

TARGET CORPORATION



March 30, 2000

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

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

Federal Reserve Board of Governors
Attention: Jennifer Johnson, Secretary
20th and C Streets NW
Washington, DC 20551

Federal Deposit Insurance Corporation
Attention: Robert Feldman, Executive Secretary
550 17th Street NW
Washington, DC 20429

Re: **COMMENT: Privacy Regulations under the Gramm-Leach Bliley Act**

Target Corporation and Retailers National Bank appreciate the opportunity to submit comments on the proposed privacy regulations published pursuant to the Gramm-Leach-Bliley Act, Public Law 106-102, 113 Stat. 1338 (the "GLB Act"). Target Corporation is a member of the National Retail Federation ("NRF") and in addition to the specific comments set forth below, Target Corporation and Retailers National Bank hereby join in and fully endorse the comments submitted by the NRF.

Target Corporation is one of the largest retailers in the United States. For the year 2000, we project annual sales of approximately \$35 billion from more than 1300 stores nationwide. Target Corporation also has a growing online retail presence and a mail-order catalog business. In addition to its retail operations, Target Corporation provides consumer credit through its wholly-owned subsidiary, Retailers National Bank ("RNB"). RNB is a CEBA credit card bank chartered under the National Bank Act. RNB issues private label

3701 Wayzata Boulevard • Minneapolis, MN 55416

Target Stores • Mervyn's California • Dayton's • Marshall Field's • Hudson's • AMC • Rivertown Trading Company
Dayton's Commercial Interiors • Target Financial Services • Target Brands, Inc.

CEBA credit card bank chartered under the National Bank Act. RNB issues private label credit cards to customers of Target Corporation's retail stores, which include Target, Mervyn's California, Dayton's, Marshall Field's and Hudson's. RNB has more than 31 million accounts, which generate over \$5 billion in credit card sales annually.

RNB has estimated its cost of compliance with the proposed initial notice provisions alone, and only for credit card customers, to be in excess of \$6.3 million. This is based on a conservative estimate of the cost, including production, postage and mailing, at 20 cents per notice.

The comments of Target Corporation and RNB are directed primarily to the proposed privacy rules published for comment by the Office of the Comptroller of the Currency ("OCC") and the Federal Trade Commission ("FTC"). RNB, as a national banking association, is subject to the regulatory authority of the OCC, while some services Target Corporation provides to its customers likely come under the purview of the FTC. However, we address our comments also to the other regulatory authorities who have promulgated proposed privacy rules, particularly in light of the need for consistency among the various regulations implementing the GLB Act. We urge each of the regulatory authorities to make every effort toward uniformity and consistency because of their overlapping jurisdiction over regulated entities. To the extent the regulations are not consistent, or are ambiguous in that respect, it will be difficult or impossible for an organization subject to the jurisdiction of multiple regulators to comply with multiple regulations implementing the same law.

Proposed Rule Section __.3: Definitions

"Clear and Conspicuous"

The proposed rule addresses the interpretation of the phrase "clear and conspicuous" and includes illustrative examples. The difficulty arises from the fact that "clear and conspicuous" is a well-established standard under the Truth in Lending Act and other consumer protection provisions that apply to the same financial institutions which will be subject to the GLB Act. The final Rule should make clear that compliance with longstanding regulatory interpretations of the "clear and conspicuous" standard in other contexts also constitutes compliance with the same standard in the GLB Act.

"Collect" and "Financial Product or Service"

The proposed definitions of "collect" and of "financial product or service" should be clarified so that they do not inadvertently encompass within the scope of the regulations an entity which is merely the conduit for financial information submitted to a

financial institution. For example, consumers obtaining credit from RNB may submit applications at retail stores operated by Target Corporation. Simply by transmitting the application information to RNB, Target Corporation could be deemed to have "obtained" information, thus falling within the proposed definition of "collect," even where it does not retain or use any of the information so obtained. Similarly, by the same transient contact with the information, Target Corporation could be deemed to have "distributed" information about the consumer, thus falling within the proposed definition of having offered a "financial product or service." This limited involvement in the facilitation of the credit application should not subject the retail entity to the provisions of the GLB Act independent of the obligations which are imposed on the financial institution which is establishing the financial relationship with the customer (in this example, RNB).

