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March 30, 2000

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

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

Dear Secretary:

This letter is submitted to the Federal Trade Commission (the "FTC") on behalf of Citigroup in response to the request for comment by the FTC on its Proposed Regulations concerning the Privacy of Consumer Financial Information (the "Proposed Regulations") issued pursuant to Title V of the Gramm-Leach-Bliley Act (the "GLB Act"). 65 Fed. Reg. 11174 (2000). This letter does not set forth comments on the specific sections of the Proposed Regulations that Citigroup believes need revision; instead, we are annexing our letter dated today to the Office of the Comptroller of the Currrency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision (collectively, the Banking Agencies") commenting on their proposed privacy regulations. We request that the FTC consider Citigroup's comments to the Banking Agencies as applying to its Proposed Regulations with equal force. Nevertheless, we also take this opportunity to express our views to the FTC with respect to the scope of applicability that the Proposed Regulations should have.

Title V of the GLB Act ("Title V") establishes broad new privacy protections for consumers and their financial information. In fact, Title V represents the strongest consumer privacy protections ever enacted. Citigroup firmly supports each of the objectives of Title V and the need for appropriate implementing regulations to ensure that its important objectives are achieved.

Consistent with the purposes of Title V, Citigroup urges the FTC to define financial institution to include not only an enterprise that engages in activities that are financial in nature as described in Section 4(k) of the GLB Act, but also in activities that are incidental to such financial activities. This would be consistent with the approach taken by the Banking Agencies. We also suggest that the FTC give more examples of entities that would be subject to FTC jurisdiction as financial institutions by virtue of their being engaged, in part, in financial activities. In addition, we urge the FTC to define "significantly engaged" in Section 313.3(j)(2) in a way that focuses on the integral nature of the financial activity to the conduct of the overall business of the enterprise and does not rely on a revenue or other similar test which the financial activity represents as measured against the total activities of the enterprise. Citigroup strongly believes that an individual who secures financial products or services should have his or her privacy rights and nonpublic personal information protected by Title V and the regulations issued thereunder regardless of whether the individual is a customer of a functionally regulated enterprise or one that is subject to FTC jurisdiction.

Consistent and comparable privacy regulations among the agencies charged with administering Title V benefit financial institutions and consumers alike. This comparability is fundamental to maintaining and promoting competitive balance among providers of financial services and products regardless of their institutional differences and privacy regulator. It is also essential to protecting the privacy rights of consumers irrespective of the financial institution to which they provide nonpublic personal information.

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We appreciate this opportunity to comment on the Proposed Regulations. If you have any questions or if you would like us to provide additional information, please do not hesitate to contact me at (212) 559-2938 or Patricia P. Santonocito of my office at (212) 559-2488.

Very truly yours,

Carl Howard

Carl V. Howard

Attachment

cc: Office of the Comptroller of the Currency
Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
Office of Thrift Supervision
Securities and Exchange Commission

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VIA ELECTRONIC MAIL AND UPS NEXT DAY DELIVERY

Communications Division
Office of the Comptroller of the Currency
250 E Street, SW
Washington, D.C. 20219
Attention: Docket No. 00-05

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments/OES (RIN 3064-AC32)
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1058

Manager
Dissemination Branch
Information Management and Services Division
Office of Thrift Supervision
1700 G Street, NW 20552
Attention: Docket No. 2000-13

Re: Citigroup's Comments on the Proposed Regulations Concerning the Privacy of Consumer Financial Information (OCC Docket No. 00-05; Federal Reserve Board Docket No. R-1058; FDIC RIN 3064-AC32; OTS Docket No. 2000-13).

Dear Sirs and Madams:

This letter is submitted to the Office of the Comptroller of the Currency (the "OCC"), the Board of Governors of the Federal Reserve System (the "Board"), the Federal Deposit Insurance Corporation and the Office of Thrift Supervision (collectively, the "Agencies") on behalf of Citigroup in response to the Agencies' request for comment on their Proposed Regulations concerning the Privacy of Consumer Financial Information (the "Proposed Regulations") issued pursuant to Title V of the Gramm-Leach-Bliley Financial Modernization Act (the "GLB Act"). 65

Fed. Reg. 8770 (2000).[1] We are also filing comment letters with the Securities and Exchange Commission and the Federal Trade Commission ("FTC") on their proposed versions of regulations implementing Title V.

Title V of the GLB Act ("Title V") establishes broad new privacy protections for consumers and their financial information. In fact, Title V represents the strongest consumer privacy protections ever enacted. In particular, Title V requires financial institutions to clearly disclose to consumers, at the inception of the relationship and annually thereafter, the financial institution's policies for collecting and sharing nonpublic financial information of the consumer. Moreover, financial institutions must give consumers the right to opt out of disclosure of their financial information to nonaffiliated third parties, with limited exceptions.

In addition, disclosure of consumer account numbers and other account access information to third party marketers is forbidden. A third party also may not receive consumer financial information from a financial institution unless it agrees to be bound by the same limits on using that information that apply to the financial institution. Finally, financial institutions must abide by new regulatory standards to protect the security and confidentiality of their consumers' financial information. Citigroup firmly supports each of these objectives of Title V and the need for appropriate implementing regulations to insure that these important objectives are achieved.

Citigroup acknowledges and appreciates the amount of time and effort that the Agencies have put into the Proposed Regulations and recognizes that through the Proposed Regulations the Agencies have attempted to implement Title V in a way that

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[1] Although we intend our comments to apply with equal force to each of the Agencies' versions of the Proposed Regulations, when we either quote the Proposed Regulations or recommend new regulatory language we have used the OCC's term "bank," rather than the other Agencies' term "you."

balances, on the one hand, the public's privacy concerns and expectations with, on the other hand, the need for financial institutions to be able to operate efficiently and in a safe and sound manner, as well as with the benefits that consumers can receive from certain uses of their information. We also appreciate that the Agencies issued the Proposed Regulations promptly and, thereby, offered financial organizations, like ourselves, ample time to review and comment on the Proposed Regulations through this rulemaking.

We generally support the Proposed Regulations. As detailed below, however, there are areas in which we believe the Proposed Regulations could be improved or clarified. In Section I, we offer our detailed comments on selected sections of the Proposed Regulations. In Section II, we recommend a modification to the Board's Regulation E that would make Regulation E more consistent with the Proposed Regulations.

I. **Detailed Comments.**

A. **Section ___.3—Definitions.**

1. **Section ___.3(b)-Definition of "Clear and Conspicuous."**

The Proposed Regulations state that a notice is "clear and conspicuous" when it is "reasonably understandable and designed to call attention to the nature and significance of the information contained in the notice." The Proposed Regulations supplement this definition of "clear and conspicuous" with several detailed examples.

Similar to the Proposed Regulations, the Federal Reserve's Regulation Z (which implements the Truth-in-Lending Act) requires that disclosures made in connection with open-end credit must be given "clearly and conspicuously." 12 C.F.R. § 226.5(a)(1). However, Regulation Z does not contain as detailed a definition of the term "clear and conspicuous" as the Proposed Regulations. Although Regulation Z does provide that some terms must be more conspicuous than others, the general definition of the term "clear and conspicuous" is provided by the following Official Staff Commentary:

> "The 'clear and conspicuous' standard requires that disclosures be in a reasonably understandable form. It 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 . . ."

Regulation Z Commentary § 226.5, Paragraph 5(a)(1).

The Regulation Z standard has been a workable standard for many years, is familiar to industry members and has served consumers well. The standard in the Proposed Regulation is less flexible than Regulation Z and has the potential to stifle market creativity. We are also concerned that the added requirements under the Proposed Regulations may be used by courts to narrowly define "clear and conspicuous" for purposes of Regulation Z as well as for purposes of the Agencies' privacy regulations.

We recommend that the Agencies amend the definition of "clear and conspicuous" in Section ___.3(b) of the Proposed Regulations to track the Regulation Z Commentary quoted above. Consistent with this recommendation, we also recommend that the Agencies (a) delete the phrase, "and designed to call attention to the nature and significance of the information contained in the notice" from Section ___.3(b)(1) and (b) either delete the examples listed in Section ___.3(b)(2) or modify them to more closely follow the more workable Regulation Z standard described above.

If the Agencies nevertheless determine to retain the proposed language (and to not conform the examples to the Regulation Z standards), then, consistent with the objective of the Agencies as expressed in the rule of construction of Section ___.2 to create safe harbors through the examples provided in the

Proposed Regulations, we have six recommendations to ensure that the safe harbors are workable:

First, Section ___.3(b)(2)(i)(E) should be changed to read: "Avoids inappropriate use of complex legal and technical business terminology." We can easily foresee situations where the notices called for under the Proposed Regulations will require the use of some legal or technical business language.

