-1058

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Federal Deposit Insurance Corporation  
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Attention: Comments/OES

Secretary  
Federal Trade Commission  
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600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Attention: Gramm-Leach-Bliley Act Privacy Rule,  
16 CFR Part 313 – Comment

Becky Baker  
Secretary of the Board  
National Credit Union Administration  
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Communications Division  
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250 E Street, SW  
Washington, DC 20219  
Attention: Docket No. 00-05

Manager, Dissemination Branch  
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Washington, DC 20552  
Attention: Docket No. 2000-13

Jonathan G. Katz, Secretary  
Securities and Exchange Commission  
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Washington, DC 20549-0609  
File No. S7-6-00

Ladies and Gentlemen:

This comment letter is filed on behalf of MasterCard International Incorporated ("MasterCard") in response to the Notices of Proposed Rulemaking ("Proposal") published by the Board of Governors of the Federal Reserve System (the "FRB"), the Federal Deposit Insurance Corporation (the "FDIC"), the Federal Trade Commission (the "FTC"), the National Credit Union Administration, the Office of the Comptroller of the Currency (the "OCC"), the Office of Thrift Supervision (the "OTS"), 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").<sup>1</sup> MasterCard is a membership organization comprised of financial institutions which are licensed to use the MasterCard service marks in connection with payment systems, including credit cards, debit cards, smart cards and stored-value cards. MasterCard commends the Agencies for their efforts to provide clear guidance on the meaning of the GLB Act in a brief period of time. The Proposal has provided a valuable framework for analyzing the wide variety of issues implicated by the GLB Act. MasterCard appreciates the opportunity to comment on the Proposal and respectfully requests

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<sup>1</sup> For consistency, this letter refers to the Proposal as published by the OCC, the FRB, the FDIC, and the OTS. However, we direct our comments to each of the Agencies as applicable.

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that the Board consider the following recommendations when adopting the Proposal in final form ("Final Rule").

In our view, the most important, but also the most difficult, challenge faced by the Agencies will be to draft a Final Rule that will protect consumers by providing them with clear and meaningful disclosures, without imposing inappropriate burdens on financial institutions and other commercial enterprises. In this regard, several statements by key Members of Congress illustrate the intent to minimize the burdens, and particularly the costs, imposed on the private sector. For example, Congressman Oxley, the principal proponent of the privacy provisions set forth in the GLB Act, stated that his amendment 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." 145 Cong. Rec. H5315 (daily ed. July 1, 1999) (statement of Rep. Oxley). In addition, the House Commerce Committee stated in its Committee Report that the FTC was to "provide for exemptions, temporary waivers or delayed effective dates" for compliance with the privacy provisions in order to "minimize costs and logistical difficulties potentially incurred" by affected parties. H. Rep. No. 106-74, Part 3, at 203. Such exemptive authority was preserved for all the Agencies in the final version of the GLB Act.

In addition, Congressman David Dreier, Chairman of the House Rules Committee, noted that financial privacy "is what the American people want. But there are some other demands that they have. They also demand low cost and integrated financial products and services . . . . That is why I am convinced that [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. 145 Cong. Rec. H5315 (daily ed. July 1, 1999) (statement of Rep. Dreier).

In our view, the plain language of the GLB Act went a long way toward achieving these legislative objectives. We believe that the approach intended by Congress can be efficiently implemented by financial institutions in a manner that fully protects consumers. We are concerned, however, that the Proposal departs from the plain language of the GLB Act in significant ways which may generate serious unintended consequences. The most significant of these consequences appear to be generated by the definitions and notice content requirements which cause the Proposal to apply more broadly than was intended under the GLB Act. Accordingly, we urge the Agencies to develop a Final Rule that follows more closely the plain language of the GLB Act, particularly as it relates to the scope of the Act.

In addition, we urge the Agencies to use the authority expressly provided to them under the GLB Act to adopt a Final Rule that provides greater

flexibility with respect to the manner in which financial institutions satisfy their obligations under the GLB Act. In particular, we strongly urge the Agencies to use the authority granted by Congress in Section 510 of the GLB Act to delay the effective date of the provisions of the Final Rule. In our view, if the Final Rule becomes effective on November 13, 2000, there simply will not be sufficient time for the thousands of affected financial institutions to adequately implement the important GLB Act requirements. Accordingly, we urge that the Agencies delay the effective date an additional 18 months after the Final Rule is published. In our view, it is more important to allow sufficient time to ensure that the GLB Act requirements can be appropriately implemented than it is to force financial institutions to rapidly deploy stop-gap measures that would be required if the November 13, 2000, effective date remains unchanged.

Moreover, we urge the Agencies to use the authority provided by Congress in Section 504(b) to grant additional exceptions to the GLB Act. We believe that Congress intended that the Agencies should utilize this authority in appropriate circumstances, and we urge the Agencies to do so in implementing a number of the recommendations we have set forth below.

In view of the length of this comment letter, we have set forth below a Table of Contents indicating the pages upon which our various comments appear.

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**§ \_\_.1 Purpose and Scope**

(a) Purpose. Section \_\_.1(a) of the Proposal and the related Supplementary Information indicate that the purpose of the Proposal is to impose three distinct privacy-related requirements on financial institutions. This description of the purpose of the Proposal appears to be accurate with respect to the obligations imposed on financial institutions but does not address an equally important purpose of the GLB Act: that the provisions be implemented without unnecessarily imposing undue burdens on financial institutions. For example, the Proposal does not recognize statements from key Members of Congress which, as noted above, make it clear that the GLB Act is intended to be implemented without costing financial institutions "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 of Rep. Oxley). To address this issue, we recommend that the Supplementary Information and the Final Rule itself be modified to state that the Final Rule "is intended to be implemented in a flexible manner which allows for the cost-effective compliance by the financial institutions subject to its provisions." We also urge the Agencies to allow this Congressional intent to guide them as they develop the Final Rule.

(b) Scope. Section \_\_.1(b) states that the Proposal applies only to information "about individuals who obtain financial products or services for personal, family or household purposes . . ." The Proposal also states that it "does not apply to information about companies or about individuals who obtain financial products or services for business purposes." Both of these statements accurately describe the intended scope of the GLB Act, and we urge that they be retained in the Final Rule.

**§ \_\_.2 Rule of Construction**

The Agencies have requested comment on whether including examples in the Final Rule will be useful. We believe that including examples is helpful, and we urge that the Agencies continue to set forth examples in the Final Rule. As discussed in more detail below in the context of specific proposed provisions, however, we recommend a number of changes to the examples included in the Proposal.

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 version, (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**

(a) 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. As discussed below, it also is important that the related definition of “control” set forth in the Proposal be retained in the Final Rule.

(b)(1) Clear and Conspicuous. The Proposal defines the phrase “clear and conspicuous” to mean a notice that “is reasonably understandable and designed to call attention to the nature and significance of the information contained in the notice.” We recognize the Agencies’ desire to provide guidance on the form in which “clear and conspicuous” notices under the Proposal should be made. We are concerned, however, that the proposed definition will have a number of adverse unintended consequences and, as discussed below, we urge the Agencies to either delete or modify the definition.

The most significant problem with the proposed definition of “clear and conspicuous” is that it is inconsistent with the FRB’s longstanding interpretations of that phrase as it appears in several other federal consumer protection statutes. For example, under the federal Truth in Lending Act (“TILA”), the FRB has interpreted “clear and conspicuous” to mean that disclosures must be in a “reasonably understandable” form. In fact, the FRB’s interpretation clarifies that the clear and conspicuous standard “does not require that disclosures be segregated from other material or located in a particular place on the disclosure statement, or that numerical amounts or percentages be in any particular type size . . . .” The FRB has issued similar interpretations of clear and conspicuous under Regulations M, AA, CC and DD.

Congress was aware of these FRB interpretations when it chose to use the “clear and conspicuous” standard in the GLB Act. Thus, it would be difficult to support the conclusion that Congress intended to give new meaning to the term “clear and conspicuous” without any statement to that effect in the GLB Act or legislative history. As a result, we believe that any proposed definition of “clear and conspicuous” that varies from prior FRB interpretations must logically be viewed as inconsistent with Congressional intent.

We also are concerned that the Agencies’ attempt to set forth a different definition of “clear and conspicuous” under the Proposal will raise compliance questions regarding disclosures designed in reliance on the FRB’s earlier interpretations of “clear and conspicuous.” Such a result would be particularly inequitable with respect to financial institutions within the Agencies’

jurisdictions where those financial institutions have been examined and have been found to be in compliance with the clear and conspicuous standard as previously articulated by the FRB. For these reasons, we urge the Agencies to delete the proposed definition of "clear and conspicuous" and instead define the term to make it clear 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.

(b)(2) Examples. Paragraph (b)(2) provides examples of how a financial institution may comply with the "clear and conspicuous" standard. These examples set forth unusually specific guidance that would create significant uncertainty about how to comply. For instance, whether a particular disclosure is drafted in "clear, concise sentences," using "definite, concrete, everyday words," and avoiding "legal and highly technical business terminology" would invariably be subject to considerable debate and create enormous potential for litigation. In addition, each of these examples exacerbates the concerns stated above by magnifying the differences between the proposed definition and the longstanding FRB interpretations on which financial institutions have been relying for years.

We also note that paragraph (2)(iii) creates other concerns as well. It 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 approach 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. For example, this guidance appears to suggest that if the GLB Act disclosures are included with a document setting forth the TILA "initial disclosures" for open-end credit, the GLB Act disclosures are required to 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 the examples from the Final Rule.

(c) Collect. The Proposal provides that "[c]ollect means to obtain information that is organized or retrievable on a personally identifiable basis, irrespective of the source of the underlying information." We urge the Agencies to consider three modifications to this definition. First, we urge that the Agencies clarify that the definition does not apply where an entity receives information and merely passes it along to another without storing the information itself. For example, when an entity receives a consumer credit application and simply transmits it to a financial institution for consideration, that entity should not be deemed to be "collecting" information provided that it does not retain information

from the application. However, under the proposed definition, such an entity could be viewed as “collecting” the information because it “obtain[ed]” the information briefly. In order to address this issue, we recommend that the definition be modified to clarify that it applies only where an entity both obtains “and stores or maintains” the relevant information.

Second, the definition should be modified to apply only to information a financial institution “systematically” collects. For example, information in an employee’s Rolodex should not be considered “collected” by the financial institution.

Third, we urge that the definition be modified to reflect the scope of the corresponding provisions of the GLB Act more accurately. Specifically, we urge that the definition of “collect” be revised to state that it only applies to obtaining and storing or maintaining “nonpublic personal information.” This would address the ambiguity created by the Proposal and accompanying Supplementary Information, which indicate that the definition would apply to obtaining “information,” not just “nonpublic personal information.”

(e)(1) 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 first portion of the definition, which limits its scope to individuals who obtain a financial product or service “from the [financial institution]” 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 second portion of the definition, which would include the “individual’s legal representative,” be modified. Specifically, it should be clarified that whenever a financial institution has an obligation with respect to a “consumer,” the financial institution will be deemed to meet that obligation if it does so with respect to either the consumer or the consumer’s legal representative. 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. Therefore, the word “and” should be changed to “or.”

(e)(2) Examples. Paragraph (e)(2) sets forth several examples of the circumstances under which an individual will be deemed to be a “consumer of a financial service,” and we offer the following comments on those examples for the Agencies’ consideration.

