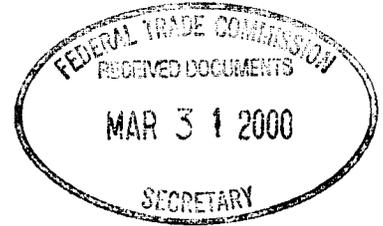




AMERICAN COLLECTORS

association, inc.

COPY



March 31, 2000

VIA HAND DELIVERY

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

**Re: Gramm-Leach-Bliley Act Privacy Rule
16 C.F.R. Part 313-Comment**

Dear Mr. Secretary:

The following comments are submitted on behalf of the American Collectors Association, Inc. ("ACA") in response to the Federal Trade Commission's request for written comments on the notice of proposed rulemaking implementing the nonpublic personal information protections provided in Subtitle A of Title V of the Gramm-Leach-Bliley Act ("G-L-B Act"), Pub. L. No. 106-102, 113 Stat. 1338, *1435 (to be codified at 15 U.S.C. § 6801 et seq.). See Privacy of Consumer Financial Information, 65 Fed. Reg. 11,174 (March 1, 2000) (Notice of Proposed Rulemaking) (to be codified at 16 C.F.R. Part 313) (hereinafter "Proposed Rule"). As requested by the Commission, ACA has enclosed five copies of these comments, along with a 3½-inch computer disk labeled "ACA's Comments."

I. Statement on ACA.

ACA is a trade association of domestic and international credit and collection professionals who provide a wide variety of accounts receivable management services. While based in Minneapolis, Minnesota, ACA represents approximately 4,400 credit and collection professions in the United States, Canada and 55 other countries. ACA members include third party collection agencies, credit grantors, attorneys and vendor affiliates.

Some ACA members also participate in ACA's Asset Buyers Program. The Asset Buyers Program is designed for members interested in purchasing debt from third party creditors. The sale and purchase of accounts receivables are growing and gaining momentum within the collection industry. In 1998 alone, creditors sold more than \$20 billion of debt to third parties, including collection agencies. ACA anticipates that debt purchasing by collection agencies will continue to increase based on projections that debt buying will surpass \$25 billion this year.

II. Summary of Comments.

ACA is committed to protecting nonpublic personal information such as that prescribed by the Proposed Rule and the underlying G-L-B Act. Indeed, ACA members have a long history of protecting consumers' nonpublic personal financial and other information based on the requirements of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (1998), and the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (1998), among other federal and state laws applicable to collection agencies. These federal statutes, as principally administered by the Federal Trade Commission, already impose substantive protections against unauthorized disclosures of sensitive consumer information.

As a threshold matter, ACA agrees that the G-L-B Act and the proposed implementing rule have limited application to collection agencies engaged in the collection of debts owed to third party creditors. That is, the Commission has indicated that the proposed rule would only apply to collection agencies that redisclose and reuse nonpublic personal information when collecting debts owed to creditors.

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Although ACA believes that even this interpretation is overly broad, it is clear that, at the most, the G-L-B Act limits the application of the Proposed Rule to collection agencies that redisclose and reuse nonpublic personal information. ACA also believes that the Proposed Rule should clarify that nonpublic personal information about a consumer obtained by collection agencies in the course of collecting an account for a creditor can be lawfully redisclosed to the creditor pursuant to Sections 313.9, 313.10 and/or 313.11. See Proposed Rule, §§ 313.9, 313.10 and 313.11.

ACA respectfully disagrees with the Commission's assessment that a collection agency that purchases a consumer's debt from a creditor effectively "steps into the shoes" of the original creditor. It is a strained interpretation of the G-L-B Act to propose that either the consumer or the collection agency reasonably believe that a "customer relationship" exists between the parties. Courts have previously concluded that a collection agency that purchases debt from a creditor functions as a "debt collector" under the FDCPA, not a "creditor." Further, the staff has opined that a collection agency that purchases defaulted accounts from a creditor is not a "creditor" under the FDCPA.