Second, Section ___.3(b)(2)(i)(F) should be deleted as vague. Almost any written notice may be subject to differing interpretations. Because compliance with all six parts of the example contained in Section ___.3(b)(2)(i) is necessary to conform to the example, a single "difference of interpretation" could prevent compliance with the example.

Third, Section ___.3(b)(2)(ii)(C) should be deleted. Whether a margin is "wide" and whether line spacing is "ample" are subject to differing interpretations and are unnecessary invitations to frivolous and possibly expensive litigation under, for example, state unfair and deceptive practices laws. If subsection (A) and (B) of this section are satisfied, then complying with subsection (C) will not call more attention to a required notice. If the Agencies are unwilling to delete subsection (C), then, at the least, we believe that deleting the words "wide" and "ample" and substituting the term "adequate" in their places would be a more reasonable requirement.

Fourth, Section ___.3(b)(2)(iii)(A) should be changed to read: "Distinctive type, such as boldface or italics;". If the Agencies do not replace the term "larger" with "distinctive," financial institutions that choose to put more than one "clear and conspicuous" disclosure in the same document may find themselves in the predicament of having to have each disclosure be in "larger" type than the other. Our recommended language also clarifies that boldface and italics are examples of distinctive type. We believe these changes further the GLB Act's goal of making disclosures sufficiently prominent while reducing burden on financial institutions by making the regulations more flexible.

Fifth, Section ___.3(b)(2)(iii)(C) should be revised to read: "Shading, sidebars or other graphic devices to highlight the notice, whenever possible."

Sixth, a new Alternative (D) should be added to Section ___.3 (b)(2)(iii) to permit the usage of "distinctive" headings if combined with a table of contents. Specifically, we recommend the Agencies move the word "or" from after Alternative (B) to after Alternative (C) and add: "(D) Distinctive Headings together with, to the extent appropriate, a table of contents."

2. Section ___.3(c) Definition of "Collect."

By referring to information that is "retrievable" the definition of the term "collect" could be regarded as encompassing information that would not normally be retrieved or could be retrieved only at great cost, such as notes kept by individual employees regarding particular customers. To avoid inadvertent violations of the notice and opt out requirements regarding information that a financial institution "collects," such information should be excluded from this definition. We therefore recommend that the Agencies limit this definition to the records of the financial institution that are centrally maintained and therefore practicably retrievable.

3. Section ___.3(e)-Definition of "Consumer."

We have five comments on the definition of "consumer":

First, the phrase "and that individual's legal representative" in Section ___.3(e)(1) is confusing. Although we recognize that the GLB Act uses the word "and," we believe Congress's intention was to make it possible for a consumer to have a legal representative stand in the consumer's shoes. Assuming the Agencies agree that this is an appropriate interpretation of the statute, then the word "and" in the Proposed Regulations should be replaced with the word "or."

Second, we urge that the Agencies clarify that the term "consumer" means only an individual who obtains financial services or products on a retail basis and that the term does not include high net worth individuals who are customers of the private bank division (or similar division catering to high net worth customers) of the financial institution. Private banking activities involve personalized financial services for individuals who demand the utmost privacy and confidentiality. Such customers have strong bargaining power and negotiate with the financial institutions the terms and conditions of the products and services they obtain. In fact, Citigroup, like most private banking institutions, has a policy of not sharing information about its high net worth customers with third parties, except for reasons covered by the exceptions in the Proposed Regulations or as otherwise authorized by the customer. This is critical to securing the trust of such clients and is inherent in the nature of the private banking relationship. Moreover, sending privacy and opt out notices as contemplated by the Proposed Regulations to high net worth individuals will prove confusing and vexing to them since such notices will by their nature imply an ability on the financial institution's part to share information with third parties that is inconsistent with the customer's expectations.

Moreover, excluding high net worth individuals from the definition of consumer would make the Proposed Regulations more consistent with the treatment of these individuals in other laws and regulations, such as: (a) the securities laws that distinguish between individuals who transact in the retail market and need greater protection and those who, because of their high net worth and sophistication, are in a position to better protect themselves and (b) Regulation Z, which exempts from most of its provisions credit over $25,000 not secured by real estate or a dwelling for similar reasons.

Accordingly, we recommend that in Section ___.3(e)(1) the phrase ", other than a high net worth individual," be added in the first line after "individual" and before "who."

Third, we recommend that the following sentence be added to example (vi) in Section ___.3(e)(2):

> "The bank and the financial institution may, however, agree by contract that the bank will treat the individual as its consumer."

Fourth, we believe the Agencies intend that the definition of "consumer" would cover a former customer who no longer has a "continuing relationship" with the financial institution. Because this could be a significant population for many financial institutions, we recommend that the Agencies include an example that addresses this class of consumers simply to add clarity to the Proposed Regulations. Our recommended additional examples are as follows:

> "(vii) An individual who provided nonpublic personal information to a bank in connection with obtaining a loan is a consumer after the loan has been paid off.
>
> (viii) An individual who provided nonpublic personal information to a bank in connection with obtaining a financial, investment or economic advisory service is a consumer after the advisory relationship ends."

Fifth, we recommend that two additional examples be added that read as follows:

> "(ix) When a bank is acting as a fiduciary or co-fiduciary for a personal fiduciary account, an individual is a consumer of the bank if the individual has an interest in the fiduciary account and is customarily entitled to periodic statements of the fiduciary account.
>
> (x) An individual is not a consumer of a bank merely because the bank provides

> services, including trustee services, for a product or program on behalf of a governmental entity, an employer or other business entity (such as a 401(k) or other retirement plan, an electronic benefit transfer program or a corporate credit card program) or the bank acts as a third party administrator for such a product or program."

New example (ix) would clarify the application of the regulations in the personal trust or fiduciary account context. The example uses the term "fiduciary account" rather than the term "trust" because bank trust departments typically act in capacities other than as trustee of inter vivos and testamentary trusts. For example, bank trust departments may provide services to estates and conservatorships. In addition, the example would provide a rule which could be easily followed and understood by financial institutions and their customers by stating that the consumer for purposes of the regulations is a person who has an interest in the fiduciary account and receives statements. We have included the words "who has an interest in the account" because a financial institution may send statements concerning a fiduciary account to persons, such as accountants, that should not be treated as "consumers" merely because they receive such statements.

New example (x) would clarify that a financial institution that contracts with a governmental body, employer or other sponsoring business entity to provide (or administer) services to a retirement, electronic benefit transfer plan, corporate credit card plan or other plan sponsored by a business entity would not be required to treat participants in those plans as if they were consumers of the financial institution for purposes of these regulations. There is generally no contractual relationship between the financial institution and the plan participant in these situations, and treating plan participants as consumers in these situations would create an undue burden for financial institutions.

4. Section ___.3(i)-Definition: of "Customer Relationship."

Section 503 of the GLB Act makes it plain that it is only consumers who have established a "customer relationship" with a financial institution who must receive the initial and annual privacy notice even if the financial institution does not intend to disclose personal financial information to nonaffiliated third parties. In furtherance of this distinction, the Agencies provide in Section ___.3(i)(2)(ii)(A) that a consumer does not have a customer relationship if the consumer obtains services only in "isolated transactions" such as ATM cash withdrawals or the purchase of a cashier's check. In the Preamble for the Proposed Regulations, the Agencies elaborate on this point by stating that even repeated isolated transactions would not necessarily transform a consumer into a customer.

Citigroup regards this distinction as a critical component of the Proposed Regulations because it will avert a major regulatory burden that would have no corresponding benefits for consumers. Requiring the provision of initial and annual notices to consumers engaging in such isolated transactions would be very expensive. For example, modifying thousands of ATMs across the country to provide initial notices would be a major undertaking. Identifying and keeping track of the individuals engaging in these isolated transactions in order to mail annual notices to them would require an equally large compliance and clerical effort. Consumers would be inundated with electronic and/or paper disclosures in which they would have no interest.

As discussed above, the distinction that the Agencies create for isolated transactions is also fully consistent with the provisions of Sections 502 and 503 of the GLB Act. Citigroup therefore recommends that the Agencies retain this distinction.

In addition, we recommend that the example contained in Section ___.3(i)(2)(ii)(C) be amended to refer (a) to transactions in the plural--"isolated transactions" and (b) stored value cards. As amended, the example would read: "(C) The bank sells the consumer airline tickets, travel insurance, traveler's checks or stored value cards in isolated transactions."

We also recommend that the Preamble to Section ___.3(i) cross-reference Section ___.4 regarding when a customer relationship begins.