First, we note that 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 provided to the consumer. We respectfully submit that this 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. (Emphasis added.) The Proposal, however, contradicts this plain language by stating that an individual becomes a consumer even where the individual is expressly denied the financial product or service the consumer is seeking to obtain. We urge the Agencies to exclude this interpretation from the Final Rule. We believe that if Congress had intended such an expansive reading of the definition of "consumer," it could have easily embodied that intent in the GLB Act by defining "consumer" as "an individual who provides nonpublic personal information to a financial institution in connection with requesting or applying for a financial product or service . . . ." Congress did not choose that definition, however, and instead, provided that an individual is not a "consumer" unless that individual "**obtains**" financial products or services from a financial institution. (Emphasis added.)

Second, the examples set forth in clauses (ii) and (iii) exacerbate a significant problem with the definition of "nonpublic personal information" (discussed in greater detail 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 individual ultimately receives the product or service he or she 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, because the definition of "nonpublic personal information" is so broad, the two examples might inappropriately be construed to cover a situation where the consumer merely provides his or her name and address to a financial institution so the financial institution can determine whether or not the individual resides in the financial institution's service area. We do not believe that such an interpretation would be consistent with the intent of the GLB Act.

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" when it acts on behalf of the financial institution.

Clause (vi) indicates that an individual is not a financial institution's consumer "solely because the bank 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 with one modification. Specifically, we urge the Agencies to add the following sentence at the end of the example: "The bank and the financial institution may, however, agree by contract that the bank will treat the individual as its consumer."

We also urge the Agencies to incorporate additional examples clarifying the circumstances under which an individual will *not* be deemed to be a "consumer." In particular, we urge that the Agencies clarify that when an individual presents a credit card, debit card, check or other medium as payment to a third party, the individual is not a "consumer of a financial service" with respect to the third party. This can be accomplished by including the following example in the Final Rule:

"An individual does not become a consumer of a merchant or other business by presenting a credit card, debit card, check or other payment device to the merchant or business."

We also note that such an interpretation would be consistent with the guidance provided by the FTC in its Proposal which provides that "[a] business that only accepts payment by check or cash, or through credit cards issued by others" is not a financial institution.

The Final Rule also should make it clear that an individual does not become a "consumer" when the financial institution simply provides product information to the individual at his or her request. For example, when an individual requests current information about a credit card account or other product the financial institution offers, the individual should not become a "consumer" when the financial institution complies with that request. Such an interaction is not a financial product or service and should not be covered by the Final Rule.

(g) Control. We believe that the definition of "control" set forth in the Proposal accurately reflects the intent of the GLB Act, and we urge that it be retained in the Final Rule.

(h) 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 reflect the intent of the GLB Act in a more accurate manner. 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 accept the consumer as a customer. For example, when a consumer fills out 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 Final Rule be modified to state 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.”

(i)(1) Customer Relationship. Under the Proposal, the definition of “customer relationship” is the key element in determining whether a “consumer” has become a “customer.” This is extremely significant because a financial institution’s obligations vary considerably depending upon whether it is dealing with a “consumer” or a “customer.” As a result, it is critically important that the definition of “customer relationship” establish a bright line differentiation from the definition of “consumer.”

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.” We are concerned 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 appears to suggest 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 the transaction” between the financial institution and the individual. In our view, 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 that 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 financial institution has agreed to obligate itself to the consumer (e.g., the consumer maintains an account with the financial institution, purchases an insurance product from the financial institution, holds an investment product through the financial institution, the financial institution brokers a mortgage for the consumer, etc.).

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 agrees to obligate itself to the consumer. 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. Accordingly, the Final Rule should make it clear that an individual does not become a customer unless the financial institution agrees to obligate itself to the individual. In addition, 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. This additional clarification would further delineate the distinction between a "consumer" and a "customer."

We also note that the Supplementary Information states that when a financial institution sells a loan but retains the servicing rights, the borrower becomes "a customer of both the institution that sold the loan and the institution that bought it." The practical implications of this interpretation could be problematic, and we urge that the Agencies provide clarification in the Final Rule to address the following issues.

The circumstances under which whole loans or interests in loans (such as participation interests) may be transferred on the secondary market vary tremendously. In some cases, the purchaser may acquire the loan as a long-term

investment and may be identified to the borrower as the new holder of the borrower's debt. In many other cases, however, the purchaser of a loan may have little or no contact with the borrower. For example, in most mortgage conduits or credit card securitizations, the borrower is completely unaffected by the transfer of his or her debt to a funding vehicle. Requiring the provision of privacy notices upon each such transfer would be unworkable and extremely confusing to the borrower and would provide no real value in terms of the goals of the GLB Act.

Moreover, when a loan is sold, there may be multiple financial institutions which purchase separate interests in the loan. Any suggestion that each of those purchasers must provide privacy notices to the borrower would be difficult to support. Also, a particular loan may be purchased and sold multiple times. There are even a variety of circumstances in which the purchaser of a loan, or a participation interest in a loan, may hold that interest for a relatively short time. For example, a simple securitization of credit card receivables may involve a transfer from the originator to a special purpose vehicle and then to a trust which issues certificates to investors. If every new purchaser of a loan, or interest in a loan, were required to furnish privacy notices even though that purchaser has no other contact with the borrower, the borrower would likely be baffled by the flow of paper. Any chance that the privacy notices required under the GLB Act will be clear and meaningful to consumers would be lost if consumers must wade through detailed disclosures not only from the financial institution that originated the loan, but also from multiple other financial institutions that at some time owned the loan but with which the consumer has never had any dealings.

Furthermore, in most of these circumstances, the loan purchaser will not make use of the borrower's personal financial information for purposes other than those permitted under the GLB Act or otherwise disclosed to the borrower by the original lender. Accordingly, if the purchaser of a loan is to be treated as having a "customer relationship" with the underlying borrowers even when servicing is retained by the originating lender, we believe it is critical that the purchaser not be required to provide any initial or annual notices. If, however, the Agencies determine to impose some notice requirements on the purchaser, any such notice should not be required unless: (i) the purchaser discloses the borrower's nonpublic personally identifiable financial information to a nonaffiliated third party and (ii) such disclosure is not otherwise authorized by Sections \_\_.9, \_\_.10 or \_\_.11 or permissible under the disclosures previously provided to the borrower by the original lender.

Such an approach would provide the balance and flexibility necessary to avoid disruption of a wide variety of secondary market and loan funding arrangements. It would avoid duplicative, burdensome and, ultimately, confusing disclosures by allowing the vast majority of secondary market

transactions to occur without further notice to, or impact on, the borrower. At the same time, it would allow lenders who would like to engage in more extensive information sharing practices to do so pursuant to notice and opt out, thus protecting the borrower's privacy interests.

(j) Financial Institution. The definition of a "financial institution" is important in establishing the scope of the Final Rule. The FTC, in the Supplementary Information to its version of the Proposal, notes that many entities that fall within the broad definition of financial institution will not be subject to the notice and opt out requirements of the Final Rule because they do not have any "consumers" or "customers." This is an extremely important clarification which should be retained in the FTC's Final Rule and incorporated into the Final Rule as adopted by the other Agencies. As the FTC recognizes, entities such as "data processors" perform services for financial institutions but do not provide financial products or services to individuals, and it is critically important that such entities not be deemed to be covered under the Final Rule. Moreover, any suggestion that such entities could be covered would be entirely inconsistent with the plain language of the GLB Act which makes it clear that Congress intended to impose new privacy restrictions only on those financial institutions that provide financial products or services directly to individuals.

(m)(1) Nonaffiliated Third Party. The definition of "nonaffiliated third party" set forth in the Proposal is important because it identifies those entities that must be described in the initial and annual privacy disclosures if they receive nonpublic personal information from the financial institution. It also is important because it helps to define the disclosures that are subject to a consumer's right to opt out. As a result, it is essential that the definition be precisely crafted in order to avoid inappropriately covering information practices that do not in any way raise the privacy concerns the GLB Act was designed to address. Most importantly, we urge that the definition be modified to make it clear that it does not cover an entity that receives information from a financial institution solely for the purpose of acting on behalf of the financial institution. For example, the definition should not cover a data processing firm or warehousing company that receives information from a financial institution solely for the purpose of evaluating or storing it on behalf of the financial institution. In these situations, the entity that receives the information may not use or disclose it to any greater extent than could the financial institution. The recipient of the information cannot use it for its independent interests. Any acts performed by the recipient with respect to the information would be done solely on behalf of the financial institution. As a result, the disclosure of information by a financial institution to an agent or other party acting on behalf of the financial institution does not implicate the privacy concerns the GLB Act was intended to address. This concept has long been recognized under the FTC interpretations of the Fair Credit Reporting Act ("FCRA") which provide that a

communication between a principal and its agent is not treated as a communication to a third party. We strongly urge the Agencies to incorporate into the Final Rule a provision which clarifies the special treatment of those who act solely on behalf of a financial institution with respect to information they receive from the financial institution. This could be accomplished by including the following language in the Final Rule:

“An entity that receives information from a financial institution will not be deemed to be a nonaffiliated third party so long as the entity acts solely on behalf of the financial institution with respect to that information. If, however, the entity were to use the information for its own purposes, the entity would become a nonaffiliated third party.”

(n)(1) Nonpublic Personal Information and (o)(1) Personally Identifiable Financial Information. The Proposal defines the terms “nonpublic personal information” and “personally identifiable financial information” broadly and, in our view, the definitions exceed the scope of those terms as intended by the GLB Act.

The GLB Act defines the term “nonpublic personal information” to mean “personally identifiable **financial information**” that is obtained by a financial institution in the manner specified in the statute. (Emphasis added.) The Proposal, on the other hand, “treat[s] **any** personally identifiable information as financial if it is obtained by a financial institution in connection with providing a financial product or service to a consumer.” (Emphasis added.) The Proposal also states that “[t]he Agencies believe that this approach reasonably interprets the word ‘financial’ and creates a workable and clear standard for distinguishing information that is financial from other personal information.” We respectfully disagree and believe that the definitions set forth in the Proposal cannot be supported by the plain language of the GLB Act or its legislative history. Indeed, there is strong evidence in the legislative history to the GLB Act that the interpretation set forth in the Proposal was expressly rejected by Congress.

Section 509(4)(A) of the GLB Act provides 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.”

(Emphasis added.) This plain statutory language makes it clear that there are three distinct elements of the definition of “nonpublic personal information.” The information must be: (i) “personally identifiable;” (ii) “financial;” and (iii) obtained by the financial institution from the consumer, from a transaction with or service performed for the consumer, or otherwise.

There is no question that unless particular information specifically satisfies all three elements of the definition, it cannot be deemed to be “nonpublic personal information.” Also, the GLB Act excludes “publicly available” information from the definition of “nonpublic personal information.” Therefore, even if information satisfies the first three elements of the definition, it will not be deemed to be “nonpublic personal information” if it is “publicly available.”

We respectfully submit that the Final Rule must be modified to accurately reflect the clear definition set forth in Section 509(4) of the GLB Act. This could be accomplished simply by using the definition of “nonpublic personal information” contained in Section 509(4). Although we appreciate the efforts of the Agencies to provide more specific guidance than is contained in the statutory language, we believe the language of Section 509(4) would, by itself, be more workable than the language set forth in the Proposal. Regardless of whether the Agencies choose to use the specific language set forth in Section 509(4) of the GLB Act, however, the Proposal should be modified to more precisely adhere to that language. The Supplementary Information and the Final Rule at a minimum should specifically state that information will not be deemed to be “nonpublic personal information” unless it is information that is: (1) personally identifiable; (2) financial; (3) obtained by a financial institution as described in the statute; and (4) not publicly available. In addition, we urge the Agencies to provide guidance in the Supplementary Information and the Final Rule to implement the following comments.

