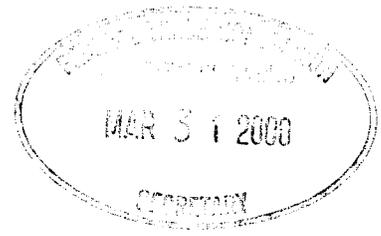




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The Market Funded Lending Industry



March 31, 2000

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

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

I. INTRODUCTION

The American Financial Services Association (“AFSA”) is the trade association for approximately 360 non-traditional market-funded providers of financial services to consumers and small businesses. It was founded in 1916. AFSA members have over 10,000 offices in the United States with outstanding receivables of over \$200 billion. Market funded lenders provide between 15% and 20% of all consumer credit in the United States.

AFSA appreciates the opportunity to comment on the proposed financial privacy regulations under Title V of the Gramm-Leach-Bliley Act (“GLB Act”). AFSA recognizes and appreciates the agencies’ effort to implement the important financial privacy provisions of the GLB Act. Given the size and complexity of the financial services industry, it is of the utmost importance that the privacy rules promulgated by the agencies be uniform and consistent with one another and with existing privacy laws. The AFSA members are acutely aware of the difficulty of implementing uniformly applicable rules that both do not disturb the legitimate business interests and practices of the multifaceted financial services industry and meet the legitimate privacy needs of consumers. AFSA provides the following comments to assist the agencies in developing final rules that satisfy the requirements of Title V of the GLB Act.

II. OVERVIEW

AFSA members include consumer financial service companies, residential mortgage lenders, auto finance companies, private label credit-card issuers and other providers of financial products and services to consumers. Accordingly, AFSA members will be significantly affected by the proposed financial privacy rule, and our comments address almost every aspect of the proposal. AFSA’s overriding concern, however, is that in many respects, the proposed rule exceeds the agencies’ statutory authority.

In enacting the GLB Act, Congress struck a careful balance between (1) financial institutions' legitimate use of consumers' nonpublic financial information and (2) consumers' valid interest in safeguarding the security and confidentiality of this information. Congress also recognized the potential burden that privacy notices and opt outs could impose. For these reasons, Congress limited the scope of the GLB Act to financial institutions' disclosure of consumers' nonpublic financial information. Moreover, Congress provided for specific exceptions to the notice and opt out provisions, and declined to impose unnecessarily rigid rules or unduly costly measures. In many instances, however, the proposed rule is inconsistent with the language of the GLB Act and the Congressional intent.

In addition, AFSA is concerned that the proposal is ambiguous in many respects and that its provisions may impose compliance burdens for the industry that are not off-set by benefits to consumers.

In this regard, we note that the FTC's Supplementary Information describes the enormous compliance and paperwork burden that the GLB Act will impose on financial institutions, especially in the first year of the rule's effective date. Specifically, in its Paperwork Reduction Act discussion, the Commission estimates that it will enforce GLB Act compliance with respect to more than 100,000 financial institutions that are not regulated by another federal agency. The Commission projects that the average annual burden for the first three years after the GLB Act is in effect will be 4.03 million hours and that the average annual labor cost associated with this paperwork burden will be \$87,300,000. This estimate assumes that the "significant start-up burden and attendant costs, such as for determining compliance obligations and developing necessary privacy policies, will be born in the first year that the rule takes effect." Moreover, this estimate does not include the cost and burden imposed on all the other financial institutions that are subject to the jurisdiction of the federal agencies other than the FTC. AFSA believes that, if anything, this paperwork burden estimate is understated because it does not appear to consider the significant legal costs for financial institutions in meeting their compliance obligations.

Because of these enormous burdens on the consumer financial services industry, AFSA urges the federal agencies to consider carefully the industry's requests for flexibility, streamlined compliance procedures and an extension in the rule's effective date.

The following summary addresses AFSA's principal concerns. It is followed by a detailed discussion of the salient points.

III. SUMMARY OF PRINCIPAL POINTS

A. Principal Conflicts with the GLB Act

Consumer. The current proposal inappropriately includes in the definition of a

“consumer” individuals who apply for, but do not obtain a financial product or service. The definition of “consumer” under the final rule should reflect the fact that the GLB Act applies only to consumers who obtain a financial product. The proposed rules also create a distinction between “consumers” and “customers” not required by the GLB Act.

Financial Institution. The definition of “financial institution” should apply only to institutions that are in the business of providing financial products or services to consumers, as intended by the GLB Act. Moreover, the definition should make clear that “financial institution” does not include entities that provide information or products to consumers in order to comply with other federal or state laws, rather than as part of their ordinary business. It also should not include retailers in a private label relationship with a credit grantor.

Nonpublic Personal Information. The GLB Act is unambiguous about the fact that “nonpublic personal information” includes only “financial” information. The proposal completely eliminates this key qualification from the definition. It is essential that the final definition cover only intrinsically financial information as required by the explicit language of the GLB Act and as clearly intended by Congress.

Oral Description and Exercise of Opt out Right. The GLB Act does not limit the notice and exercise of the opt out right to a written form. Therefore, the final rule should allow financial institutions to provide oral opt out notices in connection with oral agreements and should allow financial institutions to accept customer opt outs orally, including by telephone.

Timing of Opt Out Notices. The GLB Act requires only that opt out notices and a reasonable opportunity to opt out be given prior to the disclosure of nonpublic personal information. Thus, any requirements in the final rule that opt out notices be given at a specified time, such as during isolated transactions with the consumer, would be contrary to the Act.

Customers’ Desire Not to Receive Any Privacy Information. In order to be consistent with the purposes of the GLB Act, the final rule should ensure that if customers’ expressly direct that they not receive any privacy and opt out notices at all, then financial institutions may respect their customers’ wishes.

Paying for Customers’ Opt Out Notifications. The final rule should not require or suggest that financial institutions pay for their customers’ opt out decisions by way of self addressed and postmarked reply forms and envelopes. The GLB Act does not impose such extraordinary costs on financial institutions.

Service Providers and Joint Marketers. The final rule should reflect the intent of GLB Act Section 502(b)(2) that the disclosure and confidentiality requirements of that section apply only to information shared between two or more nonaffiliated financial institutions in connection with a joint marketing agreement between them. Otherwise, traditional

outsourcing agreements not covered by Section 502(e) could be subject to 502(b)(2)'s disclosure and confidentiality provision, contrary to Congressional intent.

Exceptions to Opt Out for Processing and Servicing Transactions. The proposed rule should mirror the language used in Section 502(e) of the GLB Act. However, if the agencies decide to adopt the proposed regulations, they should at least include the phrase “in connection with” in __.10(a)(2) and (a)(3) as Congress did in the GLB Act, Section 502(e)(1). This phrase is essential because it makes clear that activities that relate to servicing or processing a financial product are covered by the exceptions.

Private Label Exemption. To further assure consistency with the GLB Act, the proposed __.10(a)(3) should be revised to include a new __.10(a)(4), which would read “__ .10(a)(4) to another entity as part of a private label credit card program or another extension of credit on behalf of such entity;”. This formulation properly reflects the GLB Act’s recognition that, in a private label credit card program, the bank partner regularly provides information to the retailer on whose behalf the credit is extended.

Information Sharing with Affiliates. The proposal includes disclosure requirements relating to information sharing among affiliates that far exceed any such obligations under the GLB Act. The final rule should reflect the GLB Act’s limited disclosure obligations regarding information sharing with affiliates, requiring only the FCRA opt out notice.

Limits on Redisclosure and Reuse Information. The GLB Act does not impose upon financial institutions the burden of enforcing a non-affiliated party’s compliance with the redisclosure limitations. The final rule should continue to be consistent with the GLB Act in this regard.

Contents of the Privacy Notices. The current proposal suggest that financial institutions include a level of detail in the required disclosures and notices that could result in a counterproductive information overload for consumers or customers and in unduly burdensome and costly disclosures by financial institutions. The final rule should more appropriately reflect the Congressional purpose that useful privacy information be conveyed to customers in order to facilitate informed opt out decisions.

B. Principal Concerns About Ambiguity or Undue Burden

Model Forms. As discussed above, the GLB Act will impose enormous compliance and paperwork burden on financial institutions, especially in the beginning of the rule’s effective date. Many of these are small institutions, employing “low-technology” means to meet their compliance obligations. For that reason, AFSA urges the federal agencies to adopt model forms to facilitate compliance, particularly by smaller institutions.

Account Specific Opt Out. Where customers have more than one account with a financial institution, opt out decisions should apply only to the account with respect to

which the decision is made, and it should be clear that multiple accounts could be subject to divergent decisions of the same customer.

Joint Accounts. All privacy and opt out notices should only be required to be sent to one of the joint account holders. An opt out decision by one account holder should be applied to the entire account. However, if privacy and opt out notices are sent to each joint account holder, a financial institution should be able to individualize its disclosure practices based on the opt out decisions made by the individual joint account holder and should be able to continue to disclose information of those joint account holders that did not opt out.

Electronic Privacy Notices. If a customer agrees to electronic privacy notices, making them available on the financial institution's Web site should be sufficient.

Implied Consent to Information Sharing in Certain Transactions. It should be made clear that in certain transactions, such as transactions involving a co-branded credit card or other three party sales finance relationships, the consumer's consent regarding information sharing should be implied, and opt out rights do not apply because the information sharing is an integral part of the transaction.

Customer Relationship. Any definition of "customer relationship" that does not allow a financial institution to rely on its own practices and policies with respect to whether it is in an active and genuine "customer relationship" with an individual would be unworkable. Moreover, the final rule should be clear that auto dealers, retailers and other creditors who enter into retail installment contracts for the purpose of assigning them do not establish a customer relationship.