"Nonpublic Personal Information"

The GLB Act provides that "nonpublic personal information" means "personally identifiable financial information" obtained by a financial institution, excluding "publicly available information." GLB Act, § 509(4). In the Proposed Rules, the regulators have expanded the term substantially beyond its statutory meaning, and beyond the intended scope expressed in the legislative history, to the great disadvantage of financial institutions and without benefit to consumers. Target and RNB urge the regulatory agencies to be extremely careful not to exceed the scope of the GLB Act. The language of the Act and its legislative history make clear that it is intended to address concerns about the privacy of personal *financial* information.

The Proposed Rule Interprets "Financial Information" Too Broadly. Under the Proposed Rules, the regulators treat any personally identifiable information about a consumer as "financial information" if it is obtained by a financial institution in the course of providing a financial product or service to a consumer. This is inconsistent with the common meaning of the term "financial information" and inconsistent with the GLB Act and its legislative history. By the plain meaning of its language, Congress must have intended the term "personally identifiable financial information" to mean information about a consumer's financial condition, such as assets and liabilities, account balances, and payment and overdraft history. The final Rule should incorporate this common sense definition. In particular, as other commentators have noted, the mere fact that a customer relationship exists should not be considered "financial information" because that fact contains absolutely no information regarding the consumer's "financial condition." Moreover, the final rule should make it clear that publicly available information about a consumer is not "financial information."

The Proposed Rule Improperly Limits the Scope of "Publicly Available Information." The GLB Act specifically excludes "publicly available information" from

the definition of "nonpublic personal information." The notice of proposed rulemaking invites comment on two alternative definitions of "nonpublic personal information" that differ in their treatment of information that is available from public sources. Under alternative A, information is public information only if a financial institution actually obtains it from a publicly available source, such as from the phone book. Under alternative B, information is public information if it could be obtained from a publicly available source, regardless of how it was actually obtained. Alternative B is clearly the more appropriate approach. Information which otherwise would be generally available public information should not become nonpublic merely because of the manner in which it may have been obtained. Congress intended to exclude "publicly available information" from the GLB Act's coverage, but if the regulators adopt alternative A, this statutory exclusion will be rendered meaningless, and financial institutions will have to make a choice not required by the letter or spirit of the GLB Act: whether to eliminate all disclosure of information obtainable from a public source or to incur the potentially significant cost of maintaining records to prove where they actually obtained the information.

Protections Contemplated by the GLB Act Do Not Depend on an Over-Broad Definition. If the regulators' proposal to define "nonpublic personal information" in overly broad terms springs from a concern that the narrower statutory definition provides too little consumer protection, that concern is unfounded. In the first place, consumers can have no realistic expectation that their publicly available information can be kept secret. Marketers can take such information from public media – phone books, city directories, and the like – and call or mail at will. In fact, solicitations based purely on public media are potentially more troublesome than those based upon lists of financial institutions' customers; such solicitations are necessarily less focused (leading to a greater number of "junk" mailings and calls) and more likely to lead to redlining and other discriminatory marketing practices. Moreover, financial institutions, particularly those involved in retail, have significant incentives to self-regulate. Modern financial institutions recognize the crucial importance of maintaining their customers' trust, lest the customers be lost to competitors.

Depersonalized Information. The regulators have invited comment on whether "nonpublic personal information" should cover information about a consumer that contains no indicators of the consumer's identity. RNB joins with other industry commentators in vehemently opposing this unwarranted expansion. Besides being inconsistent with the common sense meaning of the language of the GLB Act, placing limits on the disclosure of depersonalized information can serve no conceivable purpose. Moreover, Target and RNB, and other financial institutions, routinely and legitimately use depersonalized information in connection with market studies, for financial modeling and to develop score cards for evaluating applications for credit products. Depriving institutions of such

information would have implications for profitability as well as safety and soundness, while serving no identifiable consumer interest whatsoever.