### “Personally Identifiable”

The GLB Act definition of “nonpublic personal information” unambiguously establishes that information will be covered by the definition only if it is “personally identifiable.” We urge the Agencies to incorporate this concept into the Final Rule by clarifying that information that is coded or otherwise masks or excludes an individual’s identity is not covered. This is important because financial institutions frequently code information about their customers in order to protect the privacy of those customers when the information is furnished to service providers such as those who perform statistical and other analyses for the financial institutions. These service providers do not match the consumer information to the identity of particular individuals and, thus, should not be viewed as receiving nonpublic personal information. The Agencies have specifically requested comment on this issue, and we urge that the Agencies make it clear in the Final Rule that information which is coded or otherwise modified to mask the individuals’ identities is not covered by the definition of “nonpublic personal information.”

### “Financial Information”

The Proposal effectively eliminates the requirement that information must be “financial” in order to be covered. In fact, the Agencies expressly recognize that, under the Proposal, information would not have to be “financial” at all in order to be covered so long as it was collected by a financial institution in connection with providing a financial product or service.

In our view, this approach cannot be supported under the plain language of the GLB Act. Moreover, the legislative history of the GLB Act demonstrates that this approach was considered and rejected by Congress. The original version of the GLB Act privacy provisions which was adopted by the House Commerce Committee, but was rejected by Congress, provided that “nonpublic personal information” was defined as “personally identifiable information, other than publicly available directory information, ***pertaining to an individual’s transactions with a financial institution.***” (Emphasis added.) We urge the Agencies to consider two aspects of this definition which are most striking in terms of their relevance to the Proposal.

First, the House Commerce Committee definition did not require that the information be “financial” in order to be covered by the definition. Under the House Commerce Committee definition, ***any*** “personally identifiable information” would have been covered if it pertained “to an individual’s transactions with a financial institution.” Congress rejected this approach. The House of Representatives later inserted the word “financial” to limit the definition to “financial information” and adopted the revised definition as an amendment on the House

floor. This was the version eventually passed by both Houses of Congress and signed by the President.

Second, the definition used by the House Commerce Committee bears a striking resemblance to the definition included in the Proposal. Indeed, the effect of the two definitions is virtually the same. Under the House Commerce Committee definition, nonpublic personal information would have included any information, whether financial or not, so long as the information was "pertaining to an individual's transactions with a financial institution." The Proposal would achieve the same result because any information gathered in connection with "providing financial products or services to consumers" would essentially be information "pertaining to [the consumer's] transactions with [the] financial institution." Because Congress rejected the House Commerce Committee approach, it appears difficult, if not impossible, to justify the virtually identical approach set forth in the Proposal. As a result, it is inescapable that Congress intended that information must be "financial" in order to be covered by the definition of "nonpublic personal information." Any interpretation, such as the one included in the Proposal, suggesting that information is covered by the definition even if it is not "financial" is entirely inconsistent with the plain language and legislative history of the GLB Act.

Therefore, we urge the Agencies to expressly clarify in the Final Rule that information will not be deemed to be covered by the definition "nonpublic personal information" unless the information is "financial" in and of itself. The Final Rule must also make it clear that the context in which a financial institution collected the information is of no consequence. In particular, we urge the Agencies to exclude from the Final Rule any suggestion that information will be deemed to be financial simply because it was obtained in connection with providing financial products or services to consumers.

In addition, we urge the Agencies to implement the clear Congressional intent to define "financial information" in accordance with its plain meaning. More specifically, we urge the Agencies to defer to two of the key participants in the House/Senate Conference Committee which produced the final version of the GLB Act—Senator Allard and Senator Gramm. During the Senate's consideration of the GLB Act, the two Senators specifically clarified that "nonpublic personal information" was to apply to "information that describes *an individual's financial condition.*" (Emphasis added.) 145 Cong. Rec. S13902 (daily ed. November 4, 1999). This definition of "financial information" not only more accurately states the plain meaning of the statutory language than does the Proposal, there is nothing in the legislative history of the GLB Act that would contradict the Senators' articulation. As a result, there appears to be no justification for adopting a definition that varies from this approach. Accordingly,

we urge the Agencies to state in the Final Rule that "information will not be deemed to be nonpublic personal information unless it describes a consumer's financial condition."

We urge the Agencies to also provide examples of the types of information excluded from the definition. These examples should expressly clarify that names, addresses, telephone numbers and other similar information are not covered by the definition. In our view, the Agencies could accurately reflect the "financial information" element of GLB Act Section 509(4)(A) by incorporating the following into the Final Rule:

"In order for information to be deemed to be 'nonpublic personal information,' it must be financial information. The fact that information was gathered by a financial institution in connection with providing a financial product or service to a consumer is not sufficient to cause the information to be deemed to be financial. A particular item of information will be deemed to fall within the definition of 'nonpublic personal information' only if that information, when examined by itself, is viewed as 'financial' and the information meets the other elements of the definition. For example, information such as a consumer's name, address and telephone number is not covered by the definition because the information does not describe the individual's financial condition."

Under this approach, the Proposal would accurately reflect the requirement that information must be "financial" in order to be covered. In addition, it would allow the term "financial" to be interpreted in accordance with its common meaning as articulated on the Senate floor. Although this approach would not provide as much guidance as would be ideal, this approach would, nonetheless, be far preferable to the approach taken in the Proposal which, as noted above, is inconsistent with the plain language of the GLB Act.

#### **Information Obtained by the Financial Institution**

As noted above, the third element of the definition of "nonpublic personal information" requires that the information be obtained by a financial institution as described in the statute. We believe that paragraph (o)(1) of the Proposal accurately describes this element in clauses (i), (ii) and (iii) of Section 509(4)(A) of the GLB Act. Clause (o)(1), however, inaccurately limits the exception for "publicly available" information. Specifically, clause (o)(1) appears to

suggest that the “publicly available” exception only applies to certain information obtained by a financial institution. In this regard, the “publicly available” exception is preferenced only in clause (iii) and not in clause (i) or (ii). Any such suggestion that the publicly available exception should be limited in this manner is entirely inconsistent with the plain language of the GLB Act. As noted above, the GLB Act clearly states that it does not apply to *any information that is publicly available*. This means that any information a financial institution has about a consumer is not covered under the GLB Act and should not be covered under the Final Rule if that information is publicly available, regardless of how it was obtained. Accordingly, we respectfully submit that the Final Rule must make it clear that it does not apply to any publicly available information held by a financial institution.

(o)(2) Examples. Paragraph (A) suggests that any “[i]nformation” a consumer provides on an application to obtain a financial product or service is deemed to be “personally identifiable financial information.” We urge the Agencies to modify this example to make it consistent with the statutory language of the GLB Act. Specifically, the example should be modified by inserting the word “Financial” immediately before the word “information,” where appropriate, to make it clear that only those portions of the information included on an application that relate to the consumer’s financial condition are covered. An individual’s name, address or telephone number, for example, would not be covered, even when included on a credit application, because that information is not “financial.”

The example in paragraph (A) also indicates that “medical information” if included on an application would be personally identifiable financial information. MasterCard fully appreciates the sensitivity of medical information and is strongly committed to protecting that information from inappropriate use and disclosure. The GLB Act, however, simply does not cover medical information. Medical information is covered by the proposal issued by the Department of Health and Human Services (“HHS”) pursuant to its authority under the Health Insurance Portability and Accountability Act. Under the HHS proposal, covered entities who come into possession of medical information are subjected to restrictions on the use and disclosure of that information. We respectfully submit that medical information should remain the purview of the HHS proposal. We also note that the coverage of medical information under the GLB Act appears to have been rejected by Congress. In this regard, earlier versions of the legislation included medical information restrictions which were subsequently deleted from the GLB Act as approved by both Houses of Congress and signed by the President.

Paragraph (C) indicates the fact that an individual is or has been a customer of a financial institution or has obtained a financial product or service from the financial institution will be deemed to be “personally identifiable financial information” unless that fact was derived using only publicly available information.

Paragraph (D) includes a similar example. We urge that both of these examples be deleted from the Final Rule. The mere fact that an individual is a customer or has had a customer relationship with a financial institution is not financial information. The existence of a customer or other relationship between an individual and a financial institution says nothing about that individual's financial condition and is not covered by the GLB Act.

Paragraph (E) states that any information provided by a consumer or otherwise obtained by a financial institution or its agent in connection with collecting on a loan or servicing a loan would be treated as personally identifiable financial information. Paragraph (F) states that any information from a consumer report also would be covered by that definition. Once again, we urge that these examples be modified to make it clear that they apply only to those aspects of the information described in the examples that are "financial" information. This can be accomplished by inserting the word "financial" before the word "information" in each of the examples.

Clause (ii) states that personally identifiable financial information does not include a list of names and addresses of customers of an entity that is not a financial institution. This provides helpful clarification which should be included in the Final Rule.

(p)(1) Publicly Available Information. The first part of the definition of "publicly available information" set forth in the Proposal defines the term as "any information that is lawfully made available to the general public." We believe that this portion of the definition accurately implements the plain language of the GLB Act and should be retained. We also urge the Agencies to make it clear that "any information that is reasonably believed to be publicly available" will be deemed to be "publicly available." There should be no requirement that a financial institution must review public sources to confirm that information is publicly available so long as the information is of the type of information (e.g., addresses) that is publicly available.

The remaining portion of the definition of "publicly available" inappropriately restricts the scope of that term. In our view, the question of whether information is "publicly available" depends upon whether the information is of the type that is available to the general public. If it is of the type that can be obtained by the general public, then it seems unavoidable that the information is "publicly available." The proposed definition, however, attempts to list the sources of "publicly available information" and describes them as: "(i) federal, state or local government records; (ii) widely distributed media; or (iii) disclosures to the general public that are required to be made by federal, state or local law." This attempt to list the sources of publicly available information inappropriately limits that definition

and unnecessarily creates uncertainty. For example, it seems clear that information that can be obtained by the general public is publicly available, regardless of whether the media through which it is made available is viewed as "widely distributed." Undoubtedly, the ambiguity inherent in the "widely distributed" standard will result in unnecessary litigation and other compliance issues for financial institutions attempting to comply with the Final Rule. In order to avoid these problems, we urge the Agencies to modify the Proposal to make it clear that information will be deemed to be "publicly available" if it "is of the type that is lawfully made available to the general public." Any other definition, including any definition that attempts to limit the sources from which publicly available information is derived, would be inconsistent with the plain meaning of "publicly available."

We also urge the Agencies to delete from paragraph (p)(2)(ii) the phrase indicating that information obtained over the Internet will not be deemed to be "publicly available" unless it can be obtained "without requiring a password or similar restriction." Many web sites which are publicly available to anyone may require a consumer to use a password or registration number when they log on to the site. The Final Rule should make it clear that such identifiers are irrelevant for purposes of determining whether information is publicly available. It is indisputable that information that may be obtained over the Internet using such identifiers is available to the general public, is not covered under the GLB Act, and should not be covered under the Final Rule.

We also urge the Agencies to refine the guidance with respect to the types of lists that will be excluded from the definition of "nonpublic personal information." 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." We believe that this exception was intended to allow a financial institution to provide a list of names and addresses of its customers or consumers 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 to Customers and Consumers of Privacy Policies and Practices Required**

(a) When Initial Notice is Required. The Proposal provides that a financial institution must furnish the "initial notice" of its privacy policies to its "customers." The Proposal also clarifies that it must provide notice to "consumers" prior to disclosing nonpublic personal information to nonaffiliated third parties. The Proposal accurately reflects the intent of the GLB Act that the timing of the required notice will differ depending upon whether the individual is a "customer" or a "consumer."

