

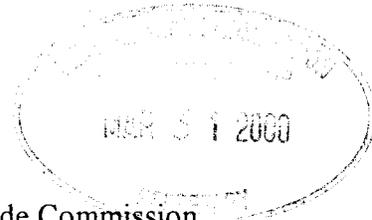


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March 31, 2000



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[Re: Gramm-Leach-Bliley Act Privacy
Rule, 16 CFR Part 313 – Comment]
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[original plus 5 copies, and on disk]

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Re: Gramm-Leach-Bliley Act – Title V
Comments on Proposed Privacy Regulations

Ladies and Gentlemen:

Merrill Lynch & Co. ("Merrill Lynch") is pleased to submit this letter in response to the proposed rules to implement Title V of the Gramm-Leach-Bliley Act (the "Act"), published for comment on various dates in the Federal Register by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Securities and Exchange

Commission ("Commission" or "SEC"), and the Federal Trade Commission ("FTC") (collectively referred to as the "Agencies"). Given that all Agencies' Proposed Rules follow the same numbering format, references to rule numbers are to the relevant sections of the C.F.R. Parts of each Agencies' proposed rules, unless otherwise noted and except for the subsections of Section 3, which are to the Commission's proposed rules.

The proposed rules would establish a number of notice obligations and impose limitations on the use of a consumer's and a customer's nonpublic financial information by broker-dealers, registered investment advisers, investment companies, and other financial institutions. Merrill Lynch commends the Agencies on the rules that they have proposed and is in general agreement with them. Clearly defined privacy principles that will guide financial institutions in the collection, use, and protection of a consumer's and customer's nonpublic financial information are essential in maintaining confidence in the financial services sector. The Agencies' proposed rules represent a significant step in this process.

Merrill Lynch believes that the proposed rules can be improved in a number of ways that will both enhance consumer protection and streamline the compliance obligations of a financial institution. Merrill Lynch also urges the Agencies to permit some flexibility in the effective date of its final rules to allow financial institutions sufficient time to comply with the new privacy regulations proposed by the Commission and banking regulators. Many of the same institutions are also aware of their need to comply with the terms of the so-called "Safe Harbor Principles" that the United States and the European Union are in the process of finalizing, which will allow U.S. financial institutions to continue to receive personal confidential information from Europe.

Merrill Lynch urges the Agencies to consider the following comments in preparing their final regulations:

1. **Rule of Construction (Proposed Rule 2)**: Although the Commission and other federal financial regulatory agencies have carefully coordinated the form and substance of their respective privacy rule proposals, the SEC's rules are different in one important respect. Each of the other federal agencies' rules contain examples of how particular rules will be interpreted. All but the SEC, however, propose that compliance with an example constitutes compliance with the underlying rule.

Merrill Lynch believes that the degree of certainty provided by the other agencies' willingness to permit a financial institution to rely on an example will enhance timely and efficient compliance with those agencies' rules. This is especially important in light of the tight rule implementation schedule that the SEC has proposed. Merrill Lynch urges the Commission to follow the lead of the other agencies in its final regulations.

2. **Purpose and Scope (Proposed Rule 1(b)), Privacy Notice Disclosure (Proposed Rule 4), Opt-Out Procedures (Proposed Rule 7)**: The proposed rules are limited in application to "nonpublic personal information about individuals who obtain financial products or services for personal, family, or household purposes." Financial information about businesses is excluded. Providing required disclosure for certain categories of non-natural persons (such as trusts, family partnerships, and personal holding companies) that are customers of the financial institution may present special problems (in terms of who must receive a privacy notice and who may elect to opt-out of disclosure) that should be addressed in the Agencies' final rules.

A. **Financial Institutions with Trusts, Family Partnerships, and Personal Holding Companies as Customers**: The beneficiaries of a given trust might include all children of a specified individual, regardless of whether those children have been born at the time that the trust account was opened. Similarly, it may be uncertain at a particular point in time who might be a trust's remainder beneficiaries. Moreover, in many instances, a trust grantor will not want a remainder beneficiary to know he or she has a contingent interest in the trust.