5. Section ___.3(m)-Definition of "Nonaffiliated Third Party."

The definition of nonaffiliated third party in Section ___.3(m) creates an exception from that definition for a financial institution affiliate, a joint employee of the financial institution and a nonaffiliated third party. By so doing, the Proposed Regulations create uncertainty regarding the status of financial institution employees, financial institution officers and directors, temporary employees of the financial institution, and other personnel that conduct the financial institution's affairs, such as its agents and independent contractors. When agents and independent contractors perform functions for the financial institution that the financial institution could perform directly itself, there is no reason to distinguish them from the financial institution's employees. Accordingly, the exceptions from the definition of "nonaffiliated third party" should be amended by rewriting clause (ii) and adding a new clause (iii) to read as follows:

> "(ii) A person acting jointly for a bank as an employee, agent or independent contractor of the bank and any company that is not the bank's affiliate (but nonaffiliated third party includes the other company that jointly employs the person).
>
> (iii) A bank officer, director or employee, a temporary bank employee, and an agent or independent contractor of the bank."

6. Sections ___.3(n), (o), and (p)-Definitions of "Nonpublic Personal Information," "Personally Identifiable Financial Information," and "Publicly Available Information."

a. Alternative A Versus Alternative B.

The Agencies request comment on two alternative definitions of nonpublic personal information.[2] Alternative A would treat information as public only if it were actually obtained from a public source, whereas Alternative B would make no such distinction. Under Alternative B if information is in fact publicly available, it does not matter where the financial institution actually gets the data.

B is clearly the better alternative, because it does not obligate each institution to copy information from public records. Such a requirement would place an undue burden on state and country governments to provide access. Requiring the gathering of data from a public source would also result in a significant number of errors and omissions which are clearly not in the customer's interest. By analogy, definitions of fair information practices endorsed by the FTC and the European Union place a strong emphasis on the accuracy and completeness of information in a privacy program.

b. Use of the Term "Financial."

i. In General.

Although Alternative B is clearly better than Alternative A, both alternatives are flawed because of the Agencies' misinterpretation of the term "financial" in Title V of the GLB Act. This term is a critical component in the definition of nonpublic personal information. The Proposed Regulations would give an extremely broad meaning to that term, and thereby cause

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[2] The Board's Proposed Regulation sets out Alternative B only.

it to cover essentially any nonpublic information about a consumer possessed by a financial institution.

The privacy protections in Title V by their terms extend only to consumers' financial information. Privacy protection for consumers' nonfinancial information is beyond the scope of Title V. Therefore, the Agencies' implementing regulations should focus exclusively on protection of financial information. This is especially the case because the Agencies' privacy regulations apply specifically to financial institutions and not to other industries that provide consumer products and services. Although privacy protection of consumers' nonfinancial information is arguably as important as protection of financial information, the need to protect consumer nonfinancial information is not any greater for the financial services industry than for other industries that provide consumer products and services.

Section 509(4)(A) of the GLB Act states that:

> "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."

Section 509(4)(B) states that nonpublic personal information does not include "publicly available information."

Section 509(4)(C) states that nonpublic personal information does include a "list" or "grouping" of consumers, but only if that list or grouping is "derived" by using nonpublic personal information.

Several things are readily apparent from the plain words of Section 509(4). First, the core component of the definition is the statement that nonpublic personal information "means personally identifiable financial information." Nothing else in Section 509(4) alters the core requirement that to be "nonpublic personal information," information must be <u>both</u> personally identifiable and financial.

Thus, the remainder of Section 509(4)(A), appearing in subparagraphs (i)-(iii), simply states that to be covered, information must (in addition to being both personally identifiable and financial) also be obtained by a financial institution from a consumer in one of three specified ways. Similarly, Section 509(4)(B) only serves to narrow the definition of nonpublic personal information further by excluding publicly available information. And, although Section 509(4)(C) might be seen as expanding the coverage of the definition of nonpublic personal information by referring to "lists" of consumers, this section says explicitly that a list is only covered if it is derived from nonpublic personal information. Because nonpublic personal information "means personally identifiable financial information," only a list containing such financial information is covered.

The Proposed Regulations, in defining the term "nonpublic personal information" in Section ___.3(n), appropriately state that such information is "personally identifiable financial information" and a list derived from such information. However, in Section ___.3(o), the Proposed Regulations abruptly abandon the words of the statute and announce that "personally identifiable financial information" means "<u>any</u> information" (emphasis supplied) that is provided to or obtained by a bank in connection with provision of a "financial product or service" to a consumer.

By so doing, the Agencies come close to treating the words "personally identifiable" and "financial" as if they had no meaning. It is, of course, a basic principle of statutory construction that words in a statute should not normally be construed as surplusage. The Agencies appear to address this issue in two ways.

First, with regard to "personally identifiable" information, the language in the Preamble suggests at one point that despite the words of the Proposed Regulations, information must nevertheless be "personally identifiable" in order to be nonpublic personal information. At another point in the Preamble, however, the Agencies also ask whether "nonpublic personal information" would cover information about a consumer that "contains no indicators of consumers' identity," which seems highly inconsistent with any normal meaning of the term "personally identifiable." The Agencies should eliminate any confusion on this point by stating unequivocally that the term "personally identifiable" information has its common meaning--information that may be associated with a particular person.

Second, with regard to the requirement that "nonpublic personal information" must also be "financial," the Agencies apparently seek to provide meaning for this term by stating in both the Proposed Regulations and the Preamble that information is financial if it is obtained by a financial institution "in connection with providing a financial product or service" to a consumer. In other words, the Agencies seek to define financial information not on the basis of its content, but rather on the basis of the context in which it is provided.

This construction of the term "financial" is flawed on several grounds. First, every word that the Agencies use to define the term "financial" is already either explicitly or implicitly contained in Section 509(4)(A)(i)-(iii) of the statute, which contains requirements for the definition of nonpublic personal information that are <u>separate</u> from the core requirement that such information be "personally identifiable financial information." Thus, subparagraphs (i)-(iii) of the statute already state that another element of the definition of nonpublic personal information is the requirement that such information must be: (i) "provided by a consumer to a financial institution," (ii) "obtained by the financial institution," or (iii) "resulting from any transaction... or service" for a consumer. And it is self-evident that the "transactions or services" referred to in subparagraphs (i)-(iii) of the statute would involve financial products or services.

The Agencies' attempt to construe the term "financial" by focusing on the context in which information is provided rather than its content therefore appears to be precluded by the fact that Congress has already addressed the context in which information is provided as a separate component of the definition of nonpublic personal information. Moreover, a definition based on the context in which information is provided, rather than one based on the content of information, is inconsistent with the common meaning of the term financial. Few people, for example, would regard their name or address as financial information simply because they had placed it on a loan application. A name on a loan application may be used for a financial purpose, but it is not itself financial information, and financial information is the term that Congress specified.

This is made quite clear by a colloquy that occurred in the Senate during the debate leading up to passage of the GLB Act. In that discussion, Senator Gramm, one of the bill's managers, agreed with Senator Allard that the statutory term "nonpublic personal information" is information that "describes an individual's financial condition."[3]

The definition of the term "financial" chosen by the Agencies is so far removed from the definition suggested by this colloquy that, under the Proposed Regulations, all information about

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[3] 145 Cong. Rec. S. 13,902 (1999). More fully, Senators Gramm and Allard agreed that "nonpublic personal information" is information that "describes an individual's financial condition obtained from one of the three sources set forth in the definition." Consistent with the text above, the Gramm-Allard colloquy therefore differentiates financial information itself from the three sources for such information set out in subparagraphs (i)-(iii) of Section 509(4)(A).

consumers possessed by financial institutions will be financial information. In other words, the definition proposed by the Agencies is completely consistent with a reading of the statute that simply deletes the word "financial" from Section 509(4).

Finally, the construction of financial information selected by the Agencies is so broad that it will have unanticipated and inappropriate consequences for both consumers and financial institutions. For example, as drafted, the Proposed Regulations would appear to prevent a financial institution from furnishing a customer list to a third party vendor that markets the bank's products in order to eliminate existing customers from prospective mailings and telemarketing programs. It would also prevent, for customers who opt out, the common and widely-accepted practice of providing a "bank reference" confirming that an individual is a customer in good standing.

We recommend that the Agencies amend Section ___.3(o)(1) to adopt a more common sense meaning of the term "financial" in which the mere fact that a person is a customer of a financial institution would be deemed no more "financial" than the fact that they are a customer of any other retail establishment. An appropriate definition of the term "financial information," and one that would be highly consistent with the rest of the GLB Act, would be a definition that focused on information related to a consumer's qualification for, or ability to obtain, any of the products that are deemed financial in nature for purposes of Title I of the Act. Such a definition would also be highly consistent with the reference to a consumers' "financial condition" used in the Gramm-Allard colloquy discussed above.

To implement the preceding recommendations with respect to whether information is "financial" and whether it is "personally identifiable," we suggest the deletion of Section ___.3(o)(1) of Alternative B and its replacement with the following:

> "Personally identifiable financial information means information that relates to a consumer's qualification for, ability to obtain, or transactions using any of the

> products or services that are deemed to be financial in nature for purposes of Section 4(k) of the Bank Holding Company Act and that can be linked to a particular consumer."