The Commission's admittedly broad interpretation of the G-L-B Act, specifically the definition of "financial institutions," is not warranted. The protections against disclosure of nonpublic personal information by financial institutions that drive the G-L-B Act are fully reflected in numerous federal and state laws that have governed the conduct of collection agencies for more than twenty years. Adding another layer of regulation for collection agencies to follow will not solve the privacy issues identified by the G-L-B Act, especially where (1) compliance with the FDCPA, FCRA and state analogs have led to few complaints by debtors for alleged privacy infringements, and (2) the G-L-B Act contains no evidence that Congress enacted the statute due to concerns that collection agencies were disclosing debtors' nonpublic personal information. ACA also is concerned that the privacy and opt out notices in the Proposed Rule will lead to consumer confusion and an increase in hyper-technical litigation under the FDCPA when combined with the validation notice and verification of debts required by the FDCPA.

To remedy these concerns, ACA offers the following comments and recommendations:

1. Clarify in the final rule that a collection agency engaged in traditional collection work on behalf of a third party creditor is not governed by the G-L-B Act. ACA proposes that the Section 313.3(ii) of the final rule expressly exclude collection agencies collecting on behalf of third party creditors.
2. Clarify in the final rule that the prohibitions on redisclosure and reuse of nonpublic personal information about a consumer obtained by a collection agency in the course of collecting an account for a creditor can be lawfully redisclosed to the creditor pursuant to Sections 313.9, 313.10 and/or 313.11. See Proposed Rule, §§ 313.9, 313.10 and 313.11.
3. Redefine "financial institutions" so as to exclude a collection agency that rediscloses or reuses nonpublic personal information. The final rule should also clarify that a collection agency that purchases debt from a third party creditor is treated no differently than an agency that does not purchase debt.
4. Clearly state that the redisclosure and reuse provisions do not prohibit a collection agency from disclosing location information to a creditor as permitted by the FDCPA.
5. Amend the definition of "nonpublic personal information" in the Proposed Rule to conform to the definition in the G-L-B Act.
6. Harmonize the final rule with the requirements of the FDCPA by indicating that (a) the privacy and opt out notices sent by a collection agency shall not be deemed to "overshadow" or "contradict" notices required by the FDCPA, and (b) the verification of a debt by a collection agency is exempt from the G-L-B Act where nonpublic personal information is obtained from the creditor.

III. The Adverse Effects of Bad Debt.

Consumer and commercial debt is incredibly costly. The Federal Reserve Board of Governors has estimated that there is \$1.3 trillion in total outstanding consumer debt in the United States. Unpaid consumer debt costs every adult in the United States \$638 each year, according to Federal Reserve Board and the United States Census Bureau estimates. This translates into an average cost of 54 hours (before taxes) in lost salary every year for the non-supervisory worker simply to pay for the bad debts of consumers.

The collection services ACA members perform are an essential part of a vibrant economy. In 1998 alone, more than \$221 billion in past due accounts was referred to collection agencies. This yielded a net return of \$31.8 billion to credit grantors. This represents a substantial amount of money allocated to credit grantors to create new jobs, increase wages, ensure that consumer goods are available at affordable prices, and offer new investment opportunities. Significantly, the economic benefits associated with collection services accrue to consumers, as well as credit grantors, by controlling rising prices generated by bad debt.

IV. Federal and State Laws Governing Collection Agencies Already Provide for Many of the Privacy Protections Included In The G-L-B Act.

Numerous existing federal and state laws governing collection agencies already provide the comprehensive privacy safeguards embodied in the G-L-B Act and the Proposed Rule. As a result, ACA believes that much of the Proposed Rule is unnecessary.

As collection agencies, ACA members are directly regulated by the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. ("FDCPA"). Among other aspects, the FDCPA delineates the proper procedures for obtaining debtor location information, communicating with consumers, and disclosing that consumers have the right to dispute the validity of the debt. The FDCPA includes provisions that not only regulate the communication between debt collectors and consumers, but also regulate communication between debt collectors and third parties. Only

in very limited situations may a debt collector communicate with anyone other than the consumer, as defined by the statute.

Certain provisions of the FDCPA restrict "communications"¹ by "debt collectors"² in connection with the collection of a debt. These provisions apply with equal force to collection agencies, as well as to any person who purchases a debt from a creditor and who attempts to collect debt provided that the principal purpose of the purchaser's business involves third party collection activity. For example, Section 805(b) of the FDCPA states:

. . . [W]ithout the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. 1692c(b) (1998). This provision requires collection agencies to obtain the consumer's consent before engaging in any communications about the debt with anyone other than the few persons listed in this section. It therefore ensures that consumers control who receives information about their debts and the information that may be shared with third parties.