Timing for Customers. Under the Proposal, a financial institution must provide its initial privacy notice to an individual who becomes a customer "prior to the time" that the financial institution establishes the customer relationship. We respectfully submit that the requirement that the notice be provided "prior to the time" that the customer relationship is established does not fully reflect the intent of the GLB Act. Specifically, the GLB Act states that for "customers," the initial privacy notice must be provided "[a]t the time of establishing a customer relationship with a consumer." In order to more accurately reflect the language of the GLB Act while also accommodating the approach proposed by the Agencies, we urge the Agencies to revise the Proposal to make it clear that for customers the initial privacy notice must be provided "prior to, or at the time of, establishing the customer relationship" with the individual.

We also urge the Agencies to explore the possibility of providing more flexible timing requirements consistent with the stated objective of the Proposal. In this regard, the Supplementary Information states that with respect to the timing rules for "customers," the Agencies are attempting "to strike a balance between: (1) ensuring that consumers will receive privacy notices at a meaningful point along the continuum of 'establishing a customer relationship'; and (2) minimizing unnecessary burdens on financial institutions that may result if a financial institution is required to provide a consumer with a series of notices at different times in a transaction." We commend the Agencies for attempting to achieve this balance. In particular, we commend the Agencies for indicating that the initial notice provided to customers may be made "at the same time a financial institution is required to give other notices, such as those required by the [FRB's] regulations implementing the [TILA] (12 CFR 226.6)." This approach provides helpful clarification, and we urge the Agencies to retain it in the Final Rule. In addition, we request that the Agencies specifically reference other similar "initial disclosure" requirements, such as those found in the FRB's regulations implementing the EFTA (12 CFR 205.7). We believe that if the initial privacy notices are combined with these other types of notices, the customers will receive privacy notices "at a meaningful point" in a manner that will at least provide some

opportunity for financial institutions to reduce the substantial costs associated with delivering the new privacy disclosures.

We also urge the Agencies to consider other approaches which would help to reduce the cost of compliance for financial institutions while ensuring that consumers receive notices at a meaningful point in time. In particular, we urge the Agencies to give serious consideration to allowing financial institutions the flexibility to provide the initial privacy notice to customers at some reasonable point in time after establishing the customer relationship. For example, one approach would be to allow financial institutions to furnish the initial disclosure to consumers after the time of establishing the customer relationship provided that the financial institution does not disclose any nonpublic personal information to a nonaffiliated third party (other than as authorized by Sections \_\_\_\_.10 and \_\_\_\_.11 of the Proposal) until the notice is made. This would give a financial institution at least some added flexibility to find alternative points in time at which the notice may be delivered more efficiently, perhaps with another regularly scheduled mailing to the customers. The customers would still receive notice at a "meaningful point in time" because the notice would be required to be delivered prior to the time any nonpublic personal information (other than as authorized by Sections \_\_\_\_.10 and \_\_\_\_.11 of the Proposal) about the customer was delivered to a nonaffiliated third party.

We understand that if such an approach is considered, the Agencies may have concerns about delaying the disclosure for an indefinite period of time. To address any such concern, the Agencies could mandate that the disclosure, in any event, must be delivered to customers within a "reasonable" period of time. We also note that allowing some delay in providing the initial notice to customers would be consistent with other aspects of the Proposal. For example, with respect to existing customers as of the effective date of the Final Rule, the Agencies allow the notice to be delayed by 30 days (as noted below, we urge that this time frame be lengthened considerably). Similarly, in connection with individuals who become customers as a result of entering into an oral contract with a financial institution or by virtue of the financial institution purchasing a portfolio which includes the customer's account, the Agencies allow for a delay in furnishing the initial notice.

Timing for Consumers. The Proposal states that a financial institution must provide the initial disclosure to a "consumer" "prior to the time" that the financial institution discloses any nonpublic personal information about the consumer to a nonaffiliated third party. The Proposal clarifies, however, that a financial institution is not required to provide the initial disclosure in those circumstances where nonpublic personal information about the consumer will be furnished to a nonaffiliated third party for one of the exceptions set forth in Sections \_\_\_\_.10 and \_\_\_\_.11. We applaud the Agencies for including this

clarification, and we urge that it be retained in the Final Rule. We believe that the approach as articulated in the Proposal comports with the intent of the GLB Act.

(b) When Initial Notice to a Consumer is Not Required. The Proposal makes it clear that a financial institution is not required to provide the initial notice to a consumer if the financial institution does not disclose any nonpublic personal information about the consumer to any nonaffiliated third party, other than as authorized by Sections \_\_\_\_.10 and \_\_\_\_.11. We urge that this provision be retained in the Final Rule. In addition, as noted above, we also request that the Final Rule allow similar flexibility for disclosures to "customers" so long as the financial institution does not disclose any nonpublic personal information to a nonaffiliated third party other than as authorized by Sections \_\_\_\_.10 and \_\_\_\_.11.

(c) When the Financial Institution Establishes a Customer Relationship—(1) General Rule. The Proposal states that a financial institution "establishes a customer relationship at the time [the financial institution] and the consumer enter into a continuing relationship." As discussed above in the context of the definition of "customer relationship," it is critically important that the Final Rule establish a bright line test for determining when a consumer becomes a customer. To accomplish this, we urge that the Agencies make it clear that a customer relationship does not exist unless the consumer has taken all the steps necessary to establish a continuing relationship and the financial institution has agreed to obligate itself to provide financial products or services to the consumer. For example, this provision could be modified to read as follows:

"A [financial institution] establishes a customer relationship when the consumer has taken the steps necessary to obtain a financial product or service and the [financial institution] has agreed to obligate itself to provide that product or service to the consumer on an ongoing basis."

This language would ensure that a financial institution is able to establish effective and efficient procedures to determine when a consumer becomes a "customer." Without such a clarification, we are concerned that a consumer could become a customer under the Proposal simply by engaging in some course of action (e.g., repeated use of financial products or services provided by the financial institution) and the financial institution would have no practical basis of identifying the point in time at which the customer relationship began.

(2) Examples. The Proposal sets forth examples of when a customer relationship is deemed to begin. These examples exacerbate the

problem noted above by stating that the customer relationship begins "when the consumer" takes certain action. Although the examples address circumstances in which the consumer and the financial institution have mutually agreed to enter into a customer relationship, such mutual agreement is not articulated as a necessary element to establishing the customer relationship. To address this issue, we urge that the first sentence of paragraph (c)(2) be revised to read as follows: "The [financial institution] will be deemed to establish a customer relationship with a consumer when the [financial institution] agrees to obligate itself to the consumer on an ongoing basis when the consumer has:". (Conforming grammatical changes to each example also would be required.)

In addition, we offer the following comments with respect to the specific examples themselves. The example set forth in clause (i) states that a customer relationship will be deemed to exist when the consumer "[o]pens a credit card account" with the financial institution. The Supplementary Information contains an important clarification 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 retained in the Final Rule.

The Supplementary Information indicates that for customer relationships that "are contractual in nature," the relationship is established "upon the execution by the consumer of a contract that is necessary to conduct the transaction in question." We urge that this language be modified to recognize that mere execution of a contract does not establish a customer relationship in many instances. For example, if a consumer executes a loan agreement but fails to pay the fees required to obtain the loan, there is no customer relationship. Accordingly, it should be made clear that with respect to relationships that are contractual in nature, a customer relationship may be established only when the consumer executes the contract "and has taken all other steps necessary to conduct the transaction in question."

The example set forth in clause (ii) of the Proposal itself raises the same issue when it indicates that a consumer becomes a customer when the consumer "[e]xecutes the contract to open a deposit account." To address this issue, clause (ii) should be revised to state that, with respect to opening a deposit account, a consumer will become a customer when the consumer executes the contract "and has completed the other requirements necessary" to open a deposit account with the financial institution.

The example set forth in clause (iii) raises similar issues. In this regard, the example indicates that a consumer becomes a customer if the consumer “[a]grees to obtain certain advisory services from a financial institution for a fee.” The Supplementary Information indicates that these are examples of transactions that may not involve a formal contract. We urge the Agencies to make it clear that, in such circumstances, the customer relationship will be established only if the consumer has taken all steps necessary, including paying any required fee or commission to obtain the service, and the financial institution agrees to provide the service on an ongoing basis. Once again, it is critically important that a customer relationship not be deemed to exist unless both parties to that relationship have taken steps to establish that relationship.

(d) How to Provide Notice—(1) General Rule. The Proposal states that a financial institution must provide the initial privacy notice so that “each consumer can reasonably be expected to receive actual notice in writing or, if the consumer agrees, in electronic form.” We agree that the GLB Act permits the delivery of notices in writing or electronic form. We are concerned, however, that the Proposal is attempting to establish a higher standard for the delivery of the GLB Act disclosures than is found in other similar federal consumer protection statutes. Under the GLB Act, a financial institution is required to “provide” certain disclosures to its consumers and customers. The Proposal, however, appears to suggest that a financial institution must determine whether the method for delivering a required disclosure to a consumer is such that the particular consumer “can reasonably be expected to receive actual notice.” Although the examples set forth in the Proposal appear to suggest that typical methods of delivery may be acceptable, the general rule established by the Proposal suggests that it requires something more than merely “providing” the required disclosures. To avoid confusion on this point, we urge the Agencies to delete the standard it has created under the Proposal and instead more closely adhere to the language of the GLB Act. Specifically, we believe that the standard articulated by Congress in the GLB Act can most clearly be articulated by stating in the Final Rule that required notices must be “delivered” or “provided” to consumers. Of course, each financial institution would be required to establish its own procedures to demonstrate that it has complied with the standard. We note that this approach would be consistent with the approach implemented by the FRB under other similar federal statutes.

We commend the Agencies for acknowledging the permissibility of delivering the GLB Act notices electronically. We urge the Agencies to modify the Proposal, however, to track the requirements of the GLB Act more closely. In this regard, Sections 502 and 503 of the GLB Act both expressly state that the disclosures may be made “in writing or in electronic form.” These provisions do not impose different requirements on the two forms of delivery. Instead, the GLB Act clearly states that the notices may be delivered in either form and do not

impose any requirement that the consumer "agree" to delivery in electronic form. In our view, it would be contrary to the intent of the GLB Act to mandate more restrictive requirements on delivery of electronic notices than are imposed for written notices in view of the plain language of the Act. Accordingly, we urge the Agencies to delete from the Proposal any suggestion that a consumer must "agree" to disclosures in electronic form.

On the other hand, we acknowledge that some commenters in the past have suggested to the Agencies that there may be concerns regarding whether electronic disclosures can be effectively delivered without some "agreement" or "consent" on the part of the consumer. Although we believe these concerns are unfounded, we are mindful of the Agencies' desire to provide additional protections in this area. It is our view that such additional protections could be provided effectively and efficiently without a formal requirement that a consumer must "agree" to receiving disclosures electronically. Accordingly, if the Agencies determine that additional protections are necessary in the Final Rule, we urge the Agencies to do so in a manner which is consistent with the following.

First, it should be made clear that a financial institution may furnish disclosures electronically whenever a consumer chooses to apply for a financial product or service electronically. Under such circumstances, we believe that 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. Thus, there should be no special requirements imposed under the Final Rule where the consumer has chosen to communicate with the financial institution electronically.