In addition to modifying the Proposed Regulations to reflect the preceding paragraph, several other changes to Section ___.3(o) would be needed. Section ___.3(o)(2)(i)(C) should be modified to delete the entire reference to "[t]he fact that an individual is or has been one of the bank's customers" and should read instead, "[a]ny list that contains personally identifiable financial information."

Section __.3(o)(2)(ii) should be modified to say that "[p]ersonally identifiable financial information does not include a list of names, addresses and social security numbers of customers of a financial institution." Similarly, Section ___.3(o)(2)(i)(D) should be deleted because it is an example based solely on the fact that a person has been a bank's consumer. In addition, a clause should be added to Section ___.3(o)(2)(i)(E) that reads "except as otherwise authorized by Section ___.3(o)(2)(ii)."

Section ___.3(n)(2) should be amended to state that nonpublic personal information does not include "[a]ny list that has been rendered anonymous by removing information that would allow the information to be traced to a particular individual."

Similarly, Section ___.3(o)(2)(ii) should be amended to make clear that information that contains no indicators of a consumer's identity is not personally identifiable financial information. Thus, Section ___.3(o)(2)(ii) should be amended to state:

> "(ii) Personally identifiable financial information does not include:
>
> (A) A list consisting only of the names, addresses, telephone

numbers and social security numbers of customers of a financial institution; and

(B) Any listing that has been rendered anonymous so that the information cannot be traced back to any individual."

c. Information Available Through Websites.

The Proposed Regulations should also be modified to clarify that information available through websites should be considered to be public information unless it is truly restricted. For example, many websites allow access to the information on a site to any individual that registers with the site. Because any individual can register, we believe the Agencies should treat the information available on such sites as public information.

As part of the registration process, users may be assigned a password that is used to verify that the individual accessing the website is a registered user. Consistent with our position that a mere registration requirement should not cause the information on a website to be nonpublic information, we also believe that the mere use of a password in this context should also not cause information available on the site to be nonpublic information. Specifically, we recommended that Section ___.3(p)(2)(ii) be amended so that the last clause reads "...or an Internet site that is available to the general public and for which access is not restricted other than by a registration requirement."

B. Sections ___.4, ___.5 and ___.6—Initial and Annual Notices.

1. Section ___.4-Initial Notice to Consumers.

a. Sections ___.4(a)(1) and ___.4(a)(2)-When Initial Notice is Required.

We recommend that the words "prior to the time" in Sections ___.4(a)(1) and ___.4(a)(2) be replaced with the words "no later than at the time." Our proposed change would make the regulation closer to the express language in the statute (which uses the words "at the time"). It would also make the regulation less burdensome on financial institutions by making it clearer that financial institutions could give the notice either "prior to the time" or "at the time" that the financial institution establishes the customer relationship.

b. Section ___.4(c)-When a Financial Institution Establishes a Customer Relationship.

We have four comments on the examples in Section ___.4(c)(2):

First, we approve of example (i) but only if the Agencies retain the Preamble language that clarifies that a consumer "opens a credit card account when he or she makes the first purchase, receives the first advance, or becomes obligated for any fee or charges under the account other than an application fee or refundable membership fee."

Second, the words "for a fee" should be added to example (iv) because the provision of a free service should not create a customer relationship. This change also makes example (iv) more consistent with example (iii) which already contains the words "for a fee."

Third, we believe that the references to insurance products should be removed from example (ii) and in its place the Agencies should add two other examples, one of which addresses when a financial institution acts as an insurance agent and one of which addresses when the financial institution acts as an insurance principal. When a financial institution acts as an insurance agent, the customer relationship should be regarded as established when the consumer delivers a completed insurance application to the financial institution. When a financial institution acts as the insurer, the customer relationship should be regarded as established when the consumer becomes an insured.

Fourth, we believe that the Agencies should add an example that clarifies that a bank establishes a customer relationship in the context of a fiduciary account only when all conditions necessary for the bank to act as fiduciary for that account have been satisfied. (See Section I.A.3 above for a discussion of why we use the terms "fiduciary" and "fiduciary account," rather than "trustee" and "trust" in proposed example (vii) below.) The following text would incorporate our proposed new examples both with respect to insurance and with respect to fiduciary accounts (and amend example (iv) as described above):

"(2) Examples. The bank establishes a customer relationship when the consumer:

(i) Opens a credit card account with the bank;

(ii) Executes the contract to open a deposit account with the bank or obtains credit from the bank;

(iii) Agrees to obtain financial, economic or investment advisory services from the bank for a fee;

(iv) Becomes the bank's client for the purpose of the bank providing credit counseling or tax preparation services for a fee;

(v) Receives insurance coverage from the bank when the bank is acting as an insurer;

(vi) Delivers a completed insurance application to the bank when the bank is acting solely as agent, rather than as insurer;

(vii) Obtains an interest in a personal fiduciary account for which the bank will act as fiduciary and all conditions necessary for the bank to act as fiduciary have been satisfied, including but not limited to written acceptance by the bank or, where applicable, issuance of a court order appointing the bank as fiduciary."

c. Sections ___.4(d)(2), ___8.(b)(1) and ___.8(b)(3)—Student Loan Issues.

The manner in which federally-insured student loans are made in the United States presents a number of unique problems under the Proposed Regulations. Sections ___.4(d)(2), ___.8(b)(1), and ___.8(b)(3) should be amended to allow subsequent delivery of the initial and opt out notices for student loans. Under student lending programs, such as the Federal Family Education Loan Program, loans can be made without face-to-face contact, on Office of Management and Budget approved common forms and with lenders often chosen by the student-borrower from a list maintained by the school the borrower is attending. A customer relationship with the applicant and actual loan disbursement may occur before the lender chosen could physically deliver its initial notice. The regulations should therefore also recognize that in such situations an opt out notice may be delivered subsequently and still conform to the requirements in the regulation. The Proposed Regulations at Section ___.8(b)(1) only allow such delayed delivery of an initial notice if the "bank and consumer orally agree to enter into a customer relationship" which fails to account for common student lending situations or other situations where no such agreement is possible because there is no contact between the borrower and the lender. We recommend the addition of a new subsection to __.4(d)(2) and a change to __.8(b)(3)as follows:

> __.4(d)(2)(iii) (new):
>
> "(iii) the bank and customer establish a customer relationship under a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S. C. 1070 et seq.) or similar federally insured student loan program."
>
> ___.8(d)(3) (revised):
>
> "(3) Same form as initial notice permitted. A bank may provide the opt out notice together with or on the same written or electronic form as the initial notice the bank provides in accordance with Section ___.4, including situations where the bank is allowed to delay the delivery of the initial notice pursuant to Section ___.4(d)(2)."

d. Section ___.4(d)(2)-Insurance Agents and Third Parties.

Section ___.4(d)(2) should be amended to include situations where third parties may create or assist in creating a customer relationship on behalf of a financial institution, but the financial institution does not have sufficient contact with the consumer to ensure delivery of the initial notice. A typical situation would be a third party insurance agent binding the financial institution to provide insurance coverage. Alternatively, a credit card issuer often has a relationship with a third party such as a merchant that allow the third party to assist a consumer to open a credit card account from the point of sale and to use the account immediately to purchase goods. We recommend the addition of a new subsection to ___.4(d)(2) as follows:

"(iv) the customer relationship is created through the actions of or with the assistance of a third party and the financial institution may be obligated to provide a product or service upon receipt of the consumer's nonpublic personal financial information."

(We have labeled our proposed language as example (iv) to reflect the fact that we proposed a new example (iii) in the previous section discussing student loans.)

e. Section ___.4(d)(5) (Preamble) - Electronic Delivery.

The Preamble to Section ___.4(d)(5)(i)(C) states that:

> ". . . it would not be sufficient to provide the initial notice only on a Web page, unless the consumer is required to access that page to obtain the product or service in question. Electronic delivery generally should be in the form of electronic mail so as to ensure that a consumer actually receives the notice. In those circumstances where a consumer is in the process of conducting a transaction over the Internet, electronic delivery also may include posting the notice on a Web page as described above." (emphasis added)

We find this language confusing and overly prohibitive in a number of respects. First, for transactions conducted over the Internet, it should be acceptable for a financial institution to display a privacy icon which the consumer would click to view. Although the privacy notice would not automatically appear unless the icon were clicked, the consumer would be required to acknowledge receipt of the notice before proceeding in the screen sequence.

Second, the Preamble language does not contemplate "mixed media" communications with customers. As an illustration, a financial institution may offer customers different ways of applying for its electronic banking services - by paper application, for example, as well as by online application. The financial institution may wish to give those customers applying by paper a choice of viewing the privacy notice on its webpage or receiving a paper notice by mail. Customers who choose to view the notice on the webpage would have to provide an acknowledgement that they did so in order to obtain the financial product or service. This would afford the financial institution significant savings in printing costs as well as provide customers with a simple electronic alternative to receiving a paper notice.