Assignee Notice and Opt Out Obligations. The final rule should be clearer on the timing and nature of any notice and opt out obligations by indirect lenders and financing companies who are in a customer relationship only by virtue of an assignment.

Opt Out Channels. Any opt outs, whether in writing or by telephone, should have to be directed only to specified addresses or telephone numbers in order to ensure proper receipt and processing by a financial institution.

Effective Date. The final rule should include a reasonable timeframe for full adoption of the GLB Act requirements. This time-frame would be at least 12 months after the final rules go into effect.

IV. DISCUSSION

Proposed Section ___3. Definitions

Definitions.

While the GLB Act financial privacy provisions are far reaching, they do not purport to encompass all kinds of nonpublic personal information disclosed in the marketplace. The Act specifically limits its coverage to the following: nonpublic personal information of a financial nature held by financial institutions on consumers. Congress defined each of these key terms: “financial institution,” “nonpublic personal information,” and “consumer.” The rule must be consistent with the intended scope of coverage.

Definition of Collect – Proposed Section __.3(c).

In proposed section __.3(c), "collect" is defined as meaning "to obtain information that is organized or retrievable on a personally identifiable basis irrespective of the source of the underlying information" (emphasis added). Under the Act, the source of the personally identifiable financial information does matter: if the source is one that is publicly available, then information obtained from it cannot be nonpublic personal information, and is, therefore, information that is not regulated by the Act.

Definition of Consumer – Proposed Section __.3(e).

The GLB Act defines consumer as “an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes” The GLB Act Section 509(9).

The proposed rule similarly defines consumer as an individual who “obtains or has obtained” a financial product or service from a financial institution that is to be used primarily for personal, family or household purposes. Proposed section __.3(e)(1). Although that regulatory definition tracks the statute, the proposed definition of “financial product or service” adds a novel meaning to the term “financial service.” Under this proposal, “financial service” means a financial institution’s “evaluation, brokerage or distribution of information” collected “in connection with a request or an application from a consumer for a financial product or service.” *See* proposed section __.3(k)(2). As further discussed below, this novel meaning of “financial service” is beyond ordinary understanding and is clearly beyond the statutory authority for this definition.

As a result of the proposed definition of “financial service,” the term “consumer” includes an applicant, as reflected in the proposal’s examples of a “consumer.” The proposed examples include individuals who (1) apply to a bank for credit “regardless of whether credit is extended,” (2) provide nonpublic information for prequalification purposes or (3) seek other types of financial advice, whether or not a customer relationship is created. Proposed section __.3(e)(2). These examples contradict the essential element of the GLB Act definition – that the individual “obtain” a “financial product or service” as defined under the Bank Holding Company Act.

If an individual does not obtain a financial product or service, the Act does not apply. If Congress had intended to include prequalifications, applications and similar pre-customer relationships, it would not have restricted the definition of consumer to those who “obtain” a financial product or service.

The result of this expansive definition is to add burden, cost, and complexity to processes that are intended to help consumers shop effectively for credit and other financial products. Thus, it is not only inconsistent with the Act, it is contrary to public policy.

The proposed rule also creates an unnecessary dichotomy between “consumers” and “customers.” *Compare* proposed sections __.3(e) and __.3(h). “Customer” is defined as a consumer who has a continuing relationship with a financial institution. This distinction will result in widespread confusion since most people think of the terms as synonymous; indeed, the Act uses them interchangeably. The rule apparently creates these two definitions in order to distinguish between those individuals entitled to initial and annual privacy statements (“customers”) and those who are not (“consumers”). This distinction causes unnecessary confusion. The rule should just define a “consumer” in the same manner as the GLB Act and then state that financial institutions are required to provide the initial and annual privacy statements to those consumers with whom they establish a continuing customer relationship.

Definition of Customer Relationship – Proposed Section __.3(i).

Because it requires initial and annual notices with consumers with whom the financial institution has a continuing relationship, the GLB Act requires that the regulations define the “time of establishing a customer relationship.” The GLB Act Section 509(11). The proposed rule does so by describing when a customer relationship is established. *See* proposed section __.4(c). The proposed rule goes farther and defines a customer relationship. This is defined as “a continuing relationship between a consumer and a [financial institution] under which [it provides] one or more financial products or services to the consumer that are to be used primarily for personal, family or household purposes.” Proposed section __.3(i)(1). The proposal also gives examples.

We believe that the rule should make clear that a financial institution may develop and follow its own policies and procedures to track open and dormant accounts and customer relationships. Most financial institutions already have systems in place for tracking their active customer relationships and should not be subject to new burdens in this regard. For example, an institution offering a particular product may easily track execution dates of certain financial contracts, and then easily track when each contract is paid off, ending the status of those customers. However, the systems requirements of another institution, for instance a credit card bank, may track dates in a vastly different manner – whether by the date the application is approved by an internal scorecard, by the date that the customer activates or first uses the card, or by some other technological event that may not even have been developed yet.

In addition, although it may be helpful to have non-exclusive examples in the rule, it is less so to have very specific directives listed in the preamble (e.g., that the activation date of a credit card is the date that a credit card holder becomes a customer). Such specifics should be removed from the preamble, and if examples are maintained in the final rule, they should be suggested only as examples.

Some of the proposed examples also need to be clarified. For example, in proposed section __.3(h)(i)(2)(B), it should be clear that an individual's status as a consumer in connection with a purchase of insurance ends when the insurance ceases to be in force. Moreover, section __.3(h)(i)(2)(F) should provide that an individual's status as a consumer in connection with a lease ends when the lease terminates. Finally, as a technical comment on the definition of "customer," it would facilitate compliance if the rule located in one section all the provisions concerning a "customer," including when the customer relationship begins and when it ends.

Definition of Financial Institution – Proposed Section __.3(j).

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

The GLB Act defines "financial institution" as "any institution the business of which is engaging in financial activities described in section 4(k) of the Bank Holding Company Act of 1956." The GLB Act, Section 509(3)(A). This section includes credit and loan servicing activities and other activities related to extensions of credit, including commercial credit. The section includes many other commercial activities such as asset management services. *See* BHCA Section 103(a)(k)(4); 12 C.F.R. § 225.28.

The proposed rule adopts *verbatim* the GLB Act definition of financial institution. *See* proposed section __.3(j). As a result, the proposed definition may include entities that engage only in commercial activities and do not offer financial products or services to consumers – such as securitization trusts, other special purpose securitization entities, and conduits. Under the proposed definition, these entities could be deemed to be financial institutions even though they do not provide financial products or services to individuals for personal, family or household purposes. There are many other cases where the proposed definition will place financial institutions under the rule's coverage even though no consumer obtains any financial products or services from them.

The proposal also creates an anomalous result for debt collection agencies: A debt collector may be a financial institution because it engages in commercial financial services under the BHCA. However, whether or not a debt collector is subject to the notice and opt out provisions of the GLB Act would depend on the nature of its business

relationship with the creditor that originated the debts it collects. If the debts were assigned to the debt collector, the debt collector would be subject to those requirements. However, if the creditor retained ownership of the debts and the debt collector collected the debts on its behalf, only the creditor would be subject to those requirements.

Therefore, when debt collectors collect assigned consumer debts, they are subject to the notice and opt out provisions as “financial institutions,” even though they offer no financial products or services to “consumers.” Moreover, under the proposal, the debtors from whom they collect are their “customers” to whom they must give initial notice and opt out and must also give annual financial privacy notices. Debt collectors and debtors have used many terms to describe their relationship, but “customer relationship” is not one such term. Thus, the proposal creates the curious result that a “financial institution” could have “customers” who are not “consumers.”

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

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

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

This definition eliminates the need for the additional, duplicative definition of “financial product and service” in proposed section __.2(k)(1).¹ It also eliminates the curious result under the proposed definition of “financial institution” whereby certain non-financial institutions would be subject to the GLB Act but not to the notice and opt out provisions

¹ As discussed above, we believe that the definition of “financial service” in Section __.3(k)(2) is beyond the scope of the GLB Act because the definition relates to applications and the Act’s definition of consumer applies only to individuals who obtain products. There is nothing in the GLB Act that would extend its coverage to applicants or information received from applicants.

because they offer only commercial products and services related to the business of banking. (Again, it should be emphasized that the provisions concerning reuse of nonpublic personal information and the use of account numbers already apply to nonaffiliated third parties.)

If this alternative definition of financial institution is adopted, the final rule should make clear that it excludes institutions that provide information or products to consumers in order to comply with other federal, state or local laws, rules or other applicable legal requirements under the exception in the GLB Act Section 504(e)(8).² Thus, the term “financial institution” would not cover debt collectors that verify debts for consumers under the Fair Debt Collection Practices Act. Although this result is implicit in section 504(e)(8), it should be made clear in the definition of “financial institution.”

The rule should make clear that when an entity’s business includes both activities that are financial as well as activities that are non-financial, the rule applies only to its financial activities.

In addition, under the FTC proposal, “financial institution” is defined to specifically include “a retailer that extends credit by issuing its own credit card *directly* to consumers” (emphasis added), but not a retailer that “accepts . . . credit cards issued by others.” The final Rule should make it clear that a retailer that arranges for a nonaffiliated financial institution to offer the retailer’s customers a private label credit card is not a “financial institution.” Such a retailer does not offer credit cards either directly or indirectly to their customers. As is the case in all other third-party credit card programs, the financial institution is ultimately responsible for all of the lending functions, such as setting credit criteria, approving or denying applications, and bearing the risk of loss, thus, the retailer should not be considered to be an additional financial institution in connection with the same credit account maintained by that nonaffiliated financial institution.