Second, even in circumstances where the consumer applies for electronic services orally or in paper form, it should be permissible to furnish the required disclosures to the consumer electronically provided that the consumer is notified that the financial institution will furnish disclosures electronically rather than in paper form. This would, nevertheless, require each financial institution to establish procedures to demonstrate that it has delivered the notices as required.

Third, the Final Rule also should make it clear that a financial institution may deliver disclosures electronically by providing the consumer with a "link" to the site where the text of the disclosure is posted. This approach is not only widely used for communicating electronically, but also is far more efficient than the approach set forth in the Proposal, which would, in many instances, require that a financial institution email the entire text of potentially extensive disclosures to millions of consumers. In addition, allowing the financial institution

to furnish a link to the consumer, through which the consumer can access notices on an as-needed basis, provides greater convenience to the consumer than is found with respect to paper disclosures, where the consumer is responsible for storing the disclosures for subsequent access. We also urge that the Agencies eliminate any suggestion that a consumer must be "required" to access disclosures when they are furnished electronically. Just as when making disclosures in written form, the only requirement should be that the financial institution has "provided" or "delivered" the disclosures and there should not be any requirement that the financial institution must take the additional step of actually requiring or forcing the consumer to access the disclosures.

(2) 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 and deposit assumptions, 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 or assumption. We are concerned that the language referring to customer 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 customer 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. 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 relationship despite the consumer's express wishes.

The Agencies also have requested comment as to whether a financial institution should be required to furnish initial and annual notices to customers who have requested that the financial institution not send statements, notices or other mail to them. In our view, it is important that financial institutions be permitted to honor such requests in order to implement the customers' choice with regard to receiving correspondence from the financial institution. Indeed, it would appear to be entirely inconsistent with the thrust of the Proposal (and particularly the opt out requirements) if the Final Rule were to prohibit a financial institution from honoring a customer's choice of this type. Accordingly, we urge the Agencies to clarify in the Final Rule that a financial institution is not required to send any notices under the Final Rule to customers who have requested that the financial institution not send correspondence to them.

(3) Oral Description of Notice Insufficient. The Proposal states that a financial institution may not provide the initial notice "solely by orally explaining, either in person or over the telephone," the financial institution's privacy policies and practices. We urge the Agencies to reconsider this approach by allowing oral disclosures where adequate protections can be provided to the consumer. Specifically, we urge that a financial institution be permitted to make the disclosures orally by telephone provided that the consumer also is informed that the consumer may obtain a written copy of the disclosures upon request. We believe that oral disclosures can provide benefits to consumers that are often overlooked and should be encouraged in appropriate circumstances. In this regard, where a consumer interacts with a financial institution by telephone or in person, it may very well be easier and more efficient for the consumer to receive the privacy disclosures orally rather than having to read the disclosures at a later date. Such oral interactions also provide opportunities for the consumer to ask questions and to obtain clarifications.

(4) Retention or Accessibility of Initial Notice for Customers. The Proposal provides that for "customers only" a financial institution must provide the initial notice "so that it can be retained or obtained at a later time by the customer, in a written form, or if the customer agrees, in electronic form." This provision goes beyond the requirements established by the plain language of the GLB Act, which simply provides that the disclosure must be made to each customer. The only restriction set forth in the GLB Act is that the information must be disclosed either "in writing" or "in electronic form." The GLB Act does not specify that the disclosures must be made in a form the consumer can keep. Accordingly, we urge the Agencies to delete this provision.

If the Agencies, nevertheless, decide to incorporate a version of this provision into the Final Rule, we respectfully request that the provision at least be modified to avoid inappropriately providing disadvantageous treatment to

electronic forms of communication. Specifically, as noted above, the plain language of the GLB Act clearly states that disclosures must be made "in writing or in electronic form" and does not mandate that the consumer must "agree" to electronic delivery. In our view, if Congress had intended to impose such a requirement, it would have expressly provided it in the GLB Act. Since Congress did not include any such language, we urge the Agencies to delete from the Final Rule any suggestion that a consumer must "agree" to electronic disclosures.

(5) Examples. The Proposal sets forth several examples of the circumstances under which a financial institution "may reasonably expect" that a consumer will receive "actual notice" of its privacy policies and practices. For the reasons stated above, we urge the Agencies to delete this language and simply indicate that the financial institution "deliver" or "provide" the notices.

Paragraphs (A) and (B) indicate that a financial institution may effectively deliver the notices by hand delivery or by mailing a printed copy of the notice to the last known address of the consumer. These two examples provide helpful clarification, and we urge that they be retained in the Final Rule.

Paragraph (C) states that with respect to a "consumer who conducts transactions electronically," the financial institution may post the notice on an electronic site if the financial institution "requires the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular financial product or service." We believe that this is only one way in which disclosures can be permissibly delivered to a consumer electronically, and we are concerned that if the example is left to stand as drafted in the Final Rule, it would suggest a more restrictive interpretation on electronic delivery than is appropriate or consistent with the GLB Act. Accordingly, we urge the Agencies to delete any suggestion that the consumer must "acknowledge" receipt of the notice. Such acknowledgements are not required under the GLB Act and should not be mandated under the Final Rule. We also urge the Agencies to include other examples of permissible electronic delivery. Specifically, we urge that the Final Rule make it clear that a financial institution may deliver electronic disclosures by: (i) sending an electronic mail message to the consumer with a link to the initial notice; or (ii) posting the privacy notice to the financial institution's web site so long as the consumer has been informed that the consumer should access the web site to obtain the disclosures.

Paragraph (D) states that for an isolated transaction with a consumer "such as an ATM transaction," the financial institution complies if it "posts the notice on the ATM screen and requires a consumer to acknowledge receipt of the notice as a necessary step to obtaining the particular financial product or service." We urge the Agencies to modify this example by eliminating the requirement that

the consumer "acknowledge receipt" of the notice. The GLB Act contains no such requirement; it simply requires that the notice be "provided." The Final Rule should not impose any greater restrictions and should allow flexibility for financial institutions to determine what method they will use to ensure that the notice has been provided as required under the GLB Act.

The Proposal also sets forth examples of delivery methods that do not comply with the initial disclosure requirements. The example set forth in (ii)(B) states that it would be unacceptable for a financial institution to send the initial notice via electronic mail to a consumer who obtains a financial product or service in person or through the mail if that consumer has not agreed to receive the notice electronically. We urge the Agencies to modify this example to clarify that a consumer's "agreement" need not be obtained before providing disclosures electronically. We believe that, as discussed above, consumers would be adequately protected if the Final Rule provided that a financial institution may furnish electronic notices to a consumer so long as the consumer is notified that the disclosures will be made by electronic means. The GLB Act permits delivery of the disclosures electronically, and the Final Rule should not place inappropriate restrictions on that delivery method that go beyond the plain language of the GLB Act.

The Proposal also sets forth examples of how the financial institution may provide notice "so that it can be retained or obtained at a later time." As discussed above, there is no requirement in the GLB Act that the notice be furnished in a form that can be retained or obtained at a later date. Accordingly, we urge that any such requirement be deleted from the Final Rule. However, if the Agencies determine to include such a requirement in the Final Rule, then the examples set forth in clauses (iii) (A), (B) and (C) should be retained in the Final Rule. The example set forth in clause (C), however, should be modified, consistent with the discussion above, to delete any requirement that a consumer's agreement must be obtained in order to furnish disclosures electronically.

**§ \_\_.5 Annual Notice to Customers of Privacy Policies and Practices Required**

(a) General Rule. 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. We note that this annual notice requirement will account for a substantial portion of the potentially staggering costs of complying with the new GLB Act provisions. 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.

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 time frame period. 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 this approach, in some situations, 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 financial institutions that do not share nonpublic personal information with nonaffiliated third parties (other than as permitted in the exceptions) from the annual notice requirement. Under such an approach, once the financial institution had 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.

Substantial cost savings also could be accrued if the Agencies were to adopt an approach that allows financial institutions which have provided the initial notice to their customers to annually provide a reminder to those customers that the customers 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 must be sent to all customers whether they wish to receive them or not.

The Final Rule also should provide guidance with respect to furnishing annual notices to customers who have already exercised their right to

opt out of sharing nonpublic personal information with nonaffiliated third parties. Specifically, we urge the Agencies to state in the Final Rule that a financial institution need not furnish an annual notice to any customer who has chosen to opt out of disclosures to nonaffiliated third parties. Where the customer has already opted out, it serves no meaningful purpose to provide the customer additional notices regarding the information practices of the financial institution. Moreover, requiring financial institutions to send additional notices to those who have opted out is likely to cause customer confusion about whether their previous opt out request has been properly implemented.

(b) How to Provide Notice. We urge the Agencies to modify this provision to reflect the plain language of the GLB Act with respect to electronic disclosures. Specifically, we urge that the Agencies specify in this provision that “a financial institution may provide the annual notice electronically by posting the notice to its web site (or other location accessible electronically) and notifying the consumer in writing or by electronic mail that the customer may view the notice by accessing that site.” We believe that this approach would be consistent with the plain language of the GLB Act, which clearly provides that the annual disclosure may be delivered “in electronic form.” In any event, it is particularly important for the Agencies to ensure that the Final Rule does not suggest that a customer’s “agreement” must be obtained before electronic disclosures can be made. As noted above, the GLB Act contains no such requirement, and we urge the Agencies to avoid creating such a requirement in the Final Rule.

In addition, we urge the Agencies to permit open-end creditors to furnish the annual notice in a manner consistent with the procedures permissible for furnishing the annual billing rights notice under the TILA. Under that approach, a creditor would be permitted to furnish the privacy notice to its customers by identifying one billing cycle per year and furnishing the notice to customers with their periodic statements for that billing cycle.

(c)(1) 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.

(2) Examples. 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 we urge that it be included in the Final Rule. 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. To provide further clarification on this issue, we urge the Agencies to state in the Final Rule that the financial institution's policies will determine the circumstances under which an account is deemed to be "inactive."

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 deposit account, closed-end loan, or open-end credit relationship such as those described in the earlier examples. In addition, the examples should be modified to make it clear that marketing materials that may be 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 frequently 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 of Privacy Policies and Practices**

(a) Information Included. The Proposal provides that the initial and annual notices must include several items of information, including:

“(1) The categories of nonpublic personal information about the [financial institution’s] consumers that the [financial institution] collects;

“(2) The categories of nonpublic personal information about the [financial institution’s] consumers that the financial institution discloses;

“(3) The categories of affiliates and nonaffiliated third parties to whom the [financial institution] discloses nonpublic personal information about its consumers, other than those parties to whom the [financial institution] discloses information under Sections \_\_\_\_.10 and \_\_\_\_.11;

“(4) The categories of nonpublic personal information about the [financial institution’s] former customers that it discloses and the categories of affiliates and nonaffiliated third parties to whom the [financial institution] discloses nonpublic personal information about its former customers, other than those parties to whom it discloses information under Sections \_\_\_\_.10 and \_\_\_\_.11

“(5) If the [financial institution] discloses nonpublic personal information to a nonaffiliated third party under Section \_\_\_\_.9 (and no other exception applies to that disclosure), a separate description of the categories of information the [financial institution] discloses and the categories of third parties with whom the [financial institution] has contracted;

“(6) An explanation of the right under Section \_\_\_\_.8(a) of the consumer to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, including the methods by which the consumer may exercise that right;

“(7) Any disclosures that the [financial institution] makes under Section 603(d)(2)(A)(iii) of the [FCRA] (15 U.S.C. 1681a(d)(2)(A)(iii) (that is, notices regarding the ability to opt out of disclosures of information among affiliates); and

“(8) The [financial institution’s] policies and practices with respect to protecting the confidentiality, security, and integrity of nonpublic personal information.”