Thus, even if a given remainder beneficiary were identifiable, he or she might have no expectation of privacy with regard to his or her unwitting interest in the trust. More importantly, to require a financial institution to provide a privacy notice and opt-out right to such an unwitting remainder beneficiary would defeat the grantor's very real and legitimate interest in keeping its remainder interest designations private. Given that a financial institution's contacts with a trust are usually limited to the trustee or trustees of a trust, it may be difficult or impossible for the financial institution to provide adequate notice about its privacy policies and procedures to all such beneficiaries because it is impractical to obtain up-to-date information regarding their names and addresses.

Similar problems exist for family partnerships and personal holding companies. Thus, providing appropriate privacy notices to each beneficiary of these entities would, in many cases, be burdensome and probably impractical given the nature of the entities.

Finally, even if a financial institution could efficiently provide privacy notices to all beneficial owners, the question remains how a financial institution would effectuate a beneficiary's election to opt out, particularly if only some – but not all – beneficiaries of a given entity make the election. Would that election apply only to information that specifically identifies the individuals electing to opt out, or to all information pertaining to all beneficiaries of the entity? A related question is whether a grantor should have any authority to exercise opt-out rights.

To address these problems, Merrill Lynch proposes that the Agencies exclude non-natural persons such as trusts, family partnerships, or personal holding companies from its privacy rules. Alternatively, the Agencies could provide that a financial institution must provide the requisite notice and opt-out right to an appropriate contact person

identified for this purpose on the relevant account opening documents (*e.g.*, a trustee), given that that individual is responsible for opening the account and instructing the financial institution on behalf of the parties to the account. Under this approach, the financial institution would not be required to provide a privacy notice to any beneficial interests, the grantor, or others that are connected in some manner to the trust.

Furthermore, the designated contact person would be the single individual authorized to make an opt-out election on behalf of the beneficiaries that he or she represents (as well as the grantor and multiple trustees, if appropriate), and any such election would apply equally to all beneficiaries and other persons connected with that entity. As a result, a financial institution would be required to comply only with elections received from a designated contact person, and would not be required to honor either a partial election by the designated contact person on behalf of only some (but not all) beneficiaries, or elections made directly to the financial institution by individual beneficiaries.

B. Financial Institutions That Serve As Trustees: The trustee itself also needs to have clear and manageable guidance regarding the nature of its obligations in connection with the underlying trust account. Merrill Lynch owns several entities that provide personal trust services, frequently in connection with related brokerage accounts. We believe that the "customer relationship" created by a trust should be deemed to exist only between the trustee and the person who appoints the trustee. The trustee therefore should be obligated to provide initial and annual notices only to that person, whether it is a grantor, testator, or otherwise. That person generally determines the terms and conditions under which the trust is to be administered and the rights of any beneficiaries of the trust. Only that person is in a position to determine what type of information sharing should be permitted in connection with the trust account that he or she is establishing. Even where a person is exercising authority to appoint a successor trustee to an already existing trust, that person sets the terms of the relationship with the new trustee. Determining that a customer relationship exists with any other person with an interest in the trust would raise all of the issues identified above, including the identification of beneficiaries and potential violation of the privacy interests of the grantor if contact with any beneficiary is mandated.

If, notwithstanding the foregoing considerations, the Agencies determine that a trustee must look beyond the person who establishes the trust relationship, we respectfully suggest that only beneficiaries who receive account statements should be deemed to have an interest and level of contact with the trustee that could be deemed to rise to the level of being a "consumer." Accordingly, the trustee would be obligated to provide notice to such persons only if it intended to share information regarding such persons with unaffiliated third parties outside of the existing exceptions in the Proposed Rules. Attempting to cover any other beneficiary would be impracticable for the reasons stated above.