Finally, as to the specific exceptions to the definition of “financial institution,” we suggest that the exemption in proposed section __.3(j)(iii) for securitizations should cover not only federally chartered securitization institutions but should also include all special-purpose securitization entities, including securitization trusts and conduits.

Definition of Financial Product or Service – Proposed Section __.3(k).

As discussed above, the definition of financial product or service is relevant in determining whether an individual is a “consumer” with respect to the financial institution. The proposed regulation defines the term as “any product or service that a financial holding company could offer by engaging in any activity that is financial in nature under section 4(k) of the Bank Holding Company Act of 1956.” Proposed section __.3(k)(1).

The definition also states that a “financial service” includes the financial institution’s evaluation of information collected in connection with a request or an application from a

² This section of the GLB Act is implemented in Section __.11(a)(7) of the proposed rule.

consumer for a product or service. Proposed section __.3(k)(2). This latter definition is inconsistent with the Act because it reads a new meaning into the word “service” and, thus is likely to cause widespread confusion. Moreover, the novel meaning is not contained in Section 4(k) of the BHCA -- and Congress has said that that Act and its regulations will define the kinds of products and services that are financial in nature. The GLB Act does not authorize the federal agencies to invent new meanings for those terms.

As discussed above, the definition of “financial products and services” that is consistent with section 4(k) of the BHCA still creates some ambiguity because many of the permissible financial activities do not involve consumers. For example, securitization trusts engage in financial activities under Section 4(k) but do not deal with consumers. Moreover, even those institutions in the business of providing financial products or services, generally may in connection with that business, disclose information to third parties that is not a “financial product or service.” For example, information on a consumer transaction that a creditor sends to a distributor on a report of sale should be excluded from the definition of “financial product or service” even if it is related to a financial product or service. In this instance, the distributor needs to know the identities of both the lessor and lessee of a vehicle for purposes of recall notices, etc. The final rule should also recognize that in any retail installment contract, the seller is the initial creditor. Because the seller uses the same information for both the sales and credit portions of the transaction, the information should be excluded from the definition of “financial product or service” to the extent the seller discloses the information to a third party for purposes of effectuating the transaction.

The final rule should make clear that vehicle service agreements, prepaid maintenance agreements, extended warranties and similar non-insurance products are excluded from the definition of “financial product or service.” These products are not financial in nature, are not regulated as insurance products and may be purchased for cash independent of the financing transaction. Moreover, when these products are included in a retail finance transaction (such as an automobile sales finance transaction), they do not become “financial products or services,” and the final rules should make this clear.

Definition of Nonpublic Personal Information – Proposed Section __.3(n-o-p).

The GLB Act defines “nonpublic personal information” to mean “personally identifiable financial information (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution.” The GLB Act § 509(4) (emphasis added). The GLB Act also provides that this term does not include “publicly available information.” *Id.* The GLB Act does not further define this term.

The proposed rule removes the word “financial” from the definition; its definition of nonpublic personal information would cover information that is not financial in nature, such as header information. “Nonpublic personal information” is defined as (i) personally

identifiable financial information; and (ii) any list, description or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable information.” *See, e.g.*, proposed section __.3(n)(1).

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

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

The legislative history demonstrates that Congress intended to limit the GLB Act privacy provisions to financial information. Senator Allard confirmed his understanding of these provisions with Chairman Gramm, who agreed on the record that:

[T]he term “nonpublic personal information” as that term is defined in Section 509(4) of title V, subtitle A, applies to information that describes an individual’s financial condition obtained from one of the three sources as set forth in the definition, and by example would include experiences with the account established in the initial transaction or other private financial information. (Emphasis added.)

145 Cong. Rec. S13883-01 at S13902.

Similarly, in his comments in support of the GLB Act, Senator Hagel noted that the Act’s privacy provisions “protect[] the privacy of customers’ financial information.” *See* Cong. Rec., Nov. 4, 1999 p. S13876). Thus, the legislative history and the purpose of Title V of the GLB Act make clear that “nonpublic personal information” includes only private, personal information of a financial nature.

In contrast, the proposed rule’s definition would cover all data collected by a financial institution regarding its customers unless the information were publicly available. This result is contrary to the Act and its legislative history, and is unwarranted by public policy. For this reason, the final definition should closely mirror the statutory language and the

legislative history. Personally identifiable financial information should be defined as information that “describes an individual’s financial condition” or other “private financial information.”

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

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

If information is personally identifiable financial information, the next inquiry under the GLB Act is – Is the information *publicly available*? The proposed definition of publicly available is adequate to cover the kinds of financial information that are available to the general public. (For example, the term includes bankruptcies, legal judgments and similar matters of public record.)

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

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

The actual definition of “publicly available information” appears broad enough, with the possible exception of “widely distributed media.” A preferable definition could read: “Publicly available information from widely distributed media includes information from books, magazines, and newspapers; television and radio programs; publicly available Internet sites, or other publicly available written or electronic media.”

Per the proposal, information transmitted through such media would only qualify if it had been lawfully made available to the public. However, restricting the media channel or adding a requirement of password access in a rapidly developing technological environment could hinder and/or confuse later determinations of what was truly public (e.g., many news services require a password for subscribers to review certain news stories, and there are many financial and legal information services available to the public for a fee. Simply because for-profit firms control the dissemination of public information in this way should not dilute the fact that the information is, in fact, public). To illustrate the problem, consider what would happen if the same criteria were used to divide what is and is not publicly available via television.

Would broadcast television be "publicly available" while cable or pay-per-view television would not? Clearly, password or even for-pay access does not, in itself, make a site "nonpublic." Returning to the Internet situation, there are sources that are definitively "publicly available" that require password access--the on-line version of the New York Times is one prominent example.

There is a final point of concern in the proposed rules' definition of "nonpublic personal information." Under the proposal, the definition would include a financial institution's list of customers. Proposed rule section __.3(n)(1)(ii). The GLB Act definition of nonpublic personal information includes "any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any nonpublic personal information other than publicly available information." The GLB Act Section 509(4)(c)(i). However, the definition excludes "any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any nonpublic personal information other than publicly available information." The GLB Act Section 509(4)(c)(ii).

Under the statutory definition, the test for whether or not a list of consumers is nonpublic personal information depends on whether or not the list was created using "nonpublic personal information other than publicly available information." Therefore, the inquiry is the same as in other instances where the question is whether the information is "nonpublic personal information." As seen above, an integral component of the definition is that the information be "personally identifiable financial information." If so, the inquiry is whether the list was derived using "publicly available information." Name, address and telephone number are publicly available information. Nonetheless, the proposed rules' definition of nonpublic personal information would include financial institutions' customer lists. This result is inconsistent with the GLB Act definition of nonpublic personal information, which clearly excludes lists derived from publicly available information, such as name, address and telephone number.

Section __.4. Initial Notice to Consumers of Privacy Policies and Practices.

Timing of Initial Notice to Customers (__4(a))

Section 503(a) of the GLB Act requires that the initial privacy notice be provided to an individual “at the time of establishing a customer relationship” (emphasis added). This language should be repeated in the regulations, replacing the language in the proposed rule that the notice be provided “prior to” establishing the customer relationship. This change could avoid disputes as to how soon in advance of the customer relationship an individual actually received, and was required to receive, the policy statement.

However, it does make sense to allow the privacy notice to be provided earlier than at the time when the customer relationship is established, if desired and practical. For example, consistent with the agencies’ supplementary information to the proposed rule, the final rule should provide that the initial notice could be provided at the same time that a financial institution is required to give other notices, such as those required by Regulation Z (12 C.F.R. § 226.17(b)) for closed-end transactions, which must be provided “prior to the consummation of the transaction.” Providing notices required by law at one time would increase customer convenience and reduce the potential for customer confusion as well as reduce costs to the financial institutions.

Establishment of the Customer Relationship (___ .4(c))

Financial institutions have their own procedures for determining when a customer relationship is established. The final rule should specifically provide that financial institutions may follow those internal procedures for purposes of determining when a customer relationship is established under the GLB Act and that the examples in the final rule are merely illustrative, but not determinative. Thus, section ___ .4(c)(2) should be prefaced with the following sentences in place of the sentence in the proposal: “The following examples illustrate circumstances that could constitute the establishment of a customer relationship.”

We also note that some of the proposed examples need revision:

Example - When a Consumer Executes a Contract to Obtain Credit From You (___ .4(c) (2) (ii))

The example involving credit contracts should make clear that it applies only to direct credit transactions -- that is, those transactions involving the consumer and the financial institution. Another example should provide for indirect credit transactions -- those involving retail installment contracts assigned by the initial creditor to the creditor as an assignee. In the latter case, the example should state that the customer relationship is established when the assignment of a retail installment contract or loan is complete.

The example should also make clear that no customer relationship is established when an auto dealer, retailer or other initial creditor that enters into a retail installment contract for the purpose of assigning the contract to a third party.

Example - When the Consumer Agrees to Obtain Financial, Economic or Investment Advisory Services For a Fee (___ .4 (c) (2) (iii))

This example should be eliminated or clarified. Although it appears designed to cover financial advisory services, it could be interpreted to include any application for financial products or services. (As noted above, this possible interpretation is partially the result of the proposed rule's expansion of financial services beyond the meaning of the GLB Act or the Bank Holding Company Act).

Arguably, individuals "agree to obtain financial services . . . for a fee" when they complete any application or form for any financial product because that step usually initiates the process towards obtaining the financial product for which the individual expects to pay a fee. Moreover, it is not uncommon for an initial application to result in some up-front charge to the consumer. Thus, under the proposal, financial institutions would have to ascertain for each product the time when each individual agreed to obtain financial services for a fee, and financial institutions could be required to provide privacy disclosures at different times for different products. Moreover, the example is ambiguous and/or contrary to the GLB Act in that it appears to encompass within the "customer relationship" definition applicants who have agreed (by applying) to pay a fee for financial services but who are not yet customers.