We believe that Section \_\_\_\_.6(a) provides a good framework for structuring the content of the initial and annual disclosures. Based on the level of detail in the foregoing description of the contents of the initial and annual notices, however, we believe that it will be unlikely that Section \_\_\_\_.6 will satisfy the objective of furnishing consumers clear and meaningful disclosure of their privacy rights under the GLB Act. In our view, the Proposal simply requires too much information and too much detail to be meaningful to consumers. Nevertheless, we believe that Section \_\_\_\_.6 could achieve the stated objective of the Proposal if it were modified to more closely adhere to the plain language of the GLB Act and to allow flexibility to more efficiently and simply craft the notices by eliminating unnecessary information. We offer the following comments to that end.

Paragraphs (a)(1) and (2) require that a financial institution disclose the categories of nonpublic personal information that the financial institution collects and discloses. Unlike paragraphs (a)(3) and (4), paragraphs (1) and (2) appear to require, inappropriately, disclosure even with respect to information that will only be disclosed under the exceptions provided in Sections \_\_\_\_.10 and \_\_\_\_.11. Requiring a financial institution to make these disclosures in circumstances where the information is disclosed pursuant to these exceptions will significantly increase the length and complexity of the initial and annual disclosures without providing consumers any appreciable benefit. Moreover, requiring such information to be included in the initial and annual notices will likely confuse consumers because the opt out right will not apply to that information nor will the information be covered by any of the descriptions with respect to the categories of nonaffiliated third parties to whom the information is disclosed. Accordingly, we urge that the Final Rule be modified to provide that the categories of nonpublic personal information that a financial institution collects and discloses need not be described in the initial or annual notices when that information is disclosed for purposes of the exceptions in Sections \_\_\_\_.10 and \_\_\_\_.11.

We also note that the Proposal would establish initial and annual notice requirements that appear to be inconsistent with the plain language of the GLB Act in four important respects. First, 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. We respectfully disagree. 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 . . . including the categories of information that may be disclosed.” Section 503(b), however, provides further explanation of “[t]he disclosure required by subsection (a)” and states that such disclosures shall include “the policies and practices of the institution with respect to disclosing nonpublic personal information to *nonaffiliated* third parties . . . .” Moreover, Section 503(b)(1)(A) states that the disclosures made with respect to “*nonaffiliated* third parties” must include “the categories of persons to whom the information is or may be disclosed.” The GLB Act does not, at any point, state that the initial and/or annual disclosures 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].” It is well established that the FCRA does not require any disclosure of the categories of affiliates with whom information is shared. Accordingly, any suggestion that the initial and/or annual notices must include the categories of affiliates is contrary to the plain language of the GLB Act and, in our view, cannot be sustained.

Second, the Proposal indicates that the FCRA affiliate sharing disclosure must be included in both the initial and annual notices. We respectfully submit that any requirement that the affiliate sharing notice be included in both the initial and annual notices is directly inconsistent with the plain language of the GLB Act and should be deleted. As noted above, Section 503(b)(4) of the GLB Act provides that the initial and annual disclosure must include “the disclosures required, *if any*,” under the FCRA affiliate sharing provisions. (Emphasis added.) It is clear from this language that the FCRA affiliate sharing notice must be included in the initial and annual notices only if that affiliate sharing notice would be required under the FCRA. Since the FCRA only requires that the affiliate sharing notice be furnished to a consumer once in order to be effective, the FCRA notice simply is not required to be included in the initial or annual notices under the GLB Act if it has already been furnished by the financial institution to the consumer. Thus, the Final Rule should make it clear that the FCRA affiliate sharing notice need not be disclosed to a consumer under the GLB Act if the financial institution has already furnished that disclosure to the consumer in compliance with the FCRA. Moreover, even if the Agencies conclude that the FCRA affiliate sharing notice must be included in the initial notice under the GLB Act, any suggestion that the FCRA notice must be included in the annual notice must be rejected. In this regard, it is well recognized that the FCRA notice need not be given more than once, and certainly not annually. Section 506(c) of the GLB Act makes it clear that nothing in the GLB Act “shall be construed to modify, limit or supersede the operation of the [FCRA] . . . .” As a result, the Final Rule cannot mandate that the FCRA affiliate sharing notice be provided annually since

to do so would at least “modify” and perhaps “supersede” the operation of the FCRA.

Third, the Proposal indicates that the initial and annual notices must include a description of the consumer’s right to opt out. Although it seems clear that the right to opt out must be furnished before nonpublic personal information is shared, the plain language of the GLB Act does not require disclosure of the right to opt out in the annual notice. Specifically, Section 502 of the GLB Act, which sets forth the opt out right, clearly provides that the only requirement with respect to the opt out is that it be given “before the time that [nonpublic personal] information is *initially* disclosed.” (Emphasis added.) As a result, a financial institution satisfies this requirement by furnishing the notice of the right to opt out at any time before nonpublic personal information about the consumer is shared with a nonaffiliated third party. Once that disclosure has been made, the financial institution’s obligation has been satisfied. Nothing in the GLB Act requires the financial institution to again disclose the right to opt out annually or at any other time. Accordingly, any suggestion that the notice of the right to opt out must be included in the annual disclosures must be excluded from the Final Rule.

Fourth, the Proposal 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 which are “other than agents of the [financial] institution.” As a result, the Final Rule should clarify that information disclosed to third parties which 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.

(b) Disclosures Permitted By Law. The Proposal provides that if a financial institution discloses nonpublic personal information to third parties as authorized by Sections \_\_.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 extremely important clarification which should be retained in the Final Rule. Even with this clarification, the proposed initial and annual notices will be far more extensive than is likely to be helpful or meaningful to consumers. If those disclosures are further expanded to include any and all disclosures of information to nonaffiliated third parties, including those disclosures that are made for purposes of the exceptions set forth in Sections \_\_.10 and

\_\_\_\_.11, this problem would be compounded dramatically. The cost of printing and delivering the disclosures would increase without any corresponding benefit to consumers. Accordingly, we strongly urge the Agencies to retain this clarification in the Final Rule.

(c) Future Disclosures. An initial or annual notice may include categories of nonpublic personal information that the financial institution reserves the right to disclose in the future, but does not currently disclose. The Proposal would also allow a financial institution to include the categories of affiliates or nonaffiliated third parties to whom the financial institution reserves the right in the future to disclose, but to whom the financial institution does not currently disclose. We applaud the Agencies for including this clarification in the Proposal, and we urge that it be retained in the Final Rule with modification. Specifically, we urge that this provision be modified to delete any reference to information shared with affiliates since, as noted above, the GLB Act does not mandate any disclosures on affiliate sharing other than those which may be made under the FCRA.

(d) Examples. The Proposal provides examples of how a financial institution may describe the categories of information collected, the categories of nonpublic personal information disclosed and the categories of affiliates and nonaffiliated third parties to whom the information is disclosed. In addition, the Proposal gives an example of a simplified notice for a financial institution which does not disclose or intend to disclose nonpublic personal information. The final example describes how a financial institution may disclose its policies with regard to protecting the "confidentiality, security, and integrity" of nonpublic personal information.

We are concerned that the Proposal requires too much detail with respect to the categories of information collected and disclosed. In particular, requiring a financial institution to disclose every single source of the information could unnecessarily complicate the initial and annual disclosures without providing any meaningful benefit to consumers. In addition, in many 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 source 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 the sources of the information and to indicate that the information is obtained "from other sources" as well. We urge the Agencies to use this approach with respect to both the categories of information collected and the categories of information disclosed. Also, we urge that the Final Rule clarify that setting forth examples of each type of source is not required but that financial institutions may choose to provide such examples if they believe it would be

helpful to consumers. This would give financial institutions the flexibility to shorten the disclosures where appropriate while also making it clear that financial institutions are permitted to use examples where doing so would be helpful.

It also is important to note that the GLB Act does not mandate that information be categorized by source. Instead, the plain language of the GLB Act simply indicates that the "categories of nonpublic personal information that are collected by the financial institution" must be disclosed. It must be recognized, therefore, that the Agencies have discretion to allow flexibility with respect to the manner in which information is categorized. We urge the Agencies to use this discretion to expressly permit financial institutions to categorize the information collected and disclosed using any method that the financial institution deems adequate to convey the "categories" of information. In particular, the Agencies should make it clear that the "sources" of the information are only one basis upon which to categorize the information and financial institutions may choose others such as the content of the information, or other descriptions which segregate the information into different types.

We also urge the Agencies to allow financial institutions to use more general descriptions of the categories of information and nonaffiliated third parties to whom the information is disclosed. In particular, where information is disclosed only for marketing purposes and not for use in determining a consumer's eligibility for any financial product or service, the financial institution should be permitted to categorize the disclosure and the nonaffiliated third parties on that basis. Under such an approach, for example, a financial institution would be permitted to identify examples of the categories of information the financial institution discloses for marketing purposes and simply indicate that the information is disclosed to nonaffiliated third parties for those purposes without being required to categorize those nonaffiliated third parties. This could significantly simplify the disclosures in a way that would be most meaningful for consumers.

Another approach would be to allow financial institutions to describe the categories of nonaffiliated third parties based on the products they offer rather than the types of businesses in which they are engaged. This would be another way of allowing financial institutions the flexibility to shorten and clarify the disclosures in a way that would be most meaningful to consumers. For the same reasons, it also should be made clear that, regardless of the method of categorization used, financial institutions should always be permitted to simply set forth examples of the categories rather than an exhaustive list.

§     .7 Limitation on Disclosure of Nonpublic Personal Information About Consumers to Nonaffiliated Third Parties

(a)(1) 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 to opt out before disclosing any nonpublic personal information, and the consumer has not opted out.

We urge the Agencies to include in the Final Rule a technical modification to make it clear that consumers may rescind their opt out request. We believe this is intended by the Agencies and could be achieved simply by modifying the language in Section     .7(a)(iv) to state that “[t]he consumer does not opt out, or has not withdrawn an earlier opt out request.”

The Agencies have specifically requested comment on how the right to opt out should apply in the case of joint accounts. We urge that the Agencies provide in the Final Rule that a financial institution is required to provide the notice and opt out right to only one party to a joint account. This approach is consistent with other requirements under the federal Consumer Credit Protection Act and also is consistent with most of the existing financial institution information systems. Indeed, for the overwhelming majority of financial institutions, significant systems modifications would be required if the Final Rule mandated that an individual notice and opt out right must be provided to each party to a joint account. Accordingly, we urge that the Agencies not mandate such an approach in the Final Rule. On the other hand, we urge that the Final Rule provide flexibility to financial institutions to enable them to handle joint accounts differently if they choose to do so in light of their 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 as applicable 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. If a financial institution wishes to undertake the costs of providing this option to its customers, the Final Rule should not prevent it from doing so.

(a)(3) Examples of Reasonable Opportunity to Opt Out. The Proposal also provides examples of what would be deemed a “reasonable opportunity” to opt out. One example is given with respect to a consumer with whom the financial institution has a customer relationship whereby the financial institution mails the initial notice and the opt out notice to the consumer and provides 30 days for the consumer to respond. 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. We urge, however, that the Agencies refrain from suggesting that a financial institution must wait 30 days for a consumer to respond. Such a waiting period would not be appropriate in many instances, for example, where the consumer has been offered a product or service which must be accepted within a shorter time frame than 30 days. In those instances, the financial institution should be permitted to specify that if the consumer wishes to opt out, the consumer must do so in the time frame established for responding to the offer.