¹ The FDCPA broadly defines communication as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2) (1998).

² A "debt collector" is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6) (1998).

Other aspects of the FDCPA further restrict or prohibit the unauthorized sharing of information about a consumer debt in the interest of protecting the consumer's privacy. For example, the FDCPA requires that:

[a]ny debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall -

- i. identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;
- ii. not state that such consumer owes any debt;
- iii. not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information.

* * *

See 15 U.S.C. § 1692b (1998). See also 15 U.S.C. § 1692c(a) (1998) (controlling a collection agency's communications about a consumer's debt when engaging in direct communication with a consumer).

In addition to the FDCPA, other federal laws governing collection agencies restrict access to nonpublic personal information. For example, collection agencies that "furnish" consumer information to consumer reporting agencies are governed by the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (1998) ("FCRA"). This law contains express limitations on the types of consumer information that can be disclosed to

third parties.³ Moreover, the majority of states have adopted specific debt collection and privacy laws.

As a result of these and other federal and state laws and regulations applicable to collection industry, the underlying privacy protections supporting the enactment of the G-L-B Act are already fully reflected in the business operations of ACA members. Given the fact that the G-L-B Act contains no evidence that Congress enacted the statute due to concerns that collection agencies were disclosing debtors' nonpublic personal information, ACA believes that the proposed privacy protections are redundant and unnecessary as applied to collection agencies.

V. Specific Comments Concerning The Proposed Rule.

ACA is generally concerned with the impact the Proposed Rule will have on collection agencies that (1) redisclose or reuse "nonpublic personal information," or (2) purchase consumer debts from third party creditors. These concerns stem from Sections 502 and 503 of the G-L-B Act. Section 502 of the G-L-B Act prohibits a "financial institution" from disclosing "nonpublic personal information" about a "consumer" to nonaffiliated third parties unless the institution satisfies various disclosure requirements and the consumer has not elected to opt out of the disclosure. Section 503 of the G-L-B Act requires a "financial institution" to provide its

³ The FCRA prohibits furnishers of consumer information from providing information to a consumer reporting agency that they know, or consciously avoid knowing, is inaccurate. 15 U.S.C. § 1681s-2(a)(1) (1998). When a consumer notifies the furnisher of a perceived inaccuracy which is then verified, the correct information must be forwarded to the consumer reporting agency. 15 U.S.C. § 1681s-2(a) (1998). Moreover, if a consumer reporting agency notifies the furnisher of a consumer's dispute of the accuracy of information provided by the furnisher, the furnisher must conduct an investigation of all relevant information provided by the consumer reporting agency, as well as any material given to the agency by the consumer, and report the results of the investigation to the agency. 15 U.S.C. § 1681s-2(b) (1998).

"customers" with a notice of its privacy policies and practices.

1. Collecting A Debt On Behalf Of A Creditor Is Properly Exempted From Most Provisions Of The Proposed Rule.

ACA agrees that most collection agencies will not be governed by the G-L-B Act because they are not "financial institutions" that have a "customer relationship" with consumers.⁴

The Proposed Rule adopts the G-L-B Act's definition of "financial institution." That is, a "financial institution" is defined as "any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956." See 113 Stat. 1338, *1443 (to be codified at 15 U.S.C. § 6809); Proposed Rule, § 313.3(j)(1). The Proposed Rule states that "'financial activities' include not only a number of traditional financial activities specified in Section 4(k) itself, but also those activities that the Federal Reserve Board has found to be closely related to banking, or usual in connection with the transaction of banking or other financial operations abroad." Proposed Rule, 65 Fed. Reg. at 11,175 (footnotes omitted). The Proposed Rule thus notes that the Federal Reserve Board has determined that collection agencies, in certain instances, perform financial activities. Proposed Rule, 65 Fed. Reg. at 11,175 fn. 2 (citing 12 C.F.R. 225.28 (1998)).

⁴ Of course, as the Proposed Rule notes, "[i]f a consumer never becomes a customer, the institution is not required to provide any notices to the consumer unless the institution intends to disclose nonpublic personal information about that consumer to nonaffiliated third parties outside of the exceptions as set out in Sections 313.10 and 313.11." Proposed Rule, 65 Fed. Reg. at 11,176 (definition of "customer"). Whether the Proposed Rule applies to collection agencies that redisclose or reuse consumers' nonpublic personal information is discussed elsewhere. See infra § V.2.