For these reasons, this example should either be eliminated or clarified, so that it applies only to "advisory services concerning financial, economic or investment products" from the financial institution.

If the example is retained, it should, at a minimum, provide that a customer relationship is established only when the individual actually "pays a fee" or "becomes contractually obligated to pay a fee" for financial, economic, or investment advisory services. In other words, the payment of the fee, not the "agreement" to obtain advisory services, should be the objective standard.

Example - When a Consumer Provides any Personally Identifiable Financial Information in an Effort to Obtain a Mortgage Loan (___ .4(c)(2)(v))

This example appears intended to apply to the establishment of a broker-client relationship, but the language is not so limited. Therefore, it could be interpreted to apply to a direct application to a mortgage lender. The example should make clear that it applies only to broker situations. Moreover, the test of "effort to obtain a mortgage loan" should be more objective. A broker should not be placed in the position of having to interpret whether specific interactions with individuals constitute "efforts" on the part of those individuals to obtain a mortgage loan. An individual may provide information informally in a context in which the recipient does not realize that the individual is making an effort to obtain a mortgage. As the intent is to cover mortgage brokerage relationships, the trigger should be the establishment of a broker-client relationship.

Example - When a Financial Institution Acquires Loan Accounts for Servicing
(__.4 (c)(2)(vi))

As a result of this proposed section and proposed section __.4(a)(1), a financial institution that services loans must give an initial notice before a servicing customer makes the first payment. Acquisitions of servicing rights are similar in some respects to acquisitions of loans and should be afforded an exception similar to the exception of __.4(d)(2)(ii). Financial institutions may acquire servicing rights after loan origination, at a time when customer payments may be imminent, leaving insufficient time to disseminate an initial notice before the customer makes the next payment.

How to Provide Notice (__.4(d))

General Rule (__.4(d)(1))

If the final rule continues the dichotomy between “consumer” and “customer,” the reference to “consumer” in __.4(d)(1) should be changed to “customer,” and a more limited form of initial notice should be implemented with respect to “consumers” (e.g., a notice on a loan officer’s desk, and oral explanation, or a description on a Web site).

Providing Notice Where There is More than One Party to an Account (__.4(d)(1))

The proposal requires that notice must be provided so that “each consumer” can reasonably be expected to receive actual notice. Further, the agencies have invited comment on providing notice for joint accounts, apparently realizing that significant operational difficulties could result from the current proposal. The issue of how to provide notice on joint accounts is one of utmost importance to financial institutions, because it will greatly affect the cost, processing and systems requirements for providing disclosures.

Typically, with a few exceptions that involve fundamental public policy concerns (such as the rescission of a security interest in a primary dwelling), all disclosures required by federal law may be provided to either party to a joint account. The disclosures required by the proposed regulations should not be equated with other circumstances that require all joint account holders be given certain disclosures. For example, in the case of a consumer’s right to rescind a residential mortgage loan transaction, notice to each joint account holder is justified because the rescission right is time-barred after three business days, exposing individual consumers to the risk of losing their homes. In contrast, the privacy opt out right is unlimited in duration and can be exercised at any given time.

A requirement to provide privacy disclosures to each party on an account creates a regulatory burden that far outweighs any benefit to the joint parties. In many cases, financial institutions would have to create separate computer programs to identify joint account holders separately on each account. Double disclosures would obviously double the expense of printing, handling, distributing, and mailing notices. Even if double distribution were somehow justifiable in the case of the initial notice, the usefulness of the

practice is negligible for the annual notices required by __.5(a). For a fifteen-year mortgage loan, for example, lenders would be required to send thirty-two privacy disclosures to joint borrowers. Joint account holders would derive no corresponding benefit from such excessive and burdensome disclosures.

Thus, we suggest that the final rule incorporate a disclosure format consistent with the distribution of notifications to multiple applicants required by Regulation B (12 C.F.R. §202.9(f)). Specifically, compliance under Regulation B is achieved when such notice is provided to one of the primarily liable applicants on the account. Similarly, compliance with the issuance of privacy notices should be satisfied by mailing the initial and annual notice to the party who receives the bills or periodic statements on the account. This approach would balance the information needs of consumers with the operational and cost burdens placed on the subject financial institutions.

Common Initial Privacy Notice for Affiliated Financial Institutions

The final rule should retain the ability for affiliated financial institutions to use a common initial Section 503 privacy notice, provided that delivery of that notice is in accordance with the rule and is accurate as to each recipient. The final rule should also provide that financial institutions may develop different privacy policies and practices for different categories of consumers, customers and products, as long as the individual notices received by a consumer or customer are accurate as to each individual consumer or customer.

The final rule should also make clear that no new disclosures are required from a financial institution if a customer enters into additional customer relationships with that institution, so long as the initial disclosure is accurate and complete with respect to the subsequent relationships.

Common Initial Privacy Notice for Nonaffiliated Financial Institutions

When more than one financial institution is involved in a transaction, the financial institutions should be able to designate one institution to provide a notice applicable to all institutions. This approach would be consistent with Regulation B, (12 C.F.R. 202.9(g)).

Exceptions to Allow Subsequent Delivery of Notice (__.4(d)(2))

The exceptions under proposed section __.4(d)(2) unduly conflict with the language of the Act: “A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless . . . (3) the customer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed . . . “ GLB Act, Section 502(b). Under the Act, the opportunity to opt out need only come before the information is disclosed to a third party, not – as implied by the proposed rules – before the establishment of a customer relationship. The rules confuse

the timing of disclosing the privacy policy with the timing of the opt out notice. This conflict with the Act should be removed from the final rule.

The exception to allow subsequent delivery of the initial notice under proposed section __.4(d)(2)(i) is not workable because it applies only when a customer has no choice about the loan purchase. What if the customer enters into a transaction with an expectation that the loan will be assigned? The rule should simply grant an exception as to assigned loans, regardless of the customer's choice in that regard. Furthermore, unless the exception is recast as an example, it should apply to all transactions that may generate a customer relationship through assignment, including where installment sales contracts are assigned. This would also help cure the failure in the proposed rule to address the notice requirement in indirect credit and financing situations. Indirect creditors and financing companies should be required to provide their notices only when assignment of the underlying contract is complete.

However, in many cases involving assignment of accounts, requiring a notice will be outside the scope of the Act because the purchaser of loans often does not have a customer relationship with the borrower. In such cases, the purchaser of the loan is provided little information about and has little direct contact with the borrower. For example, if a loan is sold but the servicing rights are retained by the originating institution, the customer will likely have no contact with the purchaser of the loan. This fact is recognized by the Real Estate Settlement Procedures Act by requiring that a transfer notice only be provided if the servicing rights are transferred. Thus, the purchaser of a loan should not be deemed to have a "customer relationship" with the borrower under such circumstances.

Further, the final rule should clarify that non-affiliated parties may send a joint notice if each entities' practices are clearly set forth in the notice. This is because many nonaffiliates have relationships in which one is the customer contact, but both may be required by law to provide the notice. Examples of such relationships include indirect financing and the dealer sale of insurance products where the dealer issues the policy for the insurance company.

In the case of the exception for customer relationships established orally, the phrase contained in proposed section __.4(d)(2)(ii) "and the consumer agrees to receive the notice thereafter" should be deleted or replaced with "and the financial institution informs the customer when and how the notice will be provided thereafter." Requiring an agreement by the customer that the financial institution may provide notice within a reasonable time after the oral establishment of a customer relationship is unworkable and confusing to the customer. What if the customer does not agree to receive the notice thereafter? Moreover, the current proposal would make it more difficult to enter into oral agreements and telephone transactions and could eliminate them altogether to the detriment of those consumers who value the speed and convenience of telephone transactions. The customer will be protected if the notice is provided at a later time because both the GLB Act and the proposed rule provide that a financial institution may not disclose any nonpublic personal

information to a nonaffiliated third party prior to sending the opt out notice and giving the consumer a reasonable opportunity to opt out.

This protection would also address the situation where a consumer opens a credit card account at the point of sale and immediately uses the credit card account. In order to avoid the situations when a third party accepts an application for the credit card and does not have the creditor's most recent privacy notices or when a third party may not consistently provide the required notices, it would be more appropriate for the customer to receive the required notices through the mail at a later point in time. Because the financial institution could not disclose nonpublic personal information until the consumer had the opportunity to opt out, the consumer's rights would be protected.

Methods of Providing Notice (____.4(d)(4) and ____4 (d)(5))

The proposed rule allows for receipt of privacy notices in electronic form, if agreed to by the consumer. As to those consumers, the final rule should provide that electronic delivery may be satisfied by making the Section 503 privacy notices available on the financial institution's Web site. The final rule should not require financial institutions to e-mail such notices individually or to require consumers to actually view notices on the Web site in order to receive the financial product or service, though it could leave these alternatives as available options for providing the Section 503 privacy notices. The proposal does not require that a consumer actually read a paper notice, only that it be provided to the consumer. Requiring individual e-mails or mandated accessing of Web sites would result in unnecessary costs to financial institutions and provide no benefit to consumers.

The final rule should provide that, if a consumer initiates a transaction electronically with a financial institution (such as applies for a credit card on-line), the consumer is presumed to have received the notice electronically.

Retention or Accessibility of Notice for Customers

Under the proposed rule, customers must be given their privacy notices in a way that may be either retained by the customer or accessed at a later time. The final rule should clarify that financial institutions may provide the notice in a form that may be retained or may allow the customer to obtain another copy at a later time of the financial institution's policy. This option is particularly important in electronic transactions where it may be difficult to provide a notice that could be retained.