Last, the Proposed Rules should make clear that in the case of a product or service that includes both a trust relationship and an associated brokerage account by affiliated entities, a single notice and opt-out could be provided to the customer, consistent with our more general comments below.

3. **Privacy Notice (Proposed Rule 4), Opt-Out Procedures (Proposed Rule 7)**: Notice and opt-out problems are also present with regard to joint accounts and accounts in which a fiduciary or other party acts on behalf of the actual account holder pursuant to a power of attorney or other arrangement. For these reasons, Merrill Lynch proposes that the Commission make it clear that a financial institution's notice obligation would be fulfilled by providing notice to the primary contact person (in the case of a joint account) or the person with power of attorney or other authority to act on behalf of the beneficial owner (as opposed to providing such notice to all account holders in a joint account or the individual that has transferred control using a power of attorney or other means). Likewise, only the person receiving the notice would have the authority to elect to make an opt-out election on behalf of all beneficial owners of the account.

This alternative, however, would not apply to situations in which a registered representative employed by a broker-dealer has discretionary authority over a customer's account. Under those circumstances, the broker-dealer would remain obliged to provide the actual customer with the requisite privacy notices and to honor that customer's opt-out election, if appropriate.

4. **Exclusions from Financial Institution Definition (Commission Proposed Rule 248.3(m)(2)(i))**: Any person engaged in "any financial activity" subject to the jurisdiction of the Commodity Futures Trading Commission ("CFTC") is not a "financial institution" for privacy purposes. Merrill Lynch urges the Agencies to clarify in its final rules that this exclusion applies to all futures investments within the CFTC's jurisdiction, including hedge funds with both commodity and securities elements.
5. **Privacy Notice Content (Proposed Rule 6)**: The Agencies' Proposed Rules would require a financial institution to disclose in its privacy notice the categories of affiliated and nonaffiliated parties to which a consumer's data could be disclosed. This proposal, however, exceeds the Agencies' statutory authority in two important respects.

First, the Act provides *no* authority for the Agencies to require an institution to describe the categories of *affiliates* to which consumer data might be disclosed. Second, even as to non-affiliated parties, the Act provides that those third parties that are agents of a financial institution need not be described in the categories of parties receiving disclosure.

Accordingly, Merrill Lynch urges the Agencies to modify their respective rules to take these important statutory limitations into account. In so doing, the Agencies will also

reduce the rules' administrative and compliance burdens on financial institutions, without compromising the consumer's privacy protections.

6. **Waiver of Privacy Notice and Opt-Out Rights (Proposed Rule 4)**: Some customers request that a financial institution hold all regular account statements, and *not* mail them to their places of business or residence. Such customers would likely request that initial and annual privacy notices also be held with the regular account statements.

Merrill Lynch urges the Agencies to clarify that under these circumstances, the customer (or designated individual in the case of a trust, etc.) may waive its privacy notice rights, provided that it may at any time revoke that waiver.

7. **Collecting Information (Commission Proposed Rule 248.3(d)), Definition of "Consumer" (Commission Proposed Rule 248.3(g)), and Protection of Customer Information (Commission Proposed Rule 248.30)**: Merrill Lynch urges the Commission to clarify the responsibilities of a broker-dealer when an individual registered representative transfers from one broker-dealer to another. In moving from Firm A to Firm B, a transferring registered representative often attempts to divert the patronage of the customers of Firm A to Firm B. The transferring registered representative also sometimes attempts to take certain customer information (*e.g.*, name, address, telephone number, and perhaps account balance and transactional information).

Merrill Lynch urges the Commission to clarify that Firm B has not "collected" information for purposes of Commission Proposed Rule 248.3(d) simply by hiring a new registered representative who arrives with customer information taken from Firm A. Likewise, an individual about whom the transferring registered representative has taken personal non-public financial information from Firm A should not be considered a "consumer" with respect to Firm B until one of the events described in Commission Proposed Rule 248.3(g) (which defines the term "consumer") has occurred.