Closely linked with a "financial institution" is the definition of a "customer relationship," which the Proposed Rule defines as "a continuing relationship between a consumer⁵ and a financial institution whereby the institution provides a financial product or service to a consumer that is to be used primarily for personal, family, or household purposes." Proposed Rule, § 313.3(h)(i)(1).

The Proposed Rule correctly notes that a "consumer" does not have a "customer relationship" with a collection agency "that simply attempts to collect amounts owed to the creditor." Proposed Rule, 65 Fed. Reg. at 11,176. The services performed by a collection agency are based on delinquent accounts that have been placed by a creditor with the agency. The creditor, however, maintains control and legal ownership over the account. Any recovery obtained by the agency is ultimately returned to the creditor. There is no "financial product or service" exchanged between the collection agency and the consumer. See Proposed Rule, § 313.3(k)(1) (defining "financial product or service" as "any product or service that a financial holding company could offer by engaging in an activity that is financial in nature under section 4(k) of the Bank Holding Company Act of 1956"). Nor is there a "customer relationship" between the parties. An agency collecting on behalf of a third party creditor is thus properly excluded from the G-L-B Act's privacy and opt out notice requirements.

Section 313.3(ii) of the Proposed Rule contains examples where a consumer does not have a continuing relationship for purposes of determining whether a "customer relationship" exists. Proposed Rule, § 313.3(ii). The list does not include a collection agency engaged in collection activity on behalf of a third party creditor. However, as noted above, the Proposed Rule acknowledges there is no "customer relationship" between a consumer and a collection agency that attempts to collect amounts owed to a creditor. ACA believes that the final rule

⁵ The Proposed Rule defines "consumer" as "an individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family or household purposes, and that individual's legal representative." Proposed Rule, § 313.3(e)(1).

should contain an express statement that excludes collection agencies collecting on behalf of creditors. Thus, ACA proposes that Section 313.3.(ii) include the following language:

- (ii) A consumer does not, however, have a continuing relationship with you if:

* * *

- (D) You are a collection agency that is collecting or attempting to collect a debt owed to a creditor.

The proposed language merely codifies the position articulated by the Commission in the Proposed Rule, that is, a "consumer" does not have a "customer relationship" with a collection agency "that simply attempts to collect amounts owed to the creditor." Proposed Rule, 65 Fed. Reg. at 11,176.

2. A Collection Agency Collecting A Debt On Behalf Of A Creditor Should Not Be Subject To The Redisdisclosure And Reuse Limitations.

Section 313.12 of the Proposed Rule generally restricts the disclosure and use of nonpublic personal information received from a nonaffiliated financial institution. See Proposed Rule, § 313.12(a). Redisdisclosure is forbidden unless the disclosure would be lawful if the financial institution made it directly. See Proposed Rule, § 313.12(a).

ACA respectfully disagrees that a collection agency is "generally bound by the limits on redisdisclosure and reuse of nonpublic personal information as set forth in proposed Section 313.12." Proposed Rule, 65 Fed. Reg. at 11,176. According to the Proposed Rule, "[t]his includes data obtained by the collector in collecting the debt because proposed Section 313.3(o)(2)(E) specifically includes information obtained by a creditor's 'agent in connection with collecting on a loan' in the definition of "personally identifiable financial information." Proposed Rule, 65 Fed. Reg. at 11,176 fn. 6 (emphasis added).

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The interchangeable use of the terms "loan" and "debt" in the Proposed Rule contributes to a unreasonable expansion of the type of information covered by the redisclosure and reuse provisions of the G-L-B Act. Only a small percentage of the accounts receivable collected by collection agencies on behalf of creditors are actually "loans." Many of the past-due "debts" involve non-loan transactions such as legal judgments, delinquent credit and dishonored checks. Indeed, the FDCPA defines the term "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5) (1998).