Notice to Customers

The final rule should provide that customers may choose not to receive any privacy notices and opt out notices. Financial institutions should not be required to act contrary to their customers' explicit wishes in this regard. At the same time, the final rule should not prohibit a financial institution from sending privacy notices to their customers under these

circumstances. Thus, the final rule should provide that when customers elect not to receive any privacy and opt out notices, financial institutions may have the option of providing such notices to these customers.

Burden of Providing Initial Notice

The agencies have requested comment on the actual burden of providing initial notices. One obvious concern (besides the cost) is that adding voluminous information to already substantial credit disclosures reduces the amount of information that consumers are likely to read, let alone absorb. As a result, from both the perspectives of financial institutions and consumers, it is imperative that the information provided be as concise as possible.

Annual Notice. Section __.5.

Under the proposed regulations, the issuer of a three year prepaid insurance policy would have no obligation to send the annual notice if no communication was made with the customer during a given year. The regulators should clarify whether in cases where an insurance policy is still in effect, regardless of ongoing communications with the customer, the annual notice is still required.

General Rule (__.5(a))

When there is more than one party to an account, it should be sufficient to provide one notice to the primary account holder for the same reasons discussed above in connection with the initial notice requirements. Even if notification of all account holders is ultimately required, it should be sufficient to provide one notice to all account holders who reside at the same address.

There should also be an exception to the annual notice requirement that parallels the proposed section __.4(b)(1) exception to the initial notice requirement for financial institutions that do not disclose any nonpublic personal financial information to any nonaffiliated third parties.

How to Provide Annual Notice (__.5(b))

When a closed-end credit customer cannot be located, there may be an interval between disappearance and charge-off when sending a notice to the last known address would be futile. The rule should permit omission of the annual notice during such period.

Termination of Customer Relationship (__.5(c))

As seen in the above discussion, financial institutions have their own procedures for determining when a customer relationship is established. Similarly, financial institutions have in place policies and procedures for determining when a customer relationship ends. The final rule should state that financial institutions may rely on those internal procedures

for determining when the customer relationship is over. The examples should make clear that they are merely illustrative and do not establish rules for determining when the customer relationship ends.

The following examples should be clarified.

Examples of When a Customer Relationship Ends (____.5(c)(2)(i))

The example addresses only a direct loan situation. The example should cover all credit transactions, including retail installment contracts. Thus, the example could state:

(i) In the case of a closed-end credit transaction, the consumer pays the loan or contract in full, you charge-off the consumer's account, or you sell the loan or contract without retaining servicing rights.

In a private label credit card program, the final rule should not suggest that a continuing relationship exists with a consumer whose charging privileges have been revoked, regardless of what attempts to collect charged-off amounts are being made. Otherwise, financial institutions will be required to go through the elaborate and expensive process of providing annual notices to consumers in default, the costs for which will ultimately be borne by the customers in good standing.

Relationships Where There Has Been No Communication for Twelve Months
(____.5(c)(2)(iii))

The 12-month test under this section creates certainty as to when certain customer relationships have terminated, and should be adopted to provide clarification when it is not otherwise apparent from the financial institution's own policies and procedures.

Dormant Accounts

Finally, with respect to the request for comments regarding dormant accounts, the final rule should provide that the financial institutions' internal rules, rather than state law, determine when an account is considered dormant and thus no longer the basis for a customer relationship requiring annual notices. A rule based on state law could result in an obligation to provide annual notices that could exceed an actual customer relationship by years, thereby causing substantial and unnecessary costs to financial institutions.

Contents of Privacy Notice. Section ____.6.

(Section ____.)6)

The final rule should allow the disclosure of categories of information (with perhaps one or two identifying examples) for the notice requirements. Any more detailed requirements

(as suggested by the current examples in the proposed rule) would result in high costs, be unnecessarily burdensome and create customer confusion. Moreover, requiring the level of detail suggested by the proposed examples could ultimately affect financial institutions' ability and willingness to create new products and services or to move to more cost-efficient and productive business strategies that would ultimately benefit the customer. If the agencies do determine that the suggested level of detail is necessary, it could be achieved by way of a toll-free number or a Web site through which customers, if they are interested, could obtain more detailed explanations of the financial institution's privacy policies and practices.

General Rule (____.6(a))

The final rule should make it clear that a financial institution may expand the categories of information and of third parties if the institution gives a new notice and right to opt out and that prior notices do not constitute contracts that bind an institution to limiting disclosure to previously disclosed categories.

Disclosure for Information Provided to Nonaffiliated Third Parties for Joint Marketing Purposes (____.6(a)(5))

Section 502(b)(2) of the GLB Act allows a financial institution to provide nonpublic personal information to a third party to perform services, including joint marketing services, if the financial institution discloses such information and enters a confidentiality agreement with the third party. There is no statutory requirement that such disclosure be completely separate and apart from the rest of the privacy disclosure. However, under the proposed rule, this disclosure appears to be required to be completely separate. If this third party disclosure fits succinctly into another section of the initial notice, then in the interest of brevity and clarity, the final rule should permit the financial institution to use its own judgment to insert it where it provides the clearest notice to the customer.

Information Sharing Among Affiliates (____.6(a)(3) and (7))

Including these disclosure requirements regarding information shared with affiliates is contrary to the GLB Act. Under Section 503 of the Act, a financial institution is not required to include in its privacy notice any disclosure information regarding information sharing practices with affiliates other than under the FCRA § 603(d)(2)(A)(iii). Section 506(____) of the GLB Act specifically provides that it does not modify the FCRA, and requiring this notice would have that effect. For that reason, the final rule should reflect this limited requirement with respect to the FCRA opt out notice and should not provide for any disclosures other than the FCRA initial disclosures with respect to an institution's information sharing among affiliates.

Future Disclosures (____.6(c))

The final rule should also provide that if a privacy notice reserves the right to disclose with respect to certain categories of nonpublic personal information, financial institutions should be allowed to subsequently make such disclosures without reissuing its privacy notices.

Categories of Nonaffiliated Third Parties to Whom Information is Disclosed (__.6(d)(3))

The proposal provides that financial institutions may describe in general terms the types of businesses nonaffiliated parties engage in, and it also requires that illustrative examples of significant lines of business be included in the disclosure. The final rule should provide, instead, that a financial institution may categorize the nonaffiliated third parties to whom it makes disclosures by the type of business the party engages in or by the type of product it offers or by both. This would give financial institutions the necessary flexibility to adequately describe the nonaffiliated third parties to whom they disclose information.

Right to Opt Out (__.6(a)(6))

The final rule should not include the current provision requiring detailed opt out information in the Section 503 privacy notice. Opt out information should be limited to the Section 503 opt out notices. Such duplication is unnecessary and would only result in disclosures that are too long and confusing. In addition, although the Act does require notice of the institution's privacy policy at the time the customer relationship is formed, it does not require an opt out notice at that time. Rather, as discussed above, such notice is required only before disclosure to a third party.

Policies that Institutions Maintain to Protect the Confidentiality and Security of Nonpublic Personal Information (__.6(d)(5))

While it is important that customers are aware that such policies and practices exist and recognizing that the clear language of the statute requires that notification of such policies be included in the notice, financial institutions should be permitted to provide this information in a very abbreviated format. For instance, a rule allowing an institution to state that it uses sophisticated firewalls, pass codes, etc. should suffice. In contrast, the example provided in __.6(d)(5) appears to require a much longer description that could overburden the notice and lose the attention of the customer. Any financial institution (or almost any other businesses for that matter) that expects to remain viable must protect its confidential information. Thus, adhering to current standard business practices for information security should suffice to address this disclosure requirement.

Transferring Information Pursuant to 502(e) (__.6(b))

We support the agencies' position that, if data is to be legally transferred pursuant to the general exceptions listed in Section 502(e), it should suffice to state that the financial institution makes disclosures "to other nonaffiliated third parties as permitted by law." Considering the voluminous, specific information required for the rest of the notice, this

statement should help maintain the clarity of the notice. Moreover, such a general statement does not diminish consumers' protections because there is no opt out right as to the exceptions.

Examples of Categories (____.6(d))

The examples of “nonpublic personal information” that the financial institution collects and discloses (apart from AFSA’s complete disagreement with the proposed definition of “nonpublic personal information”) would be adequate if the following clarifications were incorporated in the final rule. It should be made clear that:

- (1) A financial institution should be required only to provide examples of the various categories of information it collects and discloses;
- (2) a financial institution may categorize the information it collects and discloses by the type of source or by the content or by both; and
- (3) under no circumstances does the disclosure of a “source” require that the name of a source from which information is collected be identified but that only examples of types of sources must be disclosed.

These clarifications would further the interests of consumers and financial institutions alike because they would result in less voluminous and confusing disclosures to consumers and would provide financial institutions with greater flexibility to provide more adequate and cost-effective disclosures.

The Opt Out Notice. Section ____.7.

Section 502(b) of the GLB Act requires that before transferring nonpublic personal information to a third party, a financial institution must clearly and conspicuously disclose to the individual (in writing or in electronic form or in other form permitted by the regulations) that such information may be disclosed. This Section also requires that the individual be given an explanation and an opportunity to direct that such information not be disclosed to such third parties. We appreciate that the proposed rule permits some operational flexibility, but we suggest some additional concepts and indicate where more guidance is needed.

Conditions for Disclosure (____.7(a)(1))

The final rule should make clear that the disclosure prohibition does not apply to disclosure of application and consumer report information to potential retail installment contract assignees, whether by operation of ____.