Proposed Rule Section __.4: When Initial Privacy Notice Must be Given

Section __.4(a)(1) of the Proposed Rules provides that a financial institution must provide an initial privacy notice to an individual who becomes its customer, prior to the time of establishing a customer relationship, with very limited exceptions. This is inconsistent with the plain language of the GLB Act, which calls for disclosure of the privacy policy at the time of establishing the customer relationship.

Target and RNB join with other commentators in recommending that the timing requirements for privacy notices and opt-out disclosures be permitted to coincide with the timing requirements for disclosure under Regulation Z (promulgated pursuant to the Truth In Lending Act). Consumers lose nothing of substance where the initial privacy notices are deferred, since financial institutions are prohibited from sharing consumers' nonpublic personal information until they have received the privacy notice and notice of their right to opt-out, and have had a reasonable opportunity to opt-out. Modifying the proposed rule to require that the privacy and opt-out notices may be delivered at the same time as the initial disclosures required by Regulation Z will be more meaningful to customers and accomplish a significant savings for financial institutions, without any reduction of consumer protection.

Proposed Regulations Sections __.4 and __.7: Privacy and Opt-Out Notices to Joint Customers

The regulators request comment on who should receive privacy notices in situations where there is more than one party to an account.

We believe that the final rule should clearly state that if a continuing relationship is established with two or more customers jointly, a financial institution is required only to provide one copy of its privacy and opt-out notices to the parties. This is consistent with other federal consumer protection regulations, such as Regulations E and Z, requiring one set of disclosures be sent to multiple parties on an account. In addition to the obvious costs of sending additional mailings, if such notices are to be meaningful they will need to be sent to each customer in his or her individual name, at his or her own address. While in most cases, all of the customers will be at the same address, a financial institution will be forced to establish procedures for determining all relevant addresses. Many institutions' systems are not designed to accommodate this function.

Proposed Rules Section __.4 and __.5: Notices From Affiliates

The Section – by – Section Analysis of the Proposed Rules notes that the Proposed Rules “do not prohibit affiliated financial institutions from using a common initial, annual or opt out notice,” provided certain requirements are met. We strongly support this concept, and suggests that a clear and affirmative statement permitting affiliates to provide common initial, annual and opt-out notices should be incorporated into the final rule. Moreover, the final rule should provide clearly that if one or more affiliates deliver disclosures when a customer enters into a relationship with them, the affiliates should not be required to deliver additional disclosures when the customer subsequently enters into an additional relationship with any of them. These suggestions are consistent with the avowed intent of the legislature and the regulators to reduce the costs of compliance to the extent consistent with consumer protection. Clearly, a requirement of multiple notices would be costly, particularly for an organization that cross-markets its products and services. Just as clearly, such a requirement would provide no new or additional protection to customers, whose willingness to read privacy notices is most likely inversely proportional to the number of notices they receive.

Proposed Rules Section __.5: Annual Notice of Privacy Policy

The requirement for annual notice of the financial institution’s privacy policy to customers who have already received the initial notice imposes unwarranted costs on financial institutions, burdens on the mail system, and inconvenience to consumers, who will be receiving multiple notices in connection with their various financial relationships. Notice of material changes to the policy are sufficient to protect consumer interests. Alternatively, the final rule should require no more than periodic notice that a copy of the privacy policy is available upon request.