Although the Proposed Regulations would allow the financial institution such flexibility in designing its application process and offering meaningful choices to the consumer, the language in the Preamble would not. We suggest that the section of the Preamble quoted above be replaced with the following:

> "Similarly, it would not be sufficient to provide the initial notice only on a Web page unless the consumer is in the process of conducting a transaction or applying for a service over the Internet, or the consumer chooses to view the notice on the Web page instead of receiving the notice by other means. In either case, the consumer would be required to acknowledge receipt of the notice before obtaining the particular financial product or service."

f. Section ____.4 (Preamble)-Other Required Notices.

The Preamble regarding Section ____.4 states that initial notices may be provided at the same time the financial institution is required to give other notices, such as those required under Regulation Z. This authority will provide important flexibility to financial institutions and allow the use of procedures that "piggyback" on existing measures. This will reduce expense, cut the potential for compliance failures associated with separate procedures, and save consumers the inconvenience of receiving multiple communications. We therefore urge the Agencies to retain this language in the Preamble for the final regulations.

g. Section ___.4 (Preamble)-Joint Accounts-Receipt of Notice.

The Preamble regarding Section ___.4 also requests comment as to who should receive an initial notice when there is more than one party to an account. We believe that in all cases involving multiple parties to an account, the regulations should state that the recipient of the initial notice should be the party to whom the bank sends account statements. Other consumer regulations such as the Board's Regulations Z, DD, and CC allow single disclosures for jointly held accounts, and we would urge a similar approach focused on the recipient of the account statement, which would be the procedure most consistent with existing bank practices.

h. Section ___.4 (Preamble)-Do Not Mail Accounts-Receipt of Notice.

The Preamble regarding Section ___.4 also requests comment as to whether financial institutions should be required to send initial and annual notices to customers that have requested that the financial institution not send statements, notices, or other mail to them. We believe that financial institutions should be allowed to honor such requests, including customer's use of "hold all mail" services or addresses, because they clearly effectuate the customer's wishes and would be consistent with the concept embodied in Section 502(e)(1) of Title V that financial institutions should be permitted to act on the basis of customer authorization.

2. Section ___.5—Annual Notice to Customers.

a. Definition of Annually.

We recommend that the definition of "annually" in Section ___.5(a) be changed to: "Annually means, at the discretion of the bank, either at least once per calendar year or in any period of 12 consecutive months during which that relationship exists." Inclusion of a calendar year option will accommodate situations such as a large acquisition, divestiture or consolidation by a financial institution, and other scenarios where a financial institution needs to change the annual disclosure cycle in response to system changes or customer feedback. While we acknowledge this addition would theoretically allow a financial institution to provide an annual disclosure in January of one year and December of the following year (i.e., a 23 month spread), we believe that this would rarely occur in practice, and the significant reduction in regulatory burden for financial institutions that would be associated with such a change significantly outweighs any minor reduction in the frequency of notices from the customer's perspective. Furthermore, this addition would eliminate the potential that a financial institution may, in response to system changes or customer feedback, be required to provide two "annual" notices within a relatively short period of time.

For example, suppose a financial institution initially decides to provide the annual notice with a January statement but subsequently realizes that this "timing" creates system difficulties or customer confusion due to other required year-end notices (e.g., IRS Forms). If that institution wanted to change the disclosure "timing" to the March statement, the definition in the Proposed Regulations would force the financial institution to send the next "annual" disclosure within 60-75 days (i.e., March statement) of the January disclosure. Including the "per calendar year" language will allow the financial institution to make the "annual" disclosure in March of the following year and minimize customer confusion (especially for those customers who may have elected to opt out in response to the January mailing) created by receiving two "annual" notices within a short period of time.

b. Electronic Notice.

We recommend that Section ___.5(b) be amended by adding the following language before the final period in the sentence:

> "except that, if the customer has previously agreed to receive notices in electronic form pursuant to Section ___.4(d), a bank can provide the annual notice by notifying the customer annually of a Web site or other electronic location where the customer can view the annual notice."

In situations where a customer has previously agreed to electronic notices, this addition will: (a) allow a financial institution to provide a "link" to the location of the annual disclosure, as opposed to e-mailing a potentially lengthy message or attachment to thousands of customers that, in some situations, could overload a customer's electronic mailbox, or e-mail server; and (b) make it easier for the customer to view the annual notice on an "as needed" basis.

This change will also eliminate the requirement that a customer acknowledge receipt of the annual, as opposed to initial, notice. Without this change, the example in Section ___.4(d)(5)(i)(C) suggests a financial institution must obtain and record the acknowledgment of both initial and annual electronic notices (because Section ___.5(b) cross-references Section ___.4(d) regarding the means of providing notice). There is little benefit to either the customer or the financial institution in requiring an acknowledgment of the annual notices.

c. Inactive Accounts.

We believe that the example in Section ___.5(c)(2)(i) should be changed by substituting the word "inactive" for the word "dormant." Using the concept of "dormancy" to define termination of the financial institution's continuing deposit account relationship with a customer is too rigid and subject to multiple interpretations under various state laws. As such, it would require a financial institution to develop multiple, state-specific annual disclosure policies for deposit accounts with virtually no consumer benefit. Even though the Proposed Regulations refer to an account that is "dormant under the bank's policies," the concept of "dormancy" is simply too interconnected with state law to be workable.

Use of the term "inactive" works better to shift the focus of this example to the financial institution's policies and procedures concerning deposit account management which, in many cases, may classify an account as inactive sometime before it becomes "dormant" under state law. Furthermore, use of "inactive" in a deposit account setting makes the regulation's treatment of deposit accounts more consistent with the regulation's treatment of other account relationships such as "no longer provides any statements or notices" (credit card or other open-end credit relationship example) or "bank charges off the loan" (closed-end loan example). In each of these examples, the focus is on the financial institution's policies and procedures concerning account status.

d. General Provision.

Section ___.5(c)(2)(iv) provides a general rule for termination of customer relationships based on lack of communication for a 12-month period. We believe that the Agencies should delete the introductory phrase "for other types of relationships" from this Section. As currently worded, example (iv) is too limiting because it implies that it would never apply to circumstances involving a deposit account, closed-end loan or credit card relationship even though it may be appropriate to employ the no communication concept for these account relationships as well. For example, elimination of the opening qualifier will allow financial institutions to apply this concept in situations where other statutory or regulatory requirements, such as foreclosure or bankruptcy law, may restrict or preclude normal customer communication.

e. Consumer Versus Customer.

Section ___.5(a) states that a financial institution must provide a disclosure to "customers." Therefore, use of "consumer" in the Section ___.5(c)(2) examples is confusing and inconsistent with the rest of Section ___.5. By definition, this Section governs an annual disclosure process to a financial institution's customers and the examples clearly contemplate a "customer relationship" when they refer to deposit account, closed-end loan or credit card relationship. Changing "consumer" to "customer" in these examples is consistent with the language of Section ___.5(a) and a practical interpretation of the relationship between a financial institution and its account holders and borrowers.

3. Section ___.6-Information to be Included in Initial and Annual Notices.

a. Model Disclosures.

We urge the Agencies to adopt uniform model form disclosures that comply with the initial and annual disclosures required under Section ___.6 of the Proposed Regulations. Financial institutions should be given these model disclosures as a safe harbor because of the complexity of the current legal and regulatory environment concerning consumer privacy. The model disclosures should be issued for public comment and adopted sufficiently prior to the effective date of the regulation. This will allow financial institutions time to design, print, distribute and implement their own forms. Model forms may be prepared and issued in conjunction with the standards required under Section 501 of the GLB Act as referred to in the last paragraph of the Preamble regarding Section ___.6.

b. Categories Nonpublic Personal Information that Must be Disclosed.

In addition, Sections ___.6(a)(1) and ___.6(a)(2) should be amended to make it clearer that the initial and annual disclosures of the categories of nonpublic personal information that the financial institution collects and discloses do not apply to circumstances when the financial institution discloses information under Sections ___.10 and ___.11. As just one example, it would be impossible to adequately disclose to a consumer all the categories of information a financial institution might be required to disclose in response to judicial process or governmental subpoena (which disclosure is authorized by Section ___.11). Other disclosures authorized by Sections ___.10 and ___.11 similarly involve a wide range of information that would be difficult to categorize in advance. Perhaps even more significantly, unless this change is made financial institutions that do not give third parties nonpublic personal information about consumers (except as authorized by Sections ___.10 and __.11) would be required to disclose virtually the same information under these sections as institutions whose privacy policies allowed a more extensive flow of information to third parties.