The second example is for 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 commend the Agencies for including this clarification in the Proposal. We request that it be retained in the Final Rule with modification. In particular, we are concerned that the phrase "as a necessary part of the transaction" will unnecessarily create 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. Whether or not the opt out is "a necessary part of the transaction" is not relevant in that instance. We also urge the Agencies to expand this clarification to provide financial institutions the flexibility to use this process for other transactions, not just an isolated transaction. Even with respect to interactions that involve more than an isolated transaction, the consumer would be adequately protected under this guidance, so long as the consumer is requested to decide whether to opt out before completing the transaction.

(c) 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 provided that it is made clear that financial institutions may choose to allow such opt out methods, but are not required to do so.

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

(a)(1) Form of Notice. The Proposal requires a financial institution to provide a "clear and conspicuous" notice to each consumer which accurately explains the right to opt out. Specifically, the notice must state that the financial institution discloses, or reserves the right to disclose, nonpublic personal

information to a nonaffiliated third party, that the consumer has the right to opt out of that disclosure, and a "reasonable means" to opt out. This provision should be modified to clarify that the right to opt out does not apply in certain circumstances specified in the Proposal. This can be accomplished by adding the following at the end of the first sentence of paragraph (a)(1): "If [the financial institution] intends to share nonpublic personal information with nonaffiliated third parties other than under Sections \_\_.9, \_\_.10 or \_\_.11."

(a)(2) Examples. The Proposal lists examples of how a financial institution may provide a "reasonable means" of opting out. These include designated check-off boxes, a reply form, and electronic means "if the consumer agrees to the electronic delivery of information." The Proposal specifically notes that a financial institution does not provide a reasonable method of opting out if the only means to opt out is to write a letter. As a general matter, we believe that the examples provide helpful guidance for implementing the opt out requirement. We urge the Agencies, however, to consider a number of clarifications to the examples in order to more precisely reflect Congressional intent. For example, we respectfully 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 to do so. There is nothing in the plain language of the GLB Act or its legislative history that suggests this is not a reasonable means of communicating with a financial institution. Just as importantly, in a similar context—the billing error provisions of 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 in the Final Rule that requesting that a consumer write a letter is a reasonable means of opting out.

In addition, we urge that the Agencies add an example to clarify that it is a reasonable means of opting out where the financial institution "provides a toll-free telephone number the consumer may call to opt out." The FTC's Proposal already contains this example, and we urge that the other Agencies incorporate it into the Final Rule as well.

In our view, it is critically important that the Final Rule also make it clear that 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. Many financial institutions have hundreds or even thousands of locations throughout the country and could not effectively implement opt out requests if consumers were permitted to submit a request at any one of those locations at the consumer's option. To address this issue, we urge the Agencies to utilize the precedents established under the other federal statutes which permit financial institutions to specify the reasonable procedures consumers must use to exercise their rights. For example, the Final

Rule should make it clear that as part of its reasonable procedures for opting out, the financial institution may require consumers to specify their account numbers when making an opt out request. In many instances, the account number will be the most accurate and reliable identifier for distinguishing one consumer from another, particularly with respect to consumers who have common last names (e.g., Smith, Jones). Accordingly, financial institutions must be permitted to require consumers to include account numbers with their opt out request.

We commend 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.

(b)(1) How to Provide Opt Out Notice. The Proposal would require a financial institution to provide the opt out notice "in a manner so that each consumer can reasonably be expected to receive actual notice in writing or, if the consumer agrees, in electronic form." If the financial institution and the consumer orally agree to enter into a customer relationship, the Proposal states that the financial institution may provide an opt out notice within a reasonable time if the consumer "agrees."

We urge that the Agencies revise this provision consistent with our comments above. Specifically, we urge that the provision be revised to: (i) eliminate the language that notices must be delivered so that each consumer "can reasonably be expected to receive actual notice" and simply provide that the notice must be "delivered" or "provided;" (ii) eliminate any suggestion that a consumer must "agree" to delivery of disclosures in electronic form; and (iii) eliminate any requirement that a consumer who has orally entered into a customer relationship must "agree" in order to receive the opt out notice at a later time.

(b)(2) Oral Description of Opt Out Right. The Proposal states that an oral description of the opt out notice is not sufficient. We urge the Agencies to reconsider this provision. 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 may afford an opportunity to respond to questions a consumer might have and provide 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 requests disclosure in that form. We urge the Agencies to delete this provision and instead clarify that

for financial products or services in which a customer relationship is established by telephone the financial institution has the option to provide the opt out notice orally.

(b)(3) and (4) Inclusion with Initial Notice. The Proposal clarifies that a financial institution may include the opt out notice on the same form as the initial notice. However, if the financial institution provides the opt out notice at a later time than the initial notice, it must include a copy of the initial notice with the opt out notice in writing, or electronic form if the consumer "agrees." Once again, for the reasons stated above, any indication that a consumer must "agree" to electronic delivery of notices under the GLB Act should be deleted when the Final Rule is adopted.

(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. Because of the level of specificity required under the Proposal with respect to the initial disclosure, many financial institutions may be required to furnish multiple change in terms notices just for technical changes in their information practices. As a result, the change in terms requirement is likely to be particularly costly to financial institutions, and we urge the Agencies to consider providing additional flexibility in this area. Specifically, we urge the Agencies to modify this provision to provide that a change in terms notice need not be furnished to customers. The GLB Act already imposes two types of notice requirements—the initial notice which must be provided at the time of establishing a customer relationship and the annual notice which must be furnished to customers **every year**. Because customers already must receive a new notice every year, any changes in information practices that have occurred since the initial notice (or the most recent prior annual notice) can be more than adequately conveyed through the new annual notice. Thus, we request that the Agencies consider eliminating the change in terms requirement for customers.

In addition, we urge the Agencies to eliminate the requirement that a financial institution must provide consumers a new opportunity to opt out after the change in terms notice has been provided. This provision appears to establish an excessive burden on financial institutions in view of the fact that the Proposal states that a consumer already has an ongoing, continuing right to opt out at any time.

(d) Continuing Right to Opt Out. The Proposal makes it clear that a consumer may opt out at any time and that a financial institution receiving a consumer's opt out must implement the opt out "as soon as reasonably

practicable.” The Supplementary Information explains that the “disclosures [must] stop as soon as reasonably practicable” after a consumer opts out. This provision should be modified to address the practical limitations on the ability of a financial institution to implement a consumer’s opt out request after a particular information program has begun. For example, in many instances, it simply is not feasible to implement a consumer’s opt out request after a particular correspondence program has been initiated. Such programs typically involve significant lead time since the financial institution must first compile the list of recipients, draft and print the correspondence, and prepare the materials to be mailed. If a consumer opts out after the program is underway, there typically is no reasonable method for removing the consumer’s information from the materials already in progress. To address this important issue, we urge the Agencies to make it clear in the Final Rule that a consumer’s opt out should apply only to information prepared after the consumer’s opt out request has been received and recorded by the financial institution.

In addition, the Final Rule should make it clear that a financial institution is not required to honor opt out requests from any person other than the “consumer” or the “customer.” In particular, it must be made clear that financial institutions are not required to accept opt out requests in bulk from information processors.

(e) Duration of Consumer’s Opt Out. As noted in the Proposal, a consumer’s opt out is effective until revoked by the consumer in writing or in electronic form “if the consumer agrees.” We urge two modifications to this provision. First, we urge that the provision be modified to clarify that a consumer may revoke the opt out by any reasonable means specified by the financial institution, not just in writing or in electronic form. In particular, it is important that consumers be permitted to revoke the opt out by telephone. Second, the provision should be modified by deleting any suggestion that a consumer must “agree” to disclosures in electronic form.

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

(a) General Rule. The Proposal provides that the opt out requirements with regard to disclosing nonpublic personal information and providing notice of opt out do not apply when the 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 strongly urge the Agencies to reconsider the approach set forth in Section \_\_\_\_9 with respect to third parties that perform general services for a financial institution (as contrasted with joint marketing arrangements). The Proposal, as currently drafted, appears to suggest that, although the opt out provision does not apply, a financial institution must make extensive disclosures to consumers about the third parties hired by the financial institution to perform services. Such a requirement would significantly increase the length and complexity of the initial and annual notices without providing any benefit to consumers. For example, Section \_\_\_\_9 as currently drafted apparently would require a financial institution to disclose its practices of providing information to management consulting firms, data processing storage facilities, and any other entity that is providing services to the financial institution unless that disclosure also is exempt under Sections \_\_\_\_10 or \_\_\_\_11. Although these disclosures would significantly complicate the initial and annual notices, the information would not appear to benefit consumers in any way. These types of disclosures simply do not raise the privacy concerns that the GLB Act was intended to address because the information disclosures are made solely for the purpose of providing services to the financial institution that the financial institution itself could perform. The third parties who receive the information are not permitted to use it for their independent purposes.

Moreover, in the GLB Act provisions, Congress recognized that it was not appropriate to cover such disclosures. Section 502(b)(2) states that the notice and opt out obligations of Section 502 do not apply when a financial institution provides information "to a nonaffiliated third party to perform services or functions on behalf of the financial institution . . . ." Although Section 502(b)(2) sets forth other requirements, we believe that those other requirements are applicable to joint marketing arrangements only. Section 502(e) also broadly exempts from that section disclosures in connection with servicing, processing or maintaining a consumer's financial product or service. Also, Section 503(b) specifically states that the initial and annual notices apply only with respect to disclosures to nonaffiliated third parties "other than agents of the institution." We believe that, when the plain language of these provisions is read together, the GLB Act simply does not require that the Section \_\_\_\_9(a) requirements apply to any disclosures made by a financial institution to a nonaffiliated third party that is performing services on behalf of the financial institution. Accordingly, we urge that Section \_\_\_\_9 be modified to clarify that it does not apply to disclosures of information for such purposes. The notice and confidentiality provisions of

Section \_\_\_\_9 should be limited only to disclosures that are made to third parties in connection with a joint marketing relationship.

We also note that the Agencies specifically request comment on whether third parties who contract with a financial institution to provide credit and other modeling services should be permitted to use consumer information which is not personally identifiable. We urge that the Final Rule clarify that third party vendors should be permitted to use information for modeling and other purposes so long as the information is provided to the vendor in a manner which codes, encrypts or excludes the personal identities of the consumers to whom the information relates and the vendor does not match the information to the identities of particular consumers. Under such circumstances, the information simply does not give rise to any privacy concerns and, in our view, is not covered under the GLB Act because it is not "personally identifiable."

(b) Joint Marketing. As stated in the Proposal, the services provided by the third party may include marketing the financial institution's own products or services or the marketing of financial products or services offered pursuant to joint agreements between the financial institution and another financial institution.

The Agencies specifically seek comment on whether the Final Rule should require a financial institution to take steps to assure itself that the product being jointly marketed and other participants in the joint marketing agreement do not present undue risks for the financial institution. We urge the Agencies to refrain from imposing any such requirements under the Final Rule. The issues presented by the language of the GLB Act itself are complex, and the time frame for implementing them so brief, that we believe that the current rulemaking process should not be further complicated by expanding it to include issues which are not part of the GLB Act.

**§ \_\_\_\_10 Exceptions to Notice and Opt Out Requirements for Processing and Servicing Transactions**

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 the service provider/joint marketing do not apply if the financial institution discloses nonpublic personal information in a number of circumstances. As stated in the Proposal, 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 that the Agencies revise these provisions to make them consistent with the plain language of the GLB Act. Specifically, under Section 502(e) of the GLB Act, exceptions are provided for disclosures that are made "in connection with" servicing, processing or maintaining financial products or services of a consumer. This language is important because it makes it clear that disclosures can be made under these exceptions even if those disclosures are not necessarily "required" to service, process or maintain the account so long as they are made "in connection with" such activities. Accordingly, the Final Rule should accurately reflect the language of the GLB Act by including the phrase "in connection with."