Merrill Lynch also urges the Commission to clarify that, if a given registered representative (without authorization) removes non-public customer information from Firm A at the time that he or she transfers to Firm B, Firm A has discharged its responsibility under Commission Proposed Rule 248.30 to safeguard customer data if it has established and implemented reasonable and appropriate internal operating procedures to require registered representatives to protect the privacy of Firm A's customer information.

8. **"Consumer" (Commission Proposed Rule 248.3(2)(1)), "Customer Relationship" (Commission Proposed Rule 3(k))**:

A. **Consumer/Customer Distinction**: Merrill Lynch is concerned that the consumer/customer distinction is too subjective and, as a result, will be difficult for a financial institution to administer. For example, how many ATM transactions by a

non-customer are sufficient to establish a "customer relationship" for privacy purposes? At what point does a series of isolated contacts with a consumer become a continuing relationship that warrants a "customer" designation?

To minimize these subjective questions, Merrill Lynch urges the Agencies to establish an objective rule that defines a customer relationship beginning when the financial institution accepts a consumer's account application and the account is actually opened. At that point, the mandatory initial and annual customer privacy notice obligations would be triggered. A non-customer consumer would still be adequately protected because it would receive a privacy notice if the institution wanted to disclose its nonpublic data to unaffiliated third parties.

B. Information Collected from an Individual During Initial Internet Contact: The Commission proposes in its Proposed Rule 248.3(k) that no customer relationship is created when an individual provides limited personal information to a broker-dealer in connection with a request for a prospectus or information about financial products. Merrill Lynch agrees with this position, and suggests that it be amplified to take into account a common practice that occurs when an individual contacts a broker-dealer via the Internet.

For example, a broker-dealer that is initially contacted by an individual via the Internet often asks the individual for personal information about income, assets, and investment objectives before he or she may receive additional information on the broker-dealer's website. This information helps the broker-dealer tailor further information to be provided through the website to the individual's particular needs and interests. Merrill Lynch urges the Commission to state that this type of limited initial contact between a broker-dealer and an individual on the Internet does not make the individual a consumer for purposes of the SEC's proposed privacy regulations.

C. Individual Operating as a Registered Investment Adviser: In some instances, a broker-dealer's customer is a registered investment adviser. The investment adviser may place securities trades with the broker-dealer on behalf of the adviser's clients on an undisclosed basis. Under these circumstances, Commission Proposed Rule 248.3(k)(2)(i)(B) provides that the investment adviser has a customer relationship with his or her clients.

Based on the scope of the regulations described in Proposed Rule 1(b), however, Merrill Lynch is of the view that the broker-dealer should not be required to provide a privacy notice to an individual registered investment adviser, despite his or her status as a natural person, because this individual is obtaining financial products and services from the broker-dealer in a business capacity, and not in a personal capacity. This view is consistent with the example set forth in Commission Proposed Rule 248.3(k)(2)(ii) (customer of an introducing broker-dealer that clears trades on a fully disclosed basis with a second broker-dealer is also a customer of the second broker-dealer; the negative implication is that absent full disclosure, the individual would be a

customer of only the introducing broker-dealer). Merrill Lynch urges the Commission to confirm this understanding in its final rules or the release adopting the rules.

D. **Customer Relationships in Loan Sales**: One example cited in several agencies' definition of consumer relationship involves loans that have been sold. For example, FTC Proposed Rule 313.3(i)(2)(E) states that when the selling financial institution retains the servicing rights, the borrower has a customer relationship with *both* the loan seller and the loan purchaser. Thus, both institutions must provide privacy notices to the customer.

This approach would be simply impractical for a large segment of the loan resale market, in which loans are bought and sold quickly, are securitized, or are sold to multiple institutions. Furthermore, most of these categories of purchasers will likely have no interest in disclosing the borrower's nonpublic financial data beyond what is otherwise permitted under the proposed exceptions or the seller's prior disclosure. Under these circumstances, the borrower should not be deemed to be a consumer or customer of the purchaser.