10(a) or otherwise. It should further be clear that simultaneous transmission of information to more than one potential assignee is permissible under the “necessity” standard in ____.10(a).

Joint Accounts

The agencies seek comment on how to effectively deal with the opt out requirement in the context of joint accounts. In the interest of balancing consumer choice, costs, and operational flexibility, the final rule should allow for both of the following alternatives:

(1) Financial institutions should be able to provide opt out notices only to the primary account holder but should honor the opt out of any account holder. If any account holder opts out, the financial institution would not disclose any of the nonpublic personal information of any of the joint account holders;

(2) In the alternative, if financial institutions have the ability and resources, they should be allowed to provide opt out notices to all joint account holders and to individualize their disclosure practices with respect to each separate joint account holder. In other words, financial institutions should be able to honor the opt out of one joint account holder as to his or her nonpublic personal information but should also be allowed to continue to disclose the information of joint account holders who did not opt out.

Reasonable Opportunity to Opt Out (__.7(a)(3))

The proposed rule provides that the time period of 30 days in which a consumer can opt out constitutes “reasonable opportunity” to opt out of information disclosure. However, although 30 days could be considered reasonable in transactions that are consummated entirely in writing and by first class mail or where disclosure policies have changed or are given later in the customer relationship, it should not be the standard by which all opt outs are measured. For example, if an individual obtains a financial product over the Internet and reads the opt out notice before making a decision whether to complete the transaction, no time lag should be necessary at all. If a consumer reads the disclosures and signs the documents at a local financial institution, it seems unreasonable (and likely unnecessary to the consumer) to provide an additional 30 days for that individual to decide whether to opt out. In that situation, 7 days would be more fair to the institution and reasonable to the consumer.

Moreover, as there is no requirement in the legislation that the opt out itself be in writing, if individuals are given a toll-free number to call, a waiting time of 7 days again should also be sufficient for that person to decide whether to use the telephone to exercise his opt out right.

Isolated Transaction With Consumer (__.7((a)(3)(ii))

The proposal contains an example that opt out notice requirements are met for isolated transactions when the financial institutions provide the required notices at the time of the transaction and request that the consumer decide, as a necessary part of the transaction, whether to opt out before completing the transaction. This example is contrary to the GLB Act. The Act allows financial institutions to provide opt out notices to a consumer at any

time before nonpublic personal information is disclosed to a nonaffiliated third party, provided that a reasonable amount of time is also provided to opt out. This allows for the possibility, but does not require, that disclosures be made at the time of transactions.

The problem presented here is particularly acute in isolated transactions, such as ATM transactions. Indeed, ATM transactions are valued because of their speed and convenience to consumers. The current proposal would significantly impair those characteristics of ATM transactions and would be extremely costly to financial institutions. Thus, the final rule should follow the GLB Act and allow financial institutions to either provide opt out disclosures at the time of the transaction or at a later time, so long as no nonpublic personal information is disclosed without prior disclosures and the consumer is given a reasonable time to opt out.

Form and Method of Providing Section 502 Opt Out Notice. Section __.8.

Form of Opt Out Notice (__.8(a)(1))

If a customer has multiple accounts with a financial institution, it should be clear that the customer must opt out of each account separately. An opt out instruction from the customer should not be presumed to apply to all of the customer's accounts.

For example, in connection with private label programs, a single financial institution may have relationships with many different retailer partners, and consumers often participate in more than one private label program administered by a given financial institution. The final rule should make it clear that such a financial institution may provide its customers with separate notices and opt out opportunities for each of the private label programs.

Offering separate opt out opportunities will benefit consumers and financial institutions alike. Consumers will benefit from the ability to selectively opt out of the sharing of nonpublic personal information with respect to one, several, or all of their relationships with a private label lender. This may be appealing to a consumer who, for example, would like personal information regarding his or her private label credit card account with a home and gardening retailer to be shared with nonaffiliated third parties in order to receive cross-marketing offers relating to home improvement or gardening, but may wish to limit information-sharing relating to a private label credit card account with a retailer focusing on children's products. The financial institution will benefit because it will not be required to attempt to establish links between discrete account records maintained separately for each retailer portfolio.

Furthermore, most private label card customers focus on the retailer partner, rather than the financial institution partner, in such a relationship, since that is why the retailer-related credit program was established in the first place. Therefore, a requirement that a financial institution provide a global notice and opportunity to opt out could potentially confuse consumers who would more likely expect to receive individual notices for each retailer partner with whom they have a relationship.

Moreover, many financial institutions may have different divisions that manage different products, or may employ different servicing agencies to handle different types of products, each of which may record opt out requests and maintain customer information in a different manner. Requiring financial institutions to merge and coordinate these complex processes is burdensome, particularly because there is no corresponding benefit to consumers.

It is therefore critically important that the opt out notice, and any subsequent opt out request, apply only to the account related to the opt out notice, unless the financial institution elects to apply it to all accounts (whether then existing or in the future, at the institution's option) at that institution, where practical.

Thus, the opening of a new account should also be considered a partial revocation of any opt out request given in connection with a previous account held by the same customer, but only with respect to information collected for the new account. The opening of the account would, therefore, constitute the customer's consent for future information transfers under __.11(a)(1), unless the customer chose to exercise a separate opt out, pursuant to a new opt out notice provided in connection with the new account, or unless the financial institution elected to apply an opt out request to all accounts established by the individual.

While the final rule can certainly provide that new opt out notices are not required for subsequent financial products opened at the same institution, it should clearly provide that a customer's exercise of the opt out right with respect to one account maintained by the financial institution does not apply to all of that customer's accounts at the particular financial institution.

Finally, the rule should allow financial institutions to require that consumers' opt out notices to the financial institution include sufficient information to identify the account, such as account number, customer name and Social Security Number, and that opt out notices from the consumer without that information would not be a valid exercise of the opt out right. Otherwise, it will be impossible in many instances to match the opt out request with an account. This is a particular problem for financial institutions that use different computer systems for different types of account. An account number will enable the financial institution to quickly identify which computer system has the account and locate the account. Without that information, it would take considerably more time to find the account. Moreover, if the financial institution does not have a Social Security Number, and the customer has a common name, it may be even more difficult finding the account.

Self-Addressed Reply Forms and Prepaid Postage (__.8(a)(2)(ii)(B))

The final rule should not suggest that financial institutions must provide self-addressed and stamped reply forms and envelopes for consumers or customers opt out responses.

The Act does not require this additional expense, and many financial institutions do not even provide postage and envelopes for payment coupons.

Oral Agreements (__.8(b)(1))

Section __.8(b)(1) allows for the fact that an institution and a consumer may orally agree to enter into a customer relationship. In this case the proposed rule allows the financial institution to provide the opt out notice “within a reasonable time thereafter if the consumer agrees.” This proposal is unworkable and confusing. What happens if the consumer does not agree to receiving the opt out notice within a reasonable time after orally entering into a customer relationship? Is the oral agreement regarding the customer relationship then void? As explained above, to make the final rule workable, it should drop the proposed requirement that the customer agree to receiving the notice within a reasonable time after orally entering into the customer relationship.

In addition, the current proposal illustrates the benefit of allowing financial institutions to provide oral opt out explanations and of allowing customers to exercise their opt out rights orally. This would facilitate the delivery of financial services to consumers without creating additional contractual disputes or time delays. It would also be consistent with the GLB Act, which does not require written opt out notices.

The Oral Opt Out Description (__.8(b)(2))

As noted, Section 502(b) does not require that the description of the opt out right or the opt out itself be in writing. Rather, the GLB Act provides that the disclosures by the financial institution must in writing, electronic form, “or other form permitted by the regulations.” Thus, the final regulations should provide for the possibility of oral opt out explanations by financial institutions and for actual opt out by way of a telephone call to a toll free number (as already included in the FTC proposal) and should not be limited to opt out explanations and opt out mechanisms that require writing. Indeed, provisions that are limited to written forms for explaining or exercising opt outs exceed the statutory authority, and would add cost and burden to existing and developing delivery systems that are not outweighed by any benefit to consumers.

Many financial transactions are consummated outside the scope of a traditional brick and mortar office. Requiring an institution to send an opt out notice, then requiring the consumer to read it, fill it out, tear it off, and find a mailbox or fax machine to reply to the opt out notice, is not necessary to achieve the privacy goals of the GLB Act. Each customer of a financial institution will have the privacy policy, as required by the statute. A customer service representative on a toll-free line could easily explain the customer’s right to opt out, the consequences of doing so, and which button to press on a touch-tone phone to effect the opt out. Later mailings, such as the annual notice, could also contain a toll-free number for future opt outs, questions regarding the status of a customer’s opt out, or other information regarding general privacy policies. This method would reduce time

and cost burdens to the consumer and the institution, while effectively achieving the goals of Title V.

Notice of Change in Terms (__.8(c)(3)(i))

A change-in-terms notice should not be required if a financial institution begins to disclose information with respect to which the institution reserved its right to disclose in its privacy policy statements.

Receiving Opt Out Notices from Consumers or Customers

The final rule should make clear that consumers or customers can be required to send their opt outs to a specified address or that they can opt out by telephone only if they call a specified telephone number. Any other rule would be unrealistic since a company cannot be assured that any correspondence or oral communication that it receives through any channel will be directed to personnel trained to comply with the opt out requirements. For instance, customers write notations on payment coupons and checks that are never processed because lockbox banks generally process such documents. This approach is consistent with other notice requirements for disputes under the Fair Credit Billing Act and the Fair Credit Reporting Act, as well as for TILA violations.