Therefore, it is unduly broad to state the redisclosure and reuse provisions include information obtained by collection agencies in collecting the "debt" because proposed Section 313.3(o)(2)(E) specifically includes information obtained by a creditor's 'agent in connection with collecting on a loan' in the definition of "personally identifiable financial information." Proposed Rule, 65 Fed. Reg. at 11,176 fn. 6 (emphasis added). At the most, Section 313.12 should be limited to "loan" information based on the proposed definition of "personally identifiable financial information."

In the alternative, ACA believes that it is essential that the Proposed Rule clarify that nonpublic personal information about a consumer obtained by a collection agency in the course of collecting an account for a creditor can be lawfully disclosed or redisclosed to the creditor pursuant to proposed Sections 313.9, 313.10 or 313.11 - thereby obviating the need for compliance with the notification and opt out provisions. As noted, the FDCPA permits collection agencies to contact persons other than the consumer to obtain location information about the consumer. 15 U.S.C. § 1692b (1998). It is common for collection agencies to obtain this location information.

While location information is almost invariably publicly available (and therefore not governed by the G-L-B Act),⁶ it would be a perverse result if a consumer was permitted to prohibit a collection agency from providing current or updated location information to debtor's creditor. Consequently, ACA believes that the Commission should clarify that location information permissibly obtained by a collection agency under the FDCPA is a lawful exception to the application of the G-L-B Act under Sections 313.9, 313.10 or 313.11. See, e.g., Proposed Rule, Section 313.10(a)(3) ("to maintain or service the consumer's account with you, or with another entity as part of a private label credit card program or other extension of credit on behalf of such entity"); Section 313.11(a)(2)(iv) ("to persons holding a legal or beneficial interest relating to the consumer").

3. A Collection Agency That Purchases An Account From A Creditor Should Not Be Treated Differently Than Other Collection Agencies.

The Proposed Rule states that "a consumer has a 'customer relationship' with a debt collector that purchases an account from the original creditor (because he or she would have a credit account with the collector). . . ." See Proposed Rule, 65 Fed. Reg. at 11,176. Elsewhere, the Proposed Rule reiterates that "an individual also will be deemed to be a consumer of a financial institution if that institution purchases the individual's account from some other

⁶ The definition of "publicly available information" proposed in the Proposed Rule includes "information from official public records, such as real estate recordations or security interest filings. It also includes information from widely distributed media (such as a telephone book, television or radio program, or newspaper) and information that is required to be disclosed to the general public by Federal, State, or local law (such as securities disclosure documents). . . . [I]nformation obtained over the Internet will be considered publicly available information if the information is obtainable from a site available to the general public without requiring a password or similar restriction." Proposed Rule, 65 Fed. Reg. at 11,179.

institution." See Proposed Rule, 65 Fed. Reg. at 11,175 (definition of consumer).

The basis for treating a collection agency as, in effect, the legal equivalent of the original creditor appears to be that the consumer becomes a "customer" of the agency after the debt is purchased. However, it is clear that a collection agency that purchases a debt from a creditor does not offer or perform "financial products or services" for a "consumer" within the meaning of the G-L-B Act. Specifically, the "financial products or services" were extended by the original creditor of the debtor. Because the debt is usually "charged off" by the original creditor, there is typically no other business transacted between the collection agency and the debtor other than collection of the debt.⁷

Simply stated, neither the collection agency that purchases the debt nor the consumer reasonably believes that there is a "customer relationship" with continuing interactions that amount to more than a mere isolated transaction.⁸ In fact, there is only one remaining transaction between the debtor and the collection agency - full and final payment of a delinquent account originating with the creditor. Following receipt of the payment, the collection agency and the debtor have no further interaction whatsoever.

⁷ The Proposed Rule notes that "a financial institution is not required to provide annual notices to a customer with whom it no longer has a continuing relationship. The examples that follow this general rule provide guidance on when there no longer is a continuing relationship for purposes of the Rule. These include, for instance, loans that are paid in full or charged off, or accounts sold without retaining servicing rights." Proposed Rule, 65 Fed. Reg. at 11,180 (analysis of Section 313.5) (emphasis added).

⁸ As noted in the Proposed Rule, "[t]he Commission has interpreted the Act as requiring more than isolated transactions between a financial institution and a consumer to establish a customer relationship." Proposed Rule, 65 Fed. Reg. at 11,176 (definition of "customer relationship") (emphasis added).