If the Agencies do consider that a consumer or customer relationship exists, Merrill Lynch proposes that a separate exception to the privacy notice rule be defined for purchasers of loans that are serviced by the loan seller, provided that the loan purchaser does not transfer the borrower's nonpublic information to a nonaffiliated third party, except as otherwise permitted under Proposed Rules 9, 10, or 11 or the disclosures provided by the original lender to the borrower. Such an exception would limit privacy protection to situations in which it is needed, would relieve the loan purchasers of a heavy compliance burden, and would likely be more consumer-friendly by eliminating a flood of largely irrelevant privacy notices delivered by various loan purchasers that have no interest in using the consumer's nonpublic data.

E. **Termination of the Customer Relationship**: Like the creation of the customer relationship, Merrill Lynch urges the Agencies to adopt an objective standard to define the terminated customer concept. Merrill Lynch also believes that any use of the word "dormant" could lead to confusion because its legal meaning can vary from one state to the next.

To resolve these problems, Merrill Lynch proposes a simple definition whereby a customer relationship terminates either at the customer's request, or in accordance with the institution's written inactive account policy.

9. **Publicly Available Information (Proposed Rule 3(w))**: Merrill Lynch supports the alternative, less restrictive definition of publicly available information in which information is publicly available if it is lawfully available to the general public, regardless of whether such information was in fact obtained from the consumer or a public source. Merrill Lynch urges the Agencies to accept this alternative in the final

rules because it will be simpler and less confusing to apply, and it better reflects the common sense meaning of the term "publicly available information."

10. **Timing of Initial Privacy Notice Disclosure (Proposed Rules 4(a) and 4(d)):** Proposed Rule 4 requires a financial institution to provide its initial privacy notice *before* a customer relationship begins, unless the consumer orally agrees to later delivery.

A. **Broker-Dealer:** Although this approach might be feasible in some financial services contexts, such pre-customer notification in a broker-dealer context will be impractical in many cases, given the manner in which new customers often initiate relationships with a broker-dealer.

For example, it is not uncommon for an individual to first contact a broker-dealer to place an immediate securities trade. Under existing procedures, many broker-dealers permit an individual to open an account (either in person, online, or by telephone) on the basis of limited personal and financial information and to permit the individual to place limited securities trades almost immediately, provided that the individual passes a necessary and appropriate credit check and the broker-dealer promptly receives (or expects to receive) sufficient funds to cover the trade.

Immediately upon concluding the trade, the broker-dealer typically sends an account agreement to the individual, which confirms the terms of the customer relationship, and, of course, a trade confirmation. The customer must sign and return that agreement before further trades may be made. If the individual does not make prompt payment, or the individual does not return the signed account agreement (if required), the account is closed and no further trading activity is allowed. Merrill Lynch proposes that a broker-dealer be permitted to deliver the initial privacy notice with the initial trade confirmation and the account agreement.

The consumer's privacy rights will not be affected by this slight change in timing, given that the reasonable initial opt-out election period (*e.g.*, 30 days) during which the broker-dealer may not disclose the consumer's nonpublic information to third parties would not commence until the notice has been sent. Moreover, the SEC's proposed "pre-customer" notice requirement is not required by the Act. To the contrary, Section 503(a) of the Act simply requires that the initial notice be provided "[a]t the time" that the customer relationship begins.

For these reasons, Merrill Lynch urges that the single exception to the pre-customer notice requirement set forth in Commission Proposed Rule 248.4(d)(2) be expanded to permit a broker-dealer under the above circumstances to deliver the initial privacy notice within a reasonably short time period after the initial trade (*e.g.*, five business days), at the same time that the trade confirmation and account opening documentation is sent to the customer. Although a broker-dealer could retrain its personnel to obtain the customer's oral consent to receive a post-trade notice in such transactions, Merrill

Lynch is concerned that questions could later arise as to whether the requisite oral consent was in fact obtained when a given account relationship is opened. A well-defined, but limited exception to the pre-customer notice requirement is preferable.