Later Decisions to Opt Out (__.8(d))

The proposal provides that an individual's right to opt out does not lapse, but rather continues for the duration of the customer relationship. During that time, the customer may decide to opt out for any reason. The rule suggests that in such a scenario, the financial institution receiving such a direction "must comply with that direction as soon as reasonably practical." We believe that this timeframe provides fair and flexible treatment for what will likely be an unusual situation, and will treat both large and small institutions fairly.

New Opt Outs Not Required for New Products (Same Financial Institution)

The supplementary information to __.8 states that a financial institution is not "required to provide subsequent opt out notices when a consumer establishes a new type of customer relationship with that financial institution, unless the institution's opt out policies differ depending on the type of consumer relationship." We support this reasonable position, but suggest that it is important enough to be included in the regulation rather than the supplementary information.

At the same time, in the interest in maintaining consumer choice, (i) a financial institution should not be prohibited from providing a new opt out opportunity when a new financial product is obtained; and (ii) it should never be assumed that an effective opt out applicable to one product applies to all of a customer's financial products at a particular financial institution.

Exceptions to Opt Out Requirements for Service Providers and Joint Marketing. Section __.9.

Service Providers and Joint Marketers

Sections __.9 (a) and (b) should be combined so that section __.9 more obviously mirrors the intent of the GLB Act Section 502(b)(2). The GLB Act intended that the specific disclosure and confidentiality requirements of Section 502(b)(2) apply only to information shared between two or more nonaffiliated financial institutions in connection with a joint marketing agreement between them. As it stands, Section __.9 could be interpreted to mean that the disclosure and confidentiality requirements apply to information shared with nonaffiliated third parties under traditional outsourcing agreements not also covered by Section 502(e). This interpretation would mean, for example, that a financial institution could not hire a printing company to type-set and print information other than monthly statements for its customers without full disclosure of the practice and without making a special contractual agreement with the printing company that the company will maintain confidentiality of such information. Such an interpretation would create large costs for financial institutions, especially the smaller ones, without any benefit to consumers.

If the agencies conclude that the disclosure should cover any traditional outsourcing agreements (as we believe it should not) the required disclosure should read something like: “We may share with third party nonaffiliates and service providers information that allows them to assist us in maintaining your account.” A financial institution might choose to provide more detail in the notice, but should not be required to do so.

Additional regulatory requirements on disclosing information under the exception for service providers and joint marketing would constitute superfluous micromanagement necessitated neither by the GLB Act or public policy. Financial institutions enter service agreements (and a myriad of other contracts) in the ordinary course of business, and are subject to continuing supervision by their boards of directors. Hence, the institutions, as a matter of course, are self-monitoring and will assess the reputation and legal risks of these agreements to their institution. Moreover, with regard to a product that is jointly marketed, the agencies should consider carefully whether to require a financial institution to take certain steps to assure itself that the product is not unduly risky for the institution (i.e., truly necessary). It would be preferable to see if, after the proposed regulations are issued, tested, and examined, a specific problem arises.

The initial privacy notice should suffice as disclosure to consumers, and contractual enforcement of the confidentiality agreements with nonaffiliated service providers should suffice to prevent further disclosure. Hence, no additional requirements, notices, or other regulatory burdens are either necessary or merited under the statute. In this regard, the final rule should make clear that the requirements with respect to confidentiality agreements apply only to joint marketing agreements between nonaffiliated third parties and not to traditional outsourcing agreements.

The final rule should not provide examples of types of joint agreements that are covered by this provision. As technology develops and the industry consolidates as a result of the GLB Act, new types of agreements will develop that, while clearly covered by regulatory and statutory language, may appear contrary to then dated examples provided by the rule. This will result in unnecessary uncertainty; hence, examples of types of joint agreements should not be included.

Third-party nonaffiliates should be allowed to use data received under this provision that is not personally identifiable for the purpose of improving credit scoring models or analyzing marketing trends. Because the information cannot be matched to a specific individual, consumers' privacy interests will not be implicated. Moreover, under Section 502(e)(1) of the GLB Act, because the consumer has authorized the financial institution to disclose such nonpublic information to this third party, the use by the third party of non-personally identifiable information for improving credit scoring models would fall under the exception for services "necessary to effect, administer or enforce a transaction..., or in connection with" – maintaining or servicing the consumer's account with the financial institution..., whereby nonpublic personal information may be disclosed. The agencies recognize that there may need to be disclosure of personally-identifiable information by defining in __.10(b)(2)(i) "necessary to effect, administer, or enforce a transaction" to mean "required, or is a usual, appropriate or acceptable method: to carry out the transaction...and record, service or maintain the consumer's account in the ordinary course of providing the financial service or financial product." Improving credit scoring and analyzing marketing trends are common activities that might be engaged in by third party affiliates to service a consumer's account.

Exceptions to Notice and Opt Out Requirements for Processing and Servicing Transactions. Section __.10.

It is unclear why the proposed rule has reworded the GLB Act Section 502(e), and we believe that a simpler approach would be to mirror the exact language used in the GLB Act. However, if proposed sections __.10(a) and (b) are adopted, we feel it is important that the regulations are consistent with Section 502(e), and the phrase "in connection with" should be added to the beginning of the clauses in sections __.10(a)(2) and (a)(3). It is important to add this language because the additional phrase makes it clear that the exceptions in Sections 502(e)(1)(A) and (B) (as implemented by sections __.10(a)(2) and (a)(3)) include all activities relating to servicing or processing a financial product or service or maintaining or servicing the consumer's account, including, for example, forwarding of credit applications by car dealers to numerous financing companies.

Moreover, proposed sections __.10(a)(3) and(4) should be incorporated in the general list in __.11. These exemptions do not fall under the heading of __.10(a) "Exceptions for processing transactions at consumer's request," but rather were provided in the GLB Act to allow normal, everyday business transactions to occur.

The additional definition in __.10(b) of the facially clear English terms "effect, administer, or enforce a transaction" is unnecessary. The list of examples does not appear to add value to the proposed __.10 definition and it is unclear as to whether the list is exclusive. Considering the myriad of institutions, products, and services that will ultimately be covered by Title V, the operational aspects of effecting, administering, and enforcing transactions are so numerous, and will vary so widely from product to product, that such a list risks only providing confusion. However, if the agencies insist on providing a definition, we suggest the following:

(b) Necessary to effect, administer, or enforce a transaction means that the disclosure is a lawful and appropriate method to execute the obligations of the financial institution or other persons engaged in carrying out the financial transaction or providing the financial institution's product or service.

Private Label Credit Card Programs

Congress recognized that private label credit card arrangements are unique and raise unusual issues in the context of creating meaningful consumer information privacy protections. As a result, in drafting the GLB Act, Congress created a specific exemption to address the unique situation posed by private label credit cards. There are two key principles underlying the GLB Act's private label credit card exemption: parity with in-house retailer credit programs, and customer expectations about their information. Congress specifically intended to avoid unfairly disadvantaging retailers that choose to have an unaffiliated bank offer credit to the retailer's customers on the retailer's behalf, rather than performing that credit function in-house. To have the law provide otherwise would promote non-economic decisions on the part of retailers (retaining credit functions in-house even where outsourcing is less costly), and increase the costs of credit to consumers.

Congress also recognized that a private label credit cardholder expects the retailer to possess information about her and to use that information to provide the benefits associated with being a valued customer. When a private label credit cardholder elects to opt out of information sharing on a retailer's private label credit card, the cardholder does not expect the opt-out to apply to the retailer's receipt of information (and thereby lose the benefit of merchandise discounts and other offers for valued customers) – rather, she expects that her opt out applies to third parties unrelated to her private label credit card account.

The final Rule should be clarified so that when a private label credit cardholder opts out to protect her privacy, she does not impact the "third party" with whom she actually has her primary relationship - the retailer. This would harm retailers by constraining retailers' ability to offer coupons and discounts, promotional financing offers, rewards, loyalty programs and the like to their own customers, just because they chose to outsource their credit programs. Likewise, this would harm consumers by eliminating key benefits associated with being a loyal private label credit card customer of a retailer, and would

increase costs of credit where retailers make non-economic decisions to reject private label credit card program outsourcing.

The GLB Act provides an exception to the notice and opt-out requirements for disclosures "...with another entity as part of a private label credit card program or other extension of credit on behalf of such entity." The proposed regulations, however, provide an exception to the notice and opt-out requirements for disclosures "[t]o maintain or service the consumer's account with the bank, or with another entity as part of a private label credit card program"

Although perhaps merely grammatical in intention, this provision could be interpreted to limit the intended scope of the private label exemption to information used to maintain or service the consumer's account, when in private label credit card programs it is usually the financial institution and not the retailer who maintains and services the private label credit card accounts.

Instead, the proposed __.10(a)(3) should be split apart into two clauses. The revised language, which would be a new __.10(a)(4), would read " __.10(a)(4) to another entity as part of a private label credit card program or another extension of credit on behalf of such entity;". This formulation properly reflects the drafters' recognition that in a private label credit card program the private label bank regularly provides information to the retailer on whose behalf the credit is extended because the retailer's ongoing relationship with the consumer is at least as great as that of the bank.³

Other Exceptions to Notice and Opt Out Requirements. Section __.11.

Consent of Consumer (__.11(a)(1))

As an introductory note, the phrase contained in section __.11(a)(1) "[w]ith the consent or at the direction of the consumer, provided that the consumer has not revoked the consent or direction," has a superfluous second clause and should be removed. The financial institution either has the consumer's consent or it does not.

The final rule should clarify what constitutes "consent" by the consumer and how such "consent" should be indicated by the consumer.