Accordingly, we urge that the disclosures required by Section ___.6(a)(1) and ___.6(a)(2) be amended as follows to be more meaningful to the consumer:

"(1) The categories of nonpublic personal information about a bank's consumers that the bank collects, other than for a purpose covered by Sections ___.10 and ___.11;

(2) The categories of nonpublic personal information about the bank's consumers that the bank discloses, other than when the

> bank discloses information under Sections ___.10 and ___.11."

If the Agencies accept our recommended change to Section ___.6(a)(1), then we also recommend, as a conforming change, that the reference to Section ___.6(a)(1) be removed from Section ___.6(d)(4).

c. Simplified Notice.

We also recommend that the Agencies amend Section ___.6(d)(4) to provide that a simplified notice is sufficient where a financial institution discloses or intends to disclose nonpublic personal information to affiliates or nonaffiliated third parties only to the extent permitted by the exceptions in Sections ___.10 and ___.11. Specifically, we recommend that Section ___.6(d)(4) be amended by inserting the words "except as permitted by Sections ___.10 or ___.11" after the word "parties."

d. Disclosures as Permitted by Law to Nonaffiliated Third Parties.

Finally, the Agencies have invited comment on whether it would be adequate for a financial institution to be required to disclose only that it "makes disclosures as permitted by law to nonaffiliated third parties" in addition to the other disclosures described in more detail in the initial or annual notice. We believe such a disclosure would be a sufficient requirement. Further disclosure on this point would only tend to confuse customers. The list of exceptions in Sections ___.10 and ___.11 is both lengthy and technical. Even a summary of this information would be difficult for consumers to understand, and by adding length to the notice would discourage consumers from reading initial and annual notices.

C. Section ___.7–Limitation on Disclosure of Nonpublic Personal Information about Consumers to Nonaffiliated Third Parties.

Customers should be able to rescind their opt outs. To be complete, Section ___.7(a)(1)(iv) should read "[t]he consumer does not opt out or the customer has rescinded his or her opt out request." Without the ability of a customer to rescind an opt out, the customer may need to open a new relationship to take advantage of information sharing benefits such as (a) customer discounts and (b) the ability to avoid duplicative gathering of customer information.

The Preamble regarding Section ___.7 requests comment as to how the right to opt out should apply in the case of joint accounts. In particular, the Agencies ask whether a financial institution should require all parties to an account to opt out before the opt out becomes effective. This is a somewhat different question than the request for comment regarding to whom notice should be sent for purposes of Section ___.4. Although the statement recipient is the best answer for the question of receipt of a notice, here the question is whether action by all joint parties should be required. We believe that any party that has authority to act with regard to an account should be authorized to effectuate an opt out (or, for that matter, to revoke an opt out) and that the action of that party should be binding on all other parties to the account. This is the nature of joint accounts, and would be the procedure most consistent with the other functioning of such accounts.

D. Section ___.8–Form and Method of Providing Opt Out Notice to Consumers.

The phrase "if it intends to share nonpublic personal information with unaffiliated third parties outside of the exceptions in Sections ___.9, ___.10 or ___.11" should be added to the end of the first sentence in Section ___.8(a)(1). This change would clarify that although Section ___.8(a)(1) says that a financial institution "must" provide notice to each of its consumers, in fact it only needs to provide the notice if it intends to share nonpublic personal information with unaffiliated third parties outside of the exceptions in Sections ___.9, ___.10 and ___.11.

The examples of reasonable means to exercise an opt-out right in Section ___.8(a)(2)(ii) should be amended to add a new subsection that reads: "(D) Provides a toll-free telephone number where a consumer can call to opt out." This change would make Section ___.8 less burdensome for some financial institutions with no harm to consumers. Indeed, many consumers will find the option to be more convenient. The FTC's proposed regulation already includes this exception.

We also recommend that the Preamble language for Section ___.8(a) be amended to clarify that so long as a financial institution has provided a reasonable means for consumers to opt out it can refuse to honor opt out requests that are sent to it by other means. For example, if a financial institution accepts opt outs in writing, it does not have to accept opt outs by electronic mail or by phone. Such Preamble language would help to prevent compliance failures by ensuring that consumers only communicate their opt out decisions to the financial institution in a way that ensures that the financial institution will have appropriate systems in place to process the opt out.

Section ___.8(d), regarding the amount of time permitted to implement a consumer's opt-out decision, should be amended to substitute the words "within a reasonable period of time" for "as soon as reasonably practicable." The "as soon as reasonably practicable" standard is vague and its application would be unduly burdensome on financial institutions without providing a commensurate benefit to consumers. "Within a reasonable period of time" is a standard that is better understood by financial institutions and regulators.

The provisions of Section ___.8(e), relating to consumer revocation of opt-out directions, should be amended to (a) give financial institutions flexibility in how they permit consumers to revoke an opt out, and (b) clarify that if a consumer wants to revoke an opt out he or she must use a method agreed to by the financial institution and not (as is implied by the Proposed Regulations) through a method that is agreed to by the consumer. Both objectives would be accomplished if the words "in writing, or if the customer agrees, in electronic form" were deleted and replaced with: "in accordance with procedures established by the bank. A bank shall provide reasonable means to revoke the opt-out choice, such as in writing, by telephone, or, if the customer agrees, in electronic form."

Finally, we refer the reader to Section I.B.1(c) of this letter where we recommend certain changes to Section ___.8 of the Proposed Regulations to make the regulations more compatible with federally-insured student loan programs.

E. Section ___.9—Exceptions for Service Providers and Joint Marketing.

The exception provided in Section ___.9 varies significantly from those provided in Sections ___.10 and ___.11 in that Section ___.9 provides an exception only from the opt out requirements and not from the notice requirements of the Proposed Regulations. As a consequence, third parties that qualify for the exception in Section ___.9 trigger the initial notice requirements of Section ___.4, the obligation to enumerate the categories of information disclosed and categories of third party recipients in Section ___.6, and the notice of change in terms requirement in Section ___.8(c).

To the extent that these requirements are applied to third parties participating in a joint marketing arrangement with the financial institution to market products of the third party, this requirement is consistent with the basic approach of Title V, as well as the specific words of Section 502(b)(2). On the other hand, applying these requirements to a third party that markets only products of the financial institution, although perhaps consistent with the words of Section 502(b)(2), is definitely inconsistent with the overall rationale of Title V.

This is the case because a third party marketing the financial institution's products is indistinguishable from the financial institution—it does only what the financial institution can do, only at the direction of the financial institution and only offers the financial institution's products and services. A customer should be absolutely indifferent to the distinction between the financial institution and this type of agent of the financial institution. There is no reason that a customer would want to know about the activities of such agents or would care if the activities of such agents are altered.

The result of including these servicing agents in Section ___.9 will simply be to lengthen initial and annual notices with information that will be irrelevant, and to draw attention away from more important information. It will also cause the transmission of unnecessary notices of changes in terms. The Agencies should therefore amend Section ___.9 to delete references to third parties other than those engaged in a joint marketing relationship. This would necessitate a conforming change to Section ___.10 to add a new Section ___.10(a)(5) that states: "To market the bank's own products or services."

F. Sections ___.10 and ___.11—Exceptions to Notice and Opt Out Requirements.

1. Section ___.10—Exception to Notice and Opt Out Requirements for Processing and Servicing Transactions.

a. Activities "In Connection With" Servicing.

We recommend that the Agencies revise the exceptions contained in Sections ___.10(a)(2)-(4) to add the introductory phrase "or in connection with" that appears in Section 502(e)(1) of Title V. The exceptions in question relate to (a) servicing a product requested by the consumer, (b) maintaining the consumer's account in a private label credit card program and (c) a securitization related to a transaction with the consumer. The introductory phrase "or in connection with" appearing in the statute strongly suggests that Congress meant to allow greater leeway with regard to such servicing functions since the phrase is similar in meaning to phrases such as "incidental to" or "closely related to" and implies an extension of the stated authority. We submit that the most sensible meaning for this phrase is that Congress meant to allow servicing functions that were convenient for the financial institution even though they might not be absolutely required. In view of the inherently noncontroversial nature of such servicing exceptions, the Agencies should be prepared to provide the leeway implicit in the words chosen by Congress.

b. Scope of Authorizations.

We recommend that the Agencies add a new Section ___.10(c) with examples of the type of authorizations that customers implicitly give to financial institutions when they open up various types of accounts. Our recommended text for this section is as follows:

"(c) Examples.

(1) When a customer authorizes a bank to open a credit card account for an affinity or co-brand credit card, the customer authorizes the bank to share information with the other company, such as a merchant, airline, affinity group or manufacturing company.

(2) When a consumer applies for a mortgage with a mortgage broker, the consumer authorizes sharing the application information with third party mortgage lenders.