It also is important that the Agencies clarify that when a consumer requests a product that involves the financial institution and another party, such as a co-branded or affinity credit card, the financial institution may furnish information to the co-branded or affinity partner in connection with the account. In such cases, the co-branded or affinity relationship is an integral part of the product itself and any restrictions on the ability of financial institutions to share information with their co-branded partners would be entirely inconsistent with the structure of these programs and how they are used by consumers. Any such restrictions also would be inconsistent with the reasonable expectations of consumers who choose these accounts. In this regard, when a consumer obtains a co-branded or affinity account, the consumer authorizes the financial institution to share information with the co-brand or affinity company. The Final Rule should be modified to recognize that fact.

**§ \_\_\_\_ .11 Other Exceptions to Notice and Opt Out Requirements**

(a) Exceptions. 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 the service provider/joint marketing do not apply to a variety of other disclosures of nonpublic personal information. These include disclosures made with the consumer's consent or direction, to protect the financial institution's records, to protect against fraud, for institutional risk control, to resolve consumer disputes or inquiries, to rating agencies, to a consumer reporting agency in accordance with the FCRA, and from a consumer report.

We applaud the Agencies for setting forth these exceptions, and we urge that they be retained in the Final Rule. The Agencies have specifically requested comment on those situations where disclosures are made with the

consent of or at the direction of the consumer, and we offer the following comments in response. First, we believe that there should be no requirement that the consumer's consent or direction be furnished in writing or any other particular form. In this regard, it is important that financial institutions have the flexibility to obtain consumer consent in any form in which the financial institution is interacting with the consumer. This means that if a financial institution is interacting with a consumer by telephone, the financial institution should be permitted to obtain the consumer's consent to applicable disclosures during the telephone call so that the consumer's wishes can be implemented as quickly as possible. Accordingly, we urge the Agencies to refrain from imposing any requirement that a consumer's consent be in writing or that it be set forth on a separate line in a relevant document or on a distinct web page. The GLB Act does not impose any such requirements, and the Agencies should not do so in the Final Rule.

In Section \_\_\_\_11(a)(3) the Agencies provide helpful clarification that the notice and opt out requirements do not apply to information that is communicated to a financial institution's "attorneys, accountants and auditors." We urge that this clarification be retained in the Final Rule with modification. Specifically, we urge that the exception be expanded to include temporary employees of the financial institution as well as management consultants and other professionals who must have access to financial institution information in order to perform the services they were hired to perform. We believe that disclosures to such parties do not raise any of the issues the GLB Act was intended to address and must be permitted in order to facilitate common business arrangements entered into by financial institutions.

(b)(2) Examples of Revocation of Consent. The Proposal states that a consumer may revoke consent to a financial institution's disclosure of nonpublic personal information by exercising the right to opt out of future disclosures of nonpublic personal information.

We urge the Agencies to modify this provision to clarify that a financial institution may establish a process through which consumers may withdraw their consent that is a separate process from the one used for opting out of disclosures. In this regard, some financial products or services may be designed in a fashion which is based on consumer consent, and there should be no requirement that the products or services continue after the consumer withdraws consent. As a result, it would be important for financial institutions to be permitted to establish separate procedures to account for and administer a consumer's revocation of consent and the general procedures for a consumer to opt out may not be appropriate in that regard. Moreover, it is important that the Final Rule make it clear that a financial institution may terminate a consumer's account in those circumstances where the financial institution has provided the

account to the consumer in reliance on the consumer's consent but the consumer has withdrawn the consent. In those circumstances, the financial institution should have the flexibility to choose whether to terminate the consumer's account or to shift the consumer to another type of account relationship, and the Final Rule should make this clear.

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

(a) Limits on a Financial Institution's Redisdisclosure and Reuse. The Proposal provides that a financial institution that receives nonpublic personal information from a nonaffiliated financial institution may not, directly or through an affiliate, disclose the information to any other person not affiliated with either financial institution unless the disclosure would have been "lawful" for the nonaffiliated financial institution to do so. Furthermore, the Proposal states that a financial institution may "use" nonpublic personal information that it receives from a nonaffiliated financial institution pursuant to an exception under Sections \_\_.9, \_\_.10 or \_\_.11 "only for the purpose of that exception."

We urge that the Agencies clarify this provision in two respects. First, we urge the Agencies to delete any suggestion that there is a "reuse" restriction. In this regard, Section 502(c) of the GLB Act specifically imposes a restriction on "redisdisclosure" of information but does not impose any restriction on the reuse of such information. Since Congress did not impose such a restriction, we urge the Agencies to refrain from doing so in the Final Rule. Of course, in view of the protective approach taken by most financial institutions with respect to such information, it is likely that financial institutions will contractually impose reuse restrictions but they are not required to do so under the GLB Act.

Second, we urge that the Agencies make it clear in the Final Rule that Section \_\_.12 does not apply to a financial institution that receives information from another financial institution about a consumer where the receiving financial institution also has a customer relationship with the consumer and has furnished the consumer the appropriate notices. In those circumstances, the receiving financial institution has a customer relationship with the consumer, and any restrictions on the information practices of that financial institution with respect to the consumer should be imposed only under the disclosures the financial institution has made to the consumer and not under Section \_\_.12.

The Agencies request comment on the extent to which a consumer's opt out with a financial institution should affect third parties to whom the financial institution has disclosed information before the consumer opted out. In our view, it is extremely important that the Final Rule clarify that a consumer's opt out should only affect disclosures that take place after the consumer has opted out. If a third

party has received information from a financial institution before the consumer opted out, any subsequent opt out by the consumer simply cannot apply to that third party. It would be entirely unworkable if a consumer's request to opt out with one financial institution were to impact other unrelated entities who would have no feasible way to know of or obtain information about that opt out. Accordingly, we urge that the Final Rule make it clear that "a consumer's request to opt out with a financial institution has no effect on any nonaffiliated third party who received information on the consumer from the financial institution before the consumer's opt out became effective."

(b) Limits on Redisclosure and Reuse By Other Persons. The Proposal states that if a financial institution provides nonpublic personal information to a nonaffiliated third party, that party may not, directly or through an affiliate, disclose the information to any other person that is not affiliated with either the financial institution or the third party unless such disclosure would have been "lawful" for the financial institution to make directly. Furthermore, the Proposal provides that a person may "use" nonpublic personal information that it receives from a nonaffiliated financial institution pursuant to an exception under Sections \_\_\_\_.9, \_\_\_\_.10 or \_\_\_\_.11 "only for the purpose of that exception."

As noted above, the GLB Act does not impose any "use" restrictions on a nonaffiliated third party that has received information from a financial institution. Accordingly, we urge the Agencies to delete the "use" restriction from the Final Rule.

(c) Other Issue. The Agencies have specifically requested comment on whether the Final Rule should require a financial institution to develop policies and procedures to ensure that a third party who has received information from the financial institution complies with the limits on redisclosure of that information. We urge the Agencies to refrain from adopting any particular requirements with respect to this issue. In particular, we request that the Agencies ensure that a financial institution is not required to proactively assess compliance of third parties, such as by audits. It simply would not be possible for a financial institution to audit the activities of every nonaffiliated third party to whom it furnished information. Congress set forth the most appropriate mechanism for addressing the information practices of nonaffiliated third parties by restricting the circumstances under which a nonaffiliated third party may furnish nonpublic personal information to others after it has received that information from a financial institution. Any issues with respect to the information practices of a nonaffiliated third party should be addressed through enforcement of this provision, and the Final Rule should not impose additional burdens on financial institutions in this regard.

**§ \_\_\_\_.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 account, deposit account, or transaction account of a consumer to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer. The Proposal provides an exception for the disclosure of such information to a consumer reporting agency.

We urge the Agencies to adopt a number of modifications to this provision. Specifically, we urge the Agencies to make it clear that the restrictions in Section \_\_\_\_.13 apply only to credit card accounts, deposit accounts, and transaction accounts and not to other types of accounts. This could be accomplished by including an explanatory statement to that effect in the Supplementary Information.

In addition, we urge that the Agencies clarify that Section \_\_\_\_.13 does not apply when a financial institution provides account numbers to a service provider such as those routinely used to print, mail or otherwise process monthly account statements. It is not unusual for the envelopes containing the monthly billing statements to also include marketing materials, and it is clear that Congress did not intend to cover such activities under this provision. Accordingly, we urge that the Agencies make it clear in the Final Rule that Section \_\_\_\_.13 does not apply to such activities.

Moreover, we urge the Agencies to make it clear that furnishing account numbers to those who are acting on behalf of the financial institution to market the financial institution's own products or services is not covered. Such third parties often provide services more efficiently than could be achieved if the financial institution performed the same activity in-house. In addition, we urge that the Agencies make it clear that Section \_\_\_\_.13 does not preclude a financial institution from furnishing to a third party where the account number is encrypted. We believe that the plain language of the GLB Act as well as its legislative history support this clarification, and we urge that the Agencies include it in the Final Rule.

The Final Rule also should make it clear that a financial institution may disclose to a third party a reference number used by the financial institution to identify a particular customer. The reference number could consist of, for example, a partial or truncated account number, because such reference numbers cannot be used to initiate a transaction on the underlying account. In short, such a reference number is not "an account number or similar form of access number or

access code” and, therefore, is not subject to the prohibition set forth in the GLB Act.

Finally, the Final Rule must make it clear that the GLB Act does not prohibit a financial institution from disclosing a consumer’s account number with the consumer’s consent. Specifically, the Final Rule should be revised to state that a financial institution may provide an account number to a nonaffiliated third party for marketing purposes “if the consumer has consented.”

**§ \_\_\_\_ .16 Effective Date and Transition Rule**

The Proposal is to be effective on November 13, 2000. Within 30 days thereafter, financial institutions must provide initial notices to consumers who were customers on the effective date. In our view, the November 13 effective date does not provide adequate time to efficiently and effectively implement the Final Rule in a carefully considered manner. Moreover, forcing compliance within 30 days of November 13 will overburden the network of service providers who will be called upon to assist financial institutions in delivering the required notices to their customers. These service providers already are stretched to their limits during this time of year because of holiday season demands.

The provisions embodied in the GLB Act that will be implemented through the Final Rule are important consumer protections, and we urge the Agencies to allow sufficient time for financial institutions to ensure that they are implemented effectively. Accordingly, we urge the Agencies to provide that the Final Rule will not be effective until 18 months after the Final Rule is published. We believe that such an effective date would allow a sufficient period of time for all those financial institutions affected by the Final Rule to implement it effectively. In addition, it would ensure that the initial flood of privacy notices need not be furnished during the busiest time of the year and during the same time frame in each successive year.

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March 31, 2000  
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Once again, MasterCard commends the Agencies for their efforts in drafting the Proposal, and we greatly appreciate the opportunity to provide our comments. If you have any questions concerning this comment letter, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Michael F. McEneney at Sidley & Austin, at (202) 736-8368, our counsel in connection with this matter.

Sincerely yours,

A handwritten signature in black ink that reads "Noah J. Hanft". The signature is written in a cursive style with a large, stylized initial "N".

Noah J. Hanft  
Senior Vice President  
U.S. Region Counsel &  
Assistant General Counsel

cc: Michael F. McEneney