Furthermore, such a rule would serve several customer and broker-dealer interests without compromising the integrity of the SEC's privacy objectives. First, providing a prompt post-trade privacy notice would benefit the investing public by permitting a customer to make a trade that might be time and market sensitive. Second, requiring a broker-dealer to provide notice before a customer may execute a trade when time may be of the essence could impose substantial administrative complexities and costs on the broker-dealer (including opportunity costs in terms of lost business) that are not justified by any additional enhancement to privacy protections already available to the customer in many other aspects of the customer relationship. Third, such a rule would be consistent with the single "accommodation trade" exception to the term "customer relationship" described in Commission Proposed Rule 248.3(k)(2)(v).

Finally, regarding the delivery of the initial notice to existing customers once the privacy rules become effective, Merrill Lynch urges the Commission to permit a broker-dealer the flexibility to send the initial notice to existing customers with its first regular customer mailing after the effective date of the final rules, thereby allowing a broker-dealer the option of avoiding excessive additional mailing and related costs that would otherwise be incurred for a separate privacy mailing.

B. **Other Financial Institutions**: Trust companies are another example of a financial institution in which a pre-customer notice rule is not practical. In practice, the trust company has no customer relationship until a trust agreement has been signed by the customer and accepted by the trust company. The Agencies' final rules should recognize that this timing problem applies to most (if not all) categories of financial institutions.

11. **Definition of "Customer" (Commission Proposed Rule 248.3(j))**:

A. **Shareholders in Mutual Funds or Unit Investment Trusts Affiliated with a Broker-Dealer**: A brokerage customer often purchases mutual funds or unit investment trusts through its brokerage account. These investments may be in funds that are either affiliated or are unaffiliated with the broker-dealer. If the fund receives identifying information about that customer, Commission Proposed Rules 248.3(k)(i)(A) and (C) in effect provide that the same individual is a customer of both the broker-dealer and the fund. If the broker-dealer and the fund are affiliated, however, Merrill Lynch urges the Commission to allow the broker-dealer and the fund the option of sending a single notice to the customer that would apply to both entities.

If, however, a fund or unit investment trust is purchased through a broker-dealer, but the shareholder or unit holder holds his or her shares or units directly at the transfer agent or trustee bank, the broker-dealer should not be deemed to have a customer relationship with the shareholder or unit holder.

B. **401(k) Plans**: For 401(k) plans, the broker-dealer's (or other financial institution's) customer is the employer that sponsors the 401(k) plan, and not the individual employees that are the beneficial owners of investments made under the plan. Depending on the terms of the 401(k) plan, the broker-dealer will usually administer the plan, execute trades on behalf of the beneficial owners, and prepare employee-specific account information that the employer disseminates to its employees.

In these circumstances, Merrill Lynch voluntarily intends to provide appropriate privacy notices and opt-out rights to the employer customer, but takes the position that such customers are not natural persons that are obtaining financial products or services for personal purposes. As such, the Agencies' final rules should clarify that the employer customer is the "customer" for these purposes, but is entitled to no mandatory notice or opt-out rights. Thus, the employees of the employer customer would be entitled to no notice or opt-out rights because they are not the broker-dealer's customers (even if their identities are fully disclosed to the broker-dealer).

As an alternative, Merrill Lynch urges the Agencies to accept the two-option approach described in Point 2 above regarding accounts maintained by certain types of other non-natural entities. Under the first option, the Commission would allow a broker-dealer or other financial institution to consider the employer customer to be excluded from the scope of the rules (including the notice and opt-out requirements), but no information concerning the employees could be transferred to unaffiliated third parties.