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The position taken in the Proposed Rule with respect to collection agencies that purchase accounts directly conflicts with established judicial precedent interpreting the FDCPA. In Kimber v. Federal Fin. Corp., 668 F.Supp. 1480 (M.D. Ala. 1987), the Federal district court concluded that a collection agency assigned debts by a creditor was a "debt collector" under the FDCPA and not a "creditor." Interpreting the FDCPA, the district court reasoned that:

Congress clearly sought to exclude creditors—that is, those who extend credit and collect their own debts—from the Act's coverage; such persons are, in the words of the Senate Report, "restrained by the desire to protect their good will." But, when these so-called creditors are in effect merely in the business of collecting stale debts rather than extending credit, they are no longer true creditors but debt collectors who, in the words of the Senate Report, "are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them"; they are simply independent collectors of past due debts and thus clearly fall within the group Congress intended the Act to cover.

Kimber, 668 F.Supp. at 1486 (emphasis added). Accord Cirkot v. Diversified Fin. Sys., Inc., 839 F.Supp. 941 (D. Conn. 1993); Little v. World Fin. Network, Inc., 1990 WL 516544 (D. Conn. July 26, 1990) (unreported decision). As these cases demonstrate, courts have concluded that collection agencies that purchase accounts from creditors must comply with the FDCPA as "debt collectors," that is, they "are likely to have no future contact with the consumer" and are not creditors under the statute. Consequently, consumers clearly obtain the benefits that flow from the application of the FDCPA, including, for example, the numerous privacy protections that are reflected in the FDCPA. See supra § IV (discussing FDCPA privacy protections).

The Proposed Rule also conflicts with the Commission's opinion expressed in informal staff opinion letters defining the term "creditor" under the FDCPA where defaulted accounts are involved. For example, in response to a 1993 question whether a "debt collector is covered by the Fair Debt

Collection Practices Act when it purchases defaulted accounts from the original creditor," the Commission responded that "[w]e consider the purchase of a defaulted account '. . . an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.' As such, we do not believe that such a purchase removes the debt collector from Act coverage with respect to that account because it does not make the debt collector a creditor under Section 803(4)." LeFevre, FTC Informal Staff Opinion Letter (Sept. 16, 1993) (emphasis added).

As a result, ACA respectfully disagrees with the Commission's interpretation that a "customer relationship" exists between a collection agency that purchases a debt from a creditor and the debtor. The Proposed Rule clearly conflicts with judicial decisions that have concluded that a collection agency that purchases debt from a creditor is not entitled to "creditor" status under the FDCPA. The Proposed Rule also fails to account for the Commission's previous conclusion that a collection agency that purchases defaulted accounts from a creditor, as is frequently the case, is not a "creditor" under the FDCPA. As such, ACA recommends that the final rule specify that a collection agency that purchases a consumer's debt from a creditor does not have a "customer relationship" with the consumer, much the same as a collection agency that collects a debt on behalf of a creditor. In the alternative, the final rule should acknowledge, at the very minimum, that a collection agency that purchases defaulted accounts from a creditor does not render the agency a "creditor." See LeFevre, FTC Informal Staff Opinion Letter (Sept. 16, 1993).

4. The Definition Of "Nonpublic Personal Information" In The Proposed Rule Is More Comprehensive Than Mandated By The G-L-B Act.

Section 509(4) of the G-L-B 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." 113 Stat. 1338, *1444 (to be codified at 15 U.S.C. § 6809(4)). The statute also excludes "publicly available information" from the definition. In summary, the G-L-B Act defines "nonpublic

personal information" by limiting it to the three express examples of "personally identifiable financial information" cited in the statute.

By contrast, the Proposed Rule takes a much more expansive view of "nonpublic personal information." Section 313.3(n) of the Proposed Rule defines "nonpublic personal information" 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 financial information." Proposed Rule, § 313.3(n). In turn, "personally identifiable financial information" is defined as "any information: (i) provided by a consumer to you to obtain a financial product or service from you; (ii) resulting from any transaction involving a financial product or service between you and a consumer; or (iii) you otherwise obtain about a consumer in connection with providing a financial product or service to that consumer, other than publicly available information." Proposed Rule, § 313.3(o)(1).