(3) When a customer authorizes the opening of a securities brokerage account (and thereby authorizes the broker to offer to the

> customer stocks, bonds, mutual funds, annuities, mortgages, insurance, and banking services involving a wide range of affiliates and third parties), the customer authorizes the securities broker to share information with the underlying company in which the customer invests or otherwise purchases financial products or services from, as well as with stock transfer agencies and similar agencies that effectuate the transaction requested by the customer.

2. **Section ___.11—Other Exceptions to Notice and Opt Out Requirements.**

   a. **Consent.**

It is critical that the regulations provide a sufficiently broad meaning to the term "consent" so that consumers are able to easily effectuate their intentions without unnecessary inconvenience and delay. The example provided in Section ___.11(b) of the Proposed Regulations is an example of just such an appropriate consent. It would allow a consumer to permit a financial institution to disclose to a nonaffiliated insurance company that the consumer has applied to the financial institution for a mortgage so that the insurance company could offer homeowner's insurance to the consumer. Such a consent would normally be sought in the context of a mortgage application conducted orally (by telephone) until the formal closing. The benefits of such a convenient exception for consent would be totally defeated by requiring that such consent be made in writing, and the regulation should permit oral consent when the transaction is being conducted orally.

Section ___.11(b)(2) of the Proposed Regulations provides that a consumer may revoke such a consent by subsequently exercising the right to opt-out of future disclosures. In order to prevent confusion, however, the regulation should clarify that a "future" disclosure is one that occurs after the financial institution has had a reasonable opportunity to effect the customer's revocation. Specifically, we recommend that the following sentence be added to the end of Section ___.11(b)(2): "A bank should make such a revocation effective within a reasonable period of time after it receives the revocation."

b. Other Exceptions.

Although the Proposed Regulations provide a number of exceptions, it is not clear that they cover several noncontroversial instances in which financial institutions need to share customer information with third parties. We therefore recommend that the Agencies add the following additional exceptions to Section ___.11(a):

"(8) For surveys of applicants and customers for customer satisfaction, quality control, reasons for termination of customer relationships, communications, product development, and otherwise facilitating delivery of the products and services of the bank and its affiliates.

(9) To support discretionary procedures established by the bank to enforce anti-money laundering, know your customer, fair lending, or similar programs.

(10) To supply information during the application period to an agent or broker who sourced an application."

Exception (8) is important because most financial institutions use third parties for research to gain both expertise and independent viewpoints. Customer research is a requirement for protecting assets, especially when it relates to customer satisfaction and quality control. Eliminating from such research customers who have opted out may cause an institution to miss significant problems. Communication research can ensure that customer materials, such as privacy policies, are understandable. Customer research generally requires the institution to provide information about product holdings and balance ranges so that researchers can draw an appropriate sample and accurately project results.

Exception (9) is necessary because, although gathering of information required by law is exempted by exception (2) of Section ___.11(a), given the importance of capturing information for anti-money laundering, know your customer, fair lending, or similar programs, use of external companies should be allowed even where the use of these companies may go beyond what is strictly required by law or regulation.

Finally, exception (10) is necessary to ensure good customer service during the application period, particularly where the primary customer contact is through the agent or broker.

G. Section ___.12–Limits on Redisclosure and Reuse of Information.

1. Application of the Limits on Redisclosure and Reuse of Information When the Information is Shared Between Two Financial Institutions.

Section ___.12 of the Proposed Regulations implements the provisions in Section 502(c) of the GLB Act which provide that a third party receiving nonpublic personal information from a financial institution ("Financial Institution A") may not disclose that information to any other third party, unless such disclosure would have been lawful if made by Financial Institution A. However, the limitations on redisclosure of information contained in Section ___.12 should address the situation that exists when the party seeking to redisclose the information ("Financial Institution B") is itself a financial institution that gives its own initial notice to the consumer. In that situation, the consumer has become a customer of Financial Institution B and redisclosure of the information should be controlled by the initial notice and related privacy policy of Financial Institution B. As written, however, Section ___.12 will create doubt on this point, unless it is clarified.

We would therefore propose the following for addition to Section ___.12(a):

> "(3) Notwithstanding the provisions of Section ___.12(a)(1) and (2), if the bank has delivered its own initial or annual notice to the consumer, it may use such information consistent with that initial or annual notice."

Similarly, we would propose addition of the following to Section ___.12(b):

> "(3) Notwithstanding the provisions of Section ___.12(b)(1) and (2), if a financial institution has delivered its own initial or annual notice to the consumer, it may use such information consistent with that initial or annual notice."

2. Ensuring Third Parties Comply with the Limits on Redisclosure.

The Agencies have invited comment on whether the regulations should require a financial institution that discloses nonpublic personal information to a nonaffiliated third party to develop policies and procedures to ensure that this party complies with the limits on redisclosure of that information. We do not believe that the Agencies should expand the regulations to require financial institutions to develop policies and procedures to otherwise "ensure" third party compliance with the Proposed Regulations. There are many contexts in which the nonaffiliated third party will already be subject to extensive regulatory restrictions on redisclosure of data. For example, as we have discussed in the preceding subsection of this letter, if the third party is itself a financial institution, the consumer has become a customer of that financial institution, and the privacy policy of that financial institution should apply. Even if the third party is not a financial institution, but rather is some other type of third party (such as a credit card servicer), it should be the third party's responsibility to develop its own policies and procedures and to ensure its own compliance with regulations enforcing Title V. Section 502(c) of Title V by its terms creates an independent obligation for the third party to comply with the limits on redisclosure, and Section 505(a)(7) vests enforcement authority for such third parties in the FTC. These provisions appear adequate to ensure appropriate compliance.

G. Section ___.13—Limits on Sharing of Account Number.

1. Certain Accounts Only.

The Proposed Regulations prohibit a financial institution from disclosing account numbers or similar access codes for credit cards, deposits or transaction accounts to any nonaffiliated third party for use in marketing. At the outset it would be extremely useful for the Agencies to make clear that the prohibition contained in this section does not apply to simply any account number or code, but rather only to an account number or code "for a credit card account, deposit account, or transaction account" as Section 502(d) of the statute provides. Loan account numbers, for example, should not be regarded as within the scope of Section ___.13, both because they are not covered by the words of the statute and because a loan account number cannot be used to effectuate a payment instruction against a consumer's funds. If the Agencies are not prepared to make the requested clarification, they should, at a minimum, specify that this section only reaches an account number beyond those specified in the statute if it permits the initiation of a binding payment instruction against a consumer's account.

2. Exceptions.

In addition, the Agencies need to adopt several exceptions to the prohibition of Section ___.13, to avoid disrupting a number of established practices that should raise no privacy concerns for consumers and their financial information. As the Agencies state in the Preamble to the Proposed Regulations, the Conference Report for the GLB Act notes the possible need for exceptions regarding account numbers and encourages the Agencies to adopt such exceptions. However, the Agencies state that they have not proposed exceptions because of the "risks associated with third parties' direct access to a consumer's account."

We submit that such risks exist only if a third party is marketing products of its own and has direct access to a consumer's account (and could therefore create the risk of an unauthorized charge to the customer's account). If, on the other hand: (a) the third party is acting to assist the financial institution in providing a service requested by the consumer; (b) the third party is merely marketing the financial institution's products; or (c) the third party has only an encrypted or partial account number, then an entirely different situation is presented.

a. Servicing Exceptions.

Many financial institutions use third parties to print, mail or otherwise process monthly account statements that also include marketing materials for the financial institution. It is inconceivable that Congress intended to prevent inclusion of the account number in a monthly statement simply because a third party performs some ministerial act, such as the printing or mailing of statements that include the marketing materials. The final regulation should therefore provide an exemption for this routine practice.

b. Marketing Bank Products Though "Pure" Agents.

Similarly, many financial institutions use third party telemarketers to offer the financial institution's own products to existing customers. Such telemarketers (who may make outbound calls or receive incoming calls) offer no products of their own and do only what the financial institution could do directly and only at the direction and control of the financial institution. When a third party telemarketer is so acting, it is effectively a "pure" agent of the financial institution that is analytically indistinguishable from the financial institution. Just as the financial institution will often need access to a customer's account number in order to properly identify the customer, answer the customer's questions and process acceptance of an offer, so will the pure agent telemarketer. Inability to provide account numbers to such pure agents will seriously compromise their effectiveness and may force such services "in-house" even though the pure agent may be able to offer these services more efficiently and at lower cost.

c. Third Party Products and Encryption.

Financial institutions often conduct transactions with third parties that do offer their own products. Financial institutions need to be able to correctly identify a financial institution customer that has accepted an offer from the third party. Having this flexibility, for example, enhances the value and utility of credit cards for customers, by allowing customers to conveniently purchase third party products. Accomplishing such a convenient purchase requires a unique identifier that will completely differentiate the customer's selected account from all other customer accounts.