With respect to __.11(a)(1)'s exception "with the consent or at the direction of the consumer," the final rule should clarify that a consumer gives consent in certain credit or debit card arrangements where the consumer has a relationship with both a financial institution and a nonaffiliated third party. For example, a financial institution may offer a co-branded credit card with an airline company, where cardholders receive benefits such as frequent flier miles from the airline. Co-brand arrangements (or similar private label or three-party sales finance relationships) are instances where there is notice and consent,

³ As discussed above, these exemptions should more properly be included in section __.11.

under Section 502(e)(2) of the GLB Act because the nature of the product requires that the financial institution share information with the co-brand partner, retailer or other entity involved in the three-party relationship. Thus, the financial institution and the co-brand partner (or other entity) share in what is basically the same customer relationship. Similarly, it should be made clear that a customer's consent to disclosure is implied where the customer applies for financing through an auto dealer who will submit financing applications to numerous potential financing sources.

Complying with Legal Requirements (__.11(a)(7))

The exception in section __.11(a)(7) should include information supplied to effectuate an alternative dispute resolution.

Examples of Consent (__.11(b)(1))

The proposed example at __.11(b)(1) illustrates permissible disclosures made with the consent of the consumer. In the illustration, a consumer mortgage loan applicant consents that the creditor tell a third-party insurance company only that the consumer is applying for a loan. This allows the insurance company to contact the consumer regarding the provision of homeowner's insurance.

As discussed above, we do not believe the fact that the individual is a loan applicant is "nonpublic personal financial information," and the example should be modified accordingly. Nonetheless, the final rule should offer financial institutions flexibility in what methods they use to obtain consent. Requiring a consumer's consent to be only in writing could be detrimental to consumers because in certain circumstances a financial institution may not be able to obtain consent in writing in a timely fashion. In the example, if oral consent were not accepted, a consumer who applied for a mortgage loan over the telephone would not have the opportunity to obtain a homeowner's insurance quote until the consumer received and signed a form. The final rule should only require that the consent provision be presented in a clear and conspicuous manner.

The final rule should require only that the consent provision identify what types of, and the particular purposes for which, information will be disclosed. This approach is consistent with the approach the Fair Credit Reporting Act takes toward the scope of consent.

Indeed, there may be complex situations where a limited opt out is desired by either the consumer or the financial institution, and where certain safeguards could be installed. Specifically, in certain types of cross-collateralization transactions, the continued existence of special consents allows continuing information transfers to a borrower's other creditors in connection with collection programs. However, we oppose requiring either a separate signature line or limiting the timeframe of special consent, as both could present complex monitoring, recordation and other issues. To require a limitation on, for example,

the timeframe on this special consumer consent could both limit credit availability to certain borrowers and affect the collectability of certain loan portfolios.

Limits on Rediscovery and Reuse of Information. Section __.12.

The final rule should not require a financial institution that discloses nonpublic personal information to a nonaffiliated third party to develop policies and procedures to ensure that the third party complies with the limits on redisclosure of that information. Financial institutions deal almost exclusively with their partners and servicers under contracts that are enforceable in a court of law. Outside of such contractual obligations, no policies or procedures in place at a single financial institution can control what another party will do.

The rule should make clear that when a third party receives nonpublic information under an exception in __.9, __.10 or __.11, the third party should be allowed to reuse the information if that reuse occurs within an exception under __.10 or __.11. The third party otherwise could simply get the information again from the financial institution for one of these purposes.

Limits on Sharing of Account Numbers for Marketing Purposes. Section __.13.

While Section 502(d) generally prohibits the sharing of account number information for marketing purposes, the Conference Report encourages the agencies to grant an exception for the sharing of encrypted account numbers, "where the disclosure is expressly authorized by the customer and is necessary to service or process a transaction expressly requested or authorized by the customer." In the supplementary information to the proposed rule, the agencies state that they have not proposed an exception to the prohibition of Section 502(d) because of the risks associated with third parties' direct access to a consumer's account.

We agree that in an uncontrolled environment, third party access to account numbers, even encrypted ones, could result in risk to consumers, merchants, and financial institutions. However, there are situations where a third party has been engaged by a financial institution to perform marketing services, a consumer has been contacted and that consumer decides to accept the product being sold. Since the third party already has an identifiable, encrypted number through which to bill the consumer, the third party does not have to request the consumer's account number over the telephone. Therefore, an exception shall be provided for this practice. In the alternative, the final rule should provide an exception for disclosing an identifying number to a marketing firm once the consumer has agreed to purchase the goods or services being marketed. Finally, the rule should provide an exception when the consumer has consented in advance that a financial institution may provide an account number to a marketer.

The final rule should make it clear that the providing of account numbers by a financial institution to its retailer partner is not prohibited under Section 502(d) of the GLB Act. Congress did not intend the Section 502(d) prohibition to restrict the ability of a financial

institution to provide account numbers to the institution's retailer partner in connection with a private label program. Instead, Congress, through Section 502(d), restricted the ability of a financial institution to provide account numbers for a credit card account, deposit account or other transaction account of a consumer to a nonaffiliated third party for use by *that* nonaffiliated third party in marketing *that* third party's goods or services. However, Congress simply did not intend to interfere with longstanding private label programs in which the account number is the key identifier in connection with the very participants in the program.

In addition, the final rule should make clear that a financial institution may provide an account number to a nonaffiliated third party for use in marketing to the consumer, if the financial institution has obtained the consumer's prior consent to provide that information to that nonaffiliated third-party marketer. This consent provision is particularly important in the context of private label programs. A financial institution often makes available account numbers relating to the private label accounts to the retailer partners, so that when the retailer partner communicates information relating to the accounts to the financial institution, the partner can accurately identify the account to which the information relates. As discussed above, the sharing of information by a financial institution with a retailer partner -- including account numbers -- should be a matter of notice and consent. The consumer has chosen to participate in this arrangement which necessarily involves use of the information by both the financial institution and the retailer partner.

Furthermore, the final rule should make it clear that Section 502(d) does not prohibit the sharing of account numbers by a financial institution with its own agent, processor or service provider that provides operational support for to the financial institution. In this regard, a financial institution -- in making information available to its own service providers engaged in activities on the financial institutions behalf, for example, preparing and mailing monthly billing statements -- should not be viewed as "disclosing" information to a nonaffiliated third party. Instead, the service provider should be considered as an extension of the financial institution itself.

Moreover, it should be immaterial whether the provider performs marketing services in addition to its other services. In the example above, if a financial institution engages a nonaffiliated third party to prepare and mail its monthly billing statements, which necessarily includes the transfer of account numbers, the fact that the monthly billing statements include marketing materials should not render the transfer of the account numbers to be *for use in marketing*. Therefore, the Section 502(d) prohibition should not apply.

On a related issue, it is common in connection with private label credit card programs for both the financial institution and the retailer partner to utilize the same number for two discrete purposes: the financial institution as a credit card account number and the retailer partner as a membership number. The prohibition on sharing account numbers contained in Section 502(d) is intended to address situations when the recipient of the account number does not have another legitimate business need for such information, other than

for marketing purposes. Accordingly, the prohibition should not preclude a financial institution and a retailer partner from making separate use of the same number. To hold otherwise would require costly systems changes for private label credit card partners, with no discernible benefit to consumers, because both parties are appropriately in possession of the number at all times.

Effective Date. Section __.16.

The proposed effective date of the rule is November 13, 2000. The agencies seek comment on whether six months would be sufficient to allow financial institutions to comply with the privacy requirements. This time period is simply inadequate to enable financial institutions to develop the required documentation and internal mechanisms to comply with the rule. As a result, the proposed deadline would present a logistical nightmare to the consumer financial services industry and would be entirely unworkable for the many small “financial institutions” (such as small retail creditors and auto dealers) that will be subject to the new requirements.

Moreover, under Section __.16, within 30 days after that effective date (December 13, 2000), financial institutions will be required to provide privacy notices to their existing customers. The November-December time frame is the busiest time of year for retailers and credit card issuers. Many financial institutions block systems changes during the last quarter to accommodate the huge increase in business during this time period. Mail houses and printers would not have the excess capacity during the holiday season to help print and deliver privacy notices. As a result, retailers and similar institutions would have to curtail their own holiday mailings in order to provide the privacy notices. The resulting loss of revenue would further exacerbate the cost of the GLB Act.

A November – December time frame for the effective date would also be detrimental to consumers. That is the time period when consumers receive the most mail. The privacy notices would lose their effectiveness if they were buried in a stack of Christmas cards, marketing solicitations, etc. Finally, if financial institutions must send initial notices to all their customers in December, they would have to ensure that the toll free number they set up could handle the number of calls that could come in by year-end. Generating that capacity in such a short time period would further increase the regulatory burden.

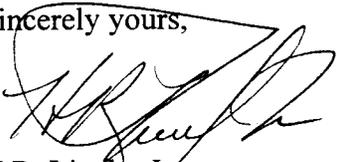
For these reasons, compliance with the Section 502 and 503 notices should be voluntary beginning on November 13, 2000, and mandatory only after a twelve month period, in order to give financial institutions sufficient time to implement the required changes within their organizations.

We also note that the supplemental information provides that, if a financial institution intends to disclose nonpublic personal information after the rule’s effective date, it would have to give its existing customers notice and an opportunity to opt out prior to the effective date. Such a rule would be contrary to the GLB Act provisions regarding the effective date and would impose an unwarranted burden on financial institutions.

Thank you for your consideration of these comments.

If you have any questions or need additional information, please contact AFSA's General Counsel, Bob McKew, at (202) 296-5544.

Sincerely yours,

A handwritten signature in black ink, appearing to read "H.R. Lively, Jr.", written over a faint, circular watermark or background.

H.R. Lively, Jr.
President and CEO