Proposed Rules Section __.5: Termination of Customer Relationship

Periodic Statements. Section __.5(c)(2)(iii) of the Proposed Rules provides in an example that a financial institution no longer has a continuing relationship with a credit card customer when it no longer provides any statements or notices to the customer. RNB strongly supports the policy behind this example. In general, great cost savings can be realized and the meaningfulness of disclosures will be enhanced if the Proposed Rules are kept as nearly as possible consistent with other federal consumer protection regulations, such as Regulations Z and E. Regulation Z permits financial institutions to cease sending periodic statements when there is no new balance and there have been no transactions to the customer’s account during the preceding billing cycle. At that point, the Regulation Z annual billing error notice requirement terminates, and it is at that same point that financial institutions should be permitted to cease sending privacy notices. The predominant

medium for sending privacy notices will be the mail, and financial institutions will likely to the extent possible provide privacy notices to customers as inserts to their periodic statements. If the notice requirement is not coextensive with the periodic statement requirement, mailing expense and mail volume will be significantly increased, with no significant increase in consumer protection.

12-Month Rule. Section __.5(c)(2)(iv) of the Proposed Rules provides in an example that a financial institution no longer has a continuing relationship with a customer when it has not communicated with the customer about the relationship for a period of twelve consecutive months other than to provide annual notices of privacy policies and practices. RNB strongly supports the policy behind this example. However, two clarifications are in order. First, this example should be explicitly made available as a means of compliance for open-end and closed-end credit relationships, which are described in the preceding examples, as well as to “other types of relationships.” Second, RNB suggests that the Proposed Rule be clarified to make it clear that advertisements and solicitations directed to inactive or dormant customers are not communications “about the relationship” and do not trigger the requirement for annual privacy notices.

State Dormancy Rules are Irrelevant. The regulators have invited comment on whether state law should determine when an account becomes “dormant,” for purposes of the annual privacy notice requirement. We believe that state laws would be irrelevant and unreliable as a standard. First, state laws are not intended for the purpose of determining when privacy notices or other communications should be sent. Where dormancy statutes exist, they have been adopted to regulate practices relating to unclaimed property and are not truly reflective of the status of the relationship. Moreover, state rules are not uniform. Financial institutions should not be required to incur the significant cost of monitoring inconsistent state laws in order to comply with federal requirements.

Proposed Rule Sections __.7 and __.8: Opt-Out

The final rules should be revised to make it clear that a financial institution may provide a toll-free telephone number as a means to opt out, in lieu of or in addition to the media permitted in the Proposed Rules. This would be consistent with the Federal Trade Commission’s proposed privacy rules and would benefit financial institutions and consumers alike. Toll-free telephone numbers are both convenient (thus more likely to be used by consumers) and inexpensive (because most financial institutions already maintain toll-free consumer inquiry lines). This is in contrast with a requirement to include self-addressed, stamped envelopes or tear-off forms, which would impose enormous costs as well as changes to automated mailing systems.

In addition, it must be clear that a financial institution can establish reasonable procedures for consumers to opt out. This is particularly significant for entities such as Target Corporation, with thousands of business locations nationwide. A controlled system for implementing opt outs is essential for the opt outs to be effective. In addition, financial institutions must have the ability to specify information consumers must provide in connection with opting out. Account number is one example of the information that may be most reliable for the financial institution to accurately identify the consumer and thus effectuate the consumer's choice.

Proposed Rules Section __.13: Encrypted Account Numbers

Section __.13 of the Proposed Rules, like the GLB Act, forbids the disclosure of account numbers, access numbers or similar forms of access numbers for transaction accounts to nonaffiliated third parties for telemarketing, direct mail marketing or marketing through electronic mail to the consumer. The final rule should make it clear that the disclosure of an encrypted number to a nonaffiliated third party that does not have the information necessary to decode or unscramble the encrypted number is not forbidden. Also, the final rule should make it clear that the term "account number or similar form of access number or access code" does not include a reference number used by a financial institution, provided the reference number cannot be used by the third party to which it is disclosed to post an unauthorized charge or debit against a particular account. The sole purpose of the rule set forth in Section __.13 of the Proposed Rules is to prevent third parties from posting charges or debits directly to customers' accounts without authorization by using account numbers. This risk that is not present where encrypted numbers or reference numbers are disclosed.

Proposed Rules Section __.16: Effective Date

The regulators seek comment on whether six months following the adoption of the final Rule is sufficient time to enable financial institutions to comply. This final provision of the proposed regulation presents perhaps the most pressing need for revision, because six months is not sufficient time to enable financial institutions to comply.