An encrypted or scrambled account number or other similar coded access number is the only practical method to accomplish this objective. It is also the only method that allows the customer to avoid giving their account number to a third party. Such encrypted numbers also greatly reduce the chance that a customer's instruction to charge their account will be applied to the wrong account, particularly where the customer has multiple accounts with the same financial institution. As long as the financial institution does not provide the nonaffiliated third party the key to decrypt the number, no "account number" has been provided to the third party in any practical or relevant sense of the term and therefore no direct access to a customer's account has been provided.

Moreover, because no usable account number would be provided to the third party in this instance, it is unnecessary, and will only create inefficiency and customer inconvenience, to require that such encryption should be allowed only if "expressly authorized by the customer and necessary to service or process a transaction expressly requested or authorized by the customer" as is suggested in the Preamble to the Proposed Regulations. This language from the Preamble regarding the need for express authorization is in turn a quotation from the Conference Report Managers' Statement at 18.

The idea that express authorization is needed for release of an encrypted account number is puzzling if the third party does not have the encryption key. This is particularly so since the better view would be that an encrypted account number is not an "account number" within the meaning of the statute because no transaction can be accomplished with an encrypted number. On the other hand, if it is assumed that the third party does have access to the key, then a perceived need for authorization makes more sense. A subsequent statement by one of the GLB Act's managers suggests that the managers had such a distinction in mind.

In a letter of December 22, 1999, to the Comptroller of the Currency, Senator Gramm and several other members of the Senate also quoted the language above from the Manager's Statement regarding the need for express authorization. As an example of the practices that would be authorized by this language, the Senators stated that "a customer's encrypted account number may be transmitted to a third party <u>after</u> the customer has agreed to purchase a third party's product..." (emphasis supplied). Of course, in this circumstance, there should be no reason that the encryption key could not also be provided to the third party, because the customer has authorized the purchase. And this would explain why the GLB Act's managers saw a need for customer authorization--they were referring to the standard for provision of an encryption key to the third party.

We would therefore submit that the Agencies should create exceptions for two situations involving encrypted account numbers. First, there should be a complete exemption for the provision of an encrypted number to a third party that does not have the key. Second, provision of the account number itself or the encryption key should be permitted if the consumer has authorized a purchase from the third party.

3. Standards for Authorizations.

In this regard, the Agencies have also requested comment concerning the standards that should govern such customer authorizations. We believe that the principal consumer protection required in this situation is clear evidence that the customer has authorized the transaction. The Agencies definitely should not require a written authorization because this would frustrate telephone transactions, but should instead permit any convenient form of authorization that is verifiable, by, for example, a tape recording of telephone sales transactions.

4. Partial Account Numbers.

Finally, the regulations should clarify that a financial institution may continue the common practice of disclosing to nonaffiliated third parties the last 3 or 4 digits of an account number to confirm a transaction, such as is done today on many ATM receipts, or to clarify to a customer that is receiving a promotional offer exactly which account that the customer has with the institution is eligible to receive the promotional offer. In many instances, the customer may have numerous accounts with the institution, and it is common industry practice today to disclose the last three or four digits in the customer communication that describes the promotional offer. Without this partial identification, the customer will not know which account is eligible for the promotional offer. Allowing the use of partial account numbers in this manner would not allow third party access to a customer's account and is in no way inconsistent with the prohibition on transferring account numbers.

H. Section ___.16—Effective Date and Transition Rule.

The Proposed Regulations subject financial institutions to the most extensive regime of privacy regulations ever in the United States. In order to implement the new regulations, financial institutions will need to thoroughly understand how they relate to other local, state and federal privacy requirements, including, but not limited to, the Fair Credit Reporting Act, the Electronic Funds Transfer Act, the Right to Financial Privacy Act and the Electronic Communications Privacy Act. Privacy jurisprudence is an emerging field with a great deal of uncertainty and flux. Moreover, in designing their privacy implementation programs, financial institutions will have to take into account the administrative, technical and physical safeguards contemplated by Section 501 of the GLB Act, which have not yet been made public.

Implementing the privacy regulations will have a very pervasive effect on financial institutions, requiring that practically every process and document involving consumer products and consumers be fundamentally revamped, particularly in the area of new customer acquisition. In addition, the disclosures required by the Proposed Regulations necessitate that financial institutions describe and summarize a tremendous amount of detailed information in a synthesized, comprehensive and clear manner. For this reason, Citigroup strongly urges the Agencies to publish model forms for the initial and annual privacy notices required by the Act and the regulations. We urge the Agencies to issue such forms for comment well before the privacy regulations become effective and that such forms be adopted in final form at least 90 days before the effective date of the privacy regulations so that financial institutions have sufficient time to produce and print their initial privacy notices. (See Section I.B.3.a. above for our recommendations on the content of such model disclosure.)

Based on Citigroup's experience, we know that for each financial institution, implementation of the privacy regulations will entail, among other things, notifying vendors of the new privacy standards, educating these vendors regarding the new requirements, revising vendor contracts, developing computer systems to handle the notices and opt outs, developing compliance and training procedures and manuals, training line, marketing and operations staff, revising customer forms and contracts, and communicating with millions of individuals. In the case of renegotiating the tremendous number of vendor contracts, the task cannot be accomplished unilaterally by financial institutions. The new contractual provisions regarding standards for confidentiality, use by third parties of nonpublic personal information and safeguards for the protection of such information will need to be reviewed and many renegotiated on a case-by-case basis.

All of this is a massive task for a large financial institution with significant resources, and an even more daunting challenge for smaller institutions with fewer resources. It is a task that cannot be appropriately completed in the short six-month period contemplated by the Proposed Regulations. Although Congress mandated May 11, 2000 as the date by which the privacy regulations must be issued in final form, Section 510(1) of the GLB Act authorizes the Agencies to prescribe an effective date later than six months after the privacy regulations are published in final form. Given the immense logistical requirements of implementing the regulations and the tremendous cost associated with implementation, requiring financial institutions to comply with the regulations on the extremely short time-frame of six months proposed by the Agencies will undoubtedly result in faulty implementation and significant additional expense.

We have had recent experience with implementing our Citigroup Privacy Promise for Consumers. In that case, which was much simpler than what the Proposed Regulations contemplate, Citigroup began to work on its privacy effort shortly after the Travelers-Citicorp merger was announced and the Board granted Citigroup a year after the merger to implement its Privacy Promise for Consumers. In total, Citigroup spent approximately 18 months to fully implement its Privacy Policy for Consumers (having started approximately 6 months before the merger). From this experience, we are confident that it would be practically impossible to successfully revamp and fully implement a privacy program as contemplated by the Proposed Regulations within the extremely short time-frame currently proposed.

For the reasons discussed above, we respectfully request that Section ___.16(a) provide that the effective date for Subtitle A of Title V of the Act be 18 months after the regulations are issued in final form. We also ask that the time to provide the initial notice to consumers pursuant to Section ___.16(b) be extended to a date that is no later than 90 days after effectiveness.

II. Coordination between the Proposed Regulation and Section 205.7(b)(9) of Federal Reserve System Regulation E.

The Agencies have requested information on Federal rules that may duplicate, overlap or conflict with the Proposed Regulations. Section 205.7(b)(9) of Regulation E, and the corresponding model disclosure in Appendix A of Regulation E, fall in such a category.

Section 205.7(b)(9) requires, at the time a consumer contracts for an electronic fund transfer service, disclosure of "the circumstances under which, in the ordinary course of business, the financial institution may provide information concerning the consumer's account to third parties."

The model disclosure for this section in Appendix A reads as follows:

> Confidentiality. We will disclose information to third parties about your account or the transfers you make:
>
> (i) Where it is necessary for completing transfers; or

(ii) In order to verify the existence and condition of your account for a third party, such as a credit bureau or merchant; or

(iii) In order to comply with government agency or court orders; or

(iv) If you give us your written permission.

The new comprehensive privacy disclosures required by the Proposed Regulations overlap and conflict with the provisions of Regulation E. It would be unduly burdensome and costly to require financial institutions to redraft, as necessary, and reprint the Regulation E confidentiality disclosures to make them consistent with the Proposed Regulations. Further, the initial and annual privacy disclosures required by the Proposed Regulations make the Regulation E confidentiality disclosures totally unnecessary and of little value to customers.

Accordingly, we urge the Board to delete Section 205.7(b)(9) of Regulation E (and the corresponding model disclosure of Appendix A of Regulation E), as of the effective date of the final privacy regulations.

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We appreciate this opportunity to comment on the Proposed Regulations. If you have any questions concerning this letter or if you would like us to provide any additional information, please do not hesitate to contact me at (212) 559-2938 or Jeff Watiker of my office at (212) 559-1864.

Very truly yours,

Carl Howard
jw

Carl V. Howard

cc: Jeffrey A. Watiker