The Proposed Rule's definition of "nonpublic personal information" is much more comprehensive than the G-L-B Act because the three express examples of "personally identifiable financial information" determine the meaning of "nonpublic personal information." By operation of these definitions, the Proposed Rule may have the effect of rendering all information about a consumer obtained from a financial institution nonpublic personal information. Such a result was not intended by the G-L-B Act.

The Proposed Rule also requests comments on Alternatives A and B for "publicly available" information. ACA believes that Alternative B is more compatible with the intention of Congress. Alternative B defines "publicly available information" as information "that is lawfully made available to the general public from: (i) Federal, State or local government records; (ii) Widely distributed media; or (iii) Disclosures to the general public that are required to be made by Federal, State or local law." See Proposed Rule, § 313.3(p)(1) (Alternative B). Thus, under Alternative B, the information would be treated as publicly available if it could be obtained from a public source. See Proposed Rule, 65 Fed. Reg. at 11,178 (definition of nonpublic personal information) ("[u]nder

Alternative B, information is 'publicly available information' if it could be obtained from a public source, regardless of its actual source") (emphasis supplied).

5. The Privacy And Opt Out Notices Required By The Proposed Rule Should Be Harmonized With The Requirements Imposed By The FDCPA.

Assuming, arguendo, that a collection agency is required to provide the privacy and opt out notices required by the Proposed Rule, ACA is concerned that these notices will confuse consumers and potentially conflict with the requirements of the FDCPA.

For example, the FDCPA requires that, within five days of the initial communication with the debtor, a collection agency must send a written notice indicating the amount of the debt and the name of the creditor. 15 U.S.C. §1692g (1998). The notice must also contain three statements: (1) the debt will be assumed to be valid unless it is disputed within thirty days; (2) if the debtor timely disputes the debt in writing, the collector will obtain verification of the debt or a judgment and mail it to the debtor; and (3) if the debtor submits a timely written dispute, the collector will provide the debtor with the name and address of the original creditor. 15 U.S.C. §1692g (1998). For a variety of reasons, the required validation notice is commonly sent to the consumer with the first collection letter.

A substantial body of law has developed around the FDCPA's validation notice requirement. It is among the most aggressively litigated provisions of the FDCPA based on allegations that the content of the collection letters sent by collection agencies to debtors during the first thirty days of collection contradict or overshadow the validation notice. See, e.g., Terran v. Kaplan, 109 F.3d 1428 (9th Cir. 1997); Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482 (4th Cir. 1991); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991); Southern Oregon Credit Serv., Inc., 869 F.2d 1222 (9th Cir. 1988).

ACA is concerned that the privacy or opt out notices sent by collection agencies during the first thirty days of collection will simply lead to increased claims by consumer

attorneys seeking new avenues to file suit based on the alleged overshadowing or contradiction of the validation notice. ACA therefore recommends that the final rule specifically clarify that the privacy and opt out notices sent by collection agencies to consumers in compliance with the G-L-B Act shall not be a basis for an alleged violation of the FDCPA's validation requirements set forth at 15 U.S.C. §1692g (1998), or for that matter, any other requirement imposed by federal or state laws or regulations.

On a related point, the FDCPA validation of debts provision also mandates that the collection agency verify the account information by providing the consumer with the requested documentation thereof before resuming any collection activity on the account. There is only one way for a collection agency to comply with this verification requirement--by contacting the original creditor and obtaining information that will help the consumer understand his or her payment obligation. Due to this FDCPA requirement, ACA believes that the final rule should state that verifying a consumer's debt is exempted from the G-L-B Act where nonpublic personal information is exchanged between the creditor and the collection agency. Indeed, this type of clarification is already contemplated by the G-L-B Act. See 113 Stat. 1338, *1437 (to be codified at 15 U.S.C. § 6802(e)(8)) (exempting the disclosure of nonpublic personal information necessary to "comply with Federal State, or local laws, rules, and other applicable legal requirements. . . .").

VI. Conclusion.

ACA appreciates the Commission's consideration of these comments. We commend the Commission's effort to translate an admittedly challenging statutory mandate into a workable regulation that protects consumers' nonpublic personal information from disclosure to nonaffiliated third parties. We offer these comments to assist the Commission by elucidating some necessary clarifications to the Proposed Rule, as well as to ensure that collection agencies can continue to comply with federal and state collection and credit laws while implementing the privacy notifications enacted by the G-L-B Act where applicable.

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Respectfully submitted,



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