First, if possible, the timetable for development of the final Rule should be extended. The regulations themselves cannot reasonably be finalized after a single round of comments. This is a new and complex area of regulation, with demonstrated potential for harsh and unintended consequences, and the final Rule must not be enacted without adequate consideration of legitimate concerns and constructive suggestions from the regulated entities. We recognize that the regulating agencies are subject to time constraints themselves under the GLB Act. If additional comments to a revised proposal cannot be

accommodated, we urge the regulators to minimize the requirements imposed under the initial Rule to allow an opportunity to evaluate their impact and effectiveness.

Second, when the Rule is finalized, financial institutions must have a reasonable period to implement the new requirements, and six months is not sufficient. The proposed regulations, and the GLB Act itself, place numerous and substantial new obligations on financial institutions. Once the true extent of the obligations are known (when the final Rule is released), significant time may be necessary to implement operational changes (potentially including changes to system design and programming) and audit procedures to comply with these obligations. In addition to developing notices under Sections 502 and 503, financial institutions must establish and implement new procedures for delivering such notices to consumers. Financial institutions may be required to establish and implement new procedures for providing opt-out methods to consumers and for receiving and handling opt outs received from consumers. In addition, institutions must design and implement effective employee training programs for satisfying all of these new procedural requirements, and must establish compliance systems to monitor their performance in complying with these requirements. Furthermore, financial institutions must evaluate all of their existing contracts with nonaffiliated third parties, to determine if they comply with the obligations imposed under Sections 502 and 503, and amend them if they do not. Further complicating compliance with these requirements is the need to comply also with various state law requirements which may be imposed in addition to the provisions of the GLB Act. It may not be possible to develop complete and accurate privacy policies and notices and install and test reliable systems for implementation of the opt-out in the time provided. As yet another complication, particularly in the retail world, it is generally the practice to impose a "freeze" on system changes in the latter part of the calendar year due to the high demands on the system and the increased importance of stability during the busiest season. Forced system changes during that period place entire business operations in jeopardy.

Moreover, once the policies and procedures have been developed and the system changes implemented, there remains the practical problem of whether it is even physically possible to meet the initial notice requirements as presently set forth. The timing established by the proposed Rule will place a crushing burden on retailers and financial institutions, as well as on the mail system, precisely during the busiest time of the year for both. If the proposed effective dates are adopted without change, initial privacy notices must be provided by all regulated entities within 30 days of the effective date of regulations. Thus, Target and RNB would be required to provide more than 31 million privacy notices at the peak of the holiday season – the busiest time for mail in the entire year. Multiply that by the number of other institutions sending notices to each of their customers, and the impact on the mail system becomes apparent. In addition, the privacy notices undoubtedly will generate a significant volume of calls regarding the meaning of

various elements of what may be a very complex privacy notice. The holiday season already is one of the peak times for customer service calls, and call center resources may be overwhelmed.

Target and RNB, and presumably most financial institutions, will need third-party service organizations to prepare, print and mail privacy notices to consumers. If we and all other financial institutions are required to send privacy notices to all existing customers within the same 30 day period, printing and mailing service providers – which are limited in number – will be completely overwhelmed. Moreover, the 30-day transition period will not allow a credit card issuer such as RNB to coordinate the mailing of privacy notices with other required disclosures that will also be mailed out during that period – such as periodic statements – because the 30-day period will not necessarily overlap with the time period in which the next periodic statement must be mailed out.

For all of these reasons, it is imperative that the proposed Rule be revised to provide a realistic period of time for regulated institutions to comply with the substantial requirements which will be imposed.

Again, Target Corporation and Retailers National Bank appreciate the opportunity to comment on these proposed regulations. If there are any questions about our comments, or if we can provide further information, please do not hesitate to contact me at (612) 307-6234.

Very truly yours,

**RETAILERS NATIONAL BANK
and TARGET CORPORATION**

By:



Ronald A. Prill

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