Under the second option, the broker-dealer or other financial institution would be required to provide privacy notices only to the employer customer, which would have exclusive authority to make the opt-out election on behalf of all plan participants. The employer customer would then provide privacy notices for dissemination to its employees. The broker-dealer or other financial institution would not be required to honor partial opt-out elections by the employer customer or individual elections made by the employees directly to the broker-dealer or other financial institution.

12. **Form and Method of Opt-Out Elections (Proposed Rule 8)**: For many financial institutions, the task of implementing a consumer's opt-out election will require them to develop sophisticated software and appropriate internal operating procedures to process the complex and large computerized databases that will be subject to these rules. Thus, it is reasonable that a broker-dealer be allowed appropriate discretion in defining the form and method by which a consumer may exercise its opt-out rights.

Merrill Lynch urges the Agencies to clarify a financial institution's alternatives in this regard. Specifically, Merrill Lynch proposes that a financial institution have the discretion to limit a consumer to two choices: either (1) to permit *no* disclosures to unaffiliated third parties, or (2) to allow *all* disclosures described in the financial institution's privacy notice. The Agencies may also authorize each financial institution to voluntarily define any additional opt-out alternatives that are administratively

appropriate for its particular business. For example, a financial institution may, at its discretion, allow consumers to authorize disclosures to certain categories of third parties but not others, to authorize disclosure of certain categories of information but not others, etc.

Consistent with this approach, Merrill Lynch also urges the Agencies to permit a financial institution to require that all consumers make their opt-out election using only the means that the financial institution has provided for this purpose (*e.g.*, a pre-printed form, an electronic form), and that such an election may be made only by the account holder (as opposed to a third party or agent), unless the consumer lacks capacity to make the election (*e.g.*, because of age, physical or mental disability). This would permit the financial institution to decline a customer's "customized" opt-out election that does not conform to the financial institution's forms, as well as most opt-out elections made by a third party.

Reasonable limits such as these are necessary to avoid confusion, mistakes, and misunderstandings. For example, given the similarity of some customer names, there is a risk that an election not made on the form provided by the financial institution will not be properly implemented. We believe that our recommendations, if adopted, will permit a financial institution to provide appropriate opt-out alternatives in an administratively feasible manner.

13. **Authority to Provide Single Privacy Notice and Opt-Out Right:** In many instances, a single individual may have separate accounts with more than one affiliated financial institution. For example, the same individual could open banking and brokerage accounts, take out a mortgage, buy shares in a mutual fund, and purchase life insurance from separate -- but affiliated -- financial institutions. Rather than require each affiliate to send a separate privacy notice (and provide a separate opt-out opportunity) to the same individual, Merrill Lynch urges the Agencies to allow affiliates the discretion to send a single "universal" privacy notice to such a customer that would provide the customer with the privacy policies for each of the affiliates with which he or she deals.

A single universal notice would be more consumer-friendly in several respects. First, a universal privacy and opt-out notice for all affiliates with which a customer has accounts would save the customer the time and trouble of having to communicate separate elections to each affiliated entity. Second, the convenience of a universal notice would avoid problems that might arise if the customer intends to opt out with respect to all of its accounts, but in fact fails to do so for one or more accounts (due to confusion, oversight, or otherwise).

Third, a universal opt-out procedure that would apply to disclosures by any of the affiliated parties should also reduce the risk that an institution might make a mistake in implementing a customer's opt-out elections. Fourth, a universal process would be

more convenient for the customer as well. Otherwise, he or she would receive essentially redundant notices simply by being a customer of more than one affiliate.

Furthermore, a universal procedure would eliminate the possibility of inconsistent opt-out elections by the same individual with respect to accounts that it holds with different affiliates, which otherwise could cause serious logistical problems in a corporate structure with multiple affiliated institutions, given that many affiliates will likely collect from the same person non-public financial information for at least some "common" categories of data (*e.g.*, income, assets). For example, what may Affiliate A do with such "common" information if a customer has elected to opt out of allowing Affiliate B to transfer his or her data to third parties, but has not communicated the same election to Affiliate A? A universal opt-out procedure that would apply to all affiliates should simplify this process. This is most critical where multiple institutions participate in the offering of a single product, such as combinations of banks and securities firms offering central asset accounts or securities-based loan products.

