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March 30, 2000

Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th and C Streets, NW
Washington, DC 20551
Docket No. R-1058

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

Robert E. Feldman
Executive Secretary
Attn: Comments/OES
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 5th Street, NW
Washington, DC 20549
File No. S7-6-00

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

Re: Privacy of Consumer Financial Information

Ladies and Gentlemen:

Wells Fargo & Company ("Wells Fargo") is pleased to comment on the proposed federal privacy regulations as promulgated by the federal banking regulators, the Securities and Exchange Commission and the Federal Trade Commission (the "Agencies") pursuant to Title V of the Gramm-Leach-Bliley Act (the "Act").

Wells Fargo is a financial holding company that has subsidiary banks in 21 mid-western and western states. Our lead bank has a mortgage company subsidiary that is one of the largest originators and servicers of residential mortgage loans in the country. Our consumer finance company operates nationwide and provides servicing for other finance companies. Other subsidiaries are engaged in the securities brokerage, investment banking, venture capital, and insurance businesses. Wells Fargo's banking subsidiaries are engaged in all aspects of the trust business including personal trust, investment management, employee benefit, master trust, and corporate trust, as well as a full range of deposit-taking, lending and other banking activities. Many of these trust activities are in the nature of servicing activities. Our organizational structure is also complex. We have separate banks in most of our 21 banking states rather than a single interstate bank.

Wells Fargo has approximately 40 million customer accounts. The number of pieces of mail or statement stuffers that we will be required to produce for the initial privacy policy disclosures will be in the range of 25 to 40 million depending on the method of disclosure. We estimate that the cost of such disclosure could be as much as $30 million. The number may be considerably higher if the Agencies do not narrow the definition of "customer relationship" as we urge in one of our comments.

Many of our customers have more than one relationship and use more than one product line, and we may need to send multiple copies of the same disclosure to the same customer. It will not be clear until all the regulations have been issued whether, and to what extent, we will be able to provide the same disclosure to customers who have relationships with different Wells Fargo subsidiaries, engaged in different lines of business. Our objective is to provide a single disclosure, if possible, and to limit the length of the disclosure itself so that it will be read by and be meaningful to our customers. Multiple disclosures from other financial services organizations will add to the number of notices and disclosures that many of our customers will receive.

Simply put, the initial and on-going implementation of Title V requirements will be one of the most complex compliance tasks ever faced by the financial services industry. Title V was enacted after a short legislative process without a complete understanding of its scope, cost and likely consequences. It is imperative that the Agencies exercise their authority to mitigate the huge and unanticipated burden of Title V to the maximum extent. To this end, we have submitted a number of comments primarily focused on reducing the cost and burden of compliance and the "disclosure overload" to consumers that will inevitably occur if the scope of the regulations is not limited.

Wells Fargo's principal comments to the Agencies are:

- **The date by which compliance with the regulations is required should be extended. If the regulations become effective November 13, 2000, compliance should be made voluntary until August 1, 2001.**

- **The definition of "customer" – which is tied to the existence of a "customer relationship" – is far too broad and will have unintended and burdensome consequences. We have suggested a "safe harbor" exception to that definition which we believe resolves the current problems with the definition.**

The preparation and delivery of the initial disclosure to our current customers will be a monumental task. This is a task that we believe should be implemented over many months. Numerous system changes will be required. The Act contemplated that an extended effective date may be appropriate and expressly provided the Agencies with extension authority. We urge the Agencies to establish an effective date that is both meaningful and realistic, given the extremely broad scope of the regulation. The standards required by Section 501(b) of the Act have not been published and yet the required privacy policy disclosure must address them. In addition, state insurance regulators have not acted. Thousands of previously unregulated businesses will be required to provide disclosures because of the breadth of the definition of "financial institution." We also expect that the final regulations will include changes as a result of the comment process, requiring financial institutions to wait until mid-May before they know what will be required of them.

A November 13, 2000 effective date is not realistic and will create enormous burdens. Without an extension, the proposed regulations would require an initial mailing to current customers by December 12, 2000, right in the middle of the holiday mailing season when mail houses and the postal system are already very busy. Disclosure during the heaviest mail period of the year would detract from a customer's likelihood of reading and understanding the disclosures.

Our specific comments are set forth on Attachment I to this letter. They may be summarized as follows:

- The definition of "customer relationship" is too broad and vague; a "safe harbor" exception is needed (Section __.3(i)).

- The excessive and unreasonable burden of mailing annual privacy disclosures to customers must be reduced (Section _ .5).

- Detailed disclosures of "categories" of information should not be required (Section __.6).

- Model disclosures should be provided (Section __.6).

- Disclosure of