The rule, however, must be sufficiently flexible to allow a financial institution to provide a mixture of universal and affiliate-specific privacy notices, if warranted by the circumstances. For example, the same individual might be a customer of a broker-dealer, an investment adviser, a mutual fund, a bank, and an insurance carrier, all of which are affiliated with each other. Given that state regulators will define the privacy rules for the insurance industry, an institution might decide that the type of universal notice and opt-out process that would be otherwise appropriate for the non-insurance affiliates might not comply with the relevant state insurance requirements.

In that event, Merrill Lynch urges the Agencies to permit multiple affiliated institutions to deliver a single universal privacy notice and opt-out right to a customer with respect to more than one of his or her affiliated accounts. Obviously, situations might arise in which a universal notice and opt-out process is appropriate for some affiliates, but not others. Such a rule would allow the insurance carrier or other institutions to provide a separate notice either to comply with state law or because the individual institution would prefer to issue its own notice. Such flexibility would further the important cost savings, consumer convenience, and accurate implementation objectives noted above, to the extent desirable or feasible.

14. **Exception to Initial Notice Requirement (Proposed Rule 4)**: Merrill Lynch urges the Agencies to clarify that a merger or consolidation of two or more accounts (*e.g.*, personal, joint, trust) would trigger no initial privacy notice requirements.
15. **Effective Date of the Regulations (Proposed Rule 15)**: It is important that financial institutions be afforded sufficient time to make the substantial systems and documentation changes necessary to implement the new rules in an orderly manner. For example, financial institutions must draft appropriate privacy policy and opt out notices, as well as implement the internal administrative processes necessary to effectuate opt-out elections, each of which are complex, time consuming tasks.

Likewise, substantial numbers of third party data processing and service contracts must be reviewed to confirm whether their existence must be noted in the financial institution's privacy notice, and possibly amended to comply with the terms of the proposed regulations (*e.g.*, Commission Proposed Rules 248.9 and 248.30). While Merrill Lynch intends to make every effort to meet the November 2000 deadline, and assumes that all financial institutions will make a similar effort, additional time may be necessary to accomplish these changes properly. Accordingly, we respectfully suggest that the Agencies make the November 2000 date voluntary, and allow financial institutions the flexibility to extend their completion date into early 2001, if necessary.

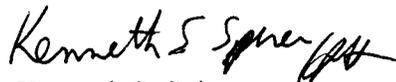
Finally, in parallel with the Agencies' rulemaking proceeding, the United States and the European Union are in the process of finishing negotiations to establish so-called "Safe Harbor Principles," which will allow transmissions of personal financial information from Europe to the United States. Although these talks are expected to conclude soon, the actual terms of the Safe Harbor Principles have not yet been finalized. In order to avoid possible inconsistencies between the procedures and computer programs that a financial institution must develop to comply with the Agencies' final rules and those that might be required to qualify under the Safe Harbor Principles, Merrill Lynch urges the Agencies to allow sufficient time to allow financial institutions, registered investment advisers, and investment companies to coordinate their development of the above internal systems and computer programs in a manner that will enable them to conform their activities with both sets of privacy requirements.

16. **Rule Compliance Costs:** While Merrill Lynch has not conducted a detailed analysis of the estimated costs to comply with the proposed regulations, it believes that the Agencies' estimates significantly understate the anticipated costs.

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We appreciate the opportunity to respond to the Agencies' request for public comment and to address the important issues raised by the Proposed Rules. If you have any questions, please call the undersigned at (212) 670-0225.

Sincerely,


Kenneth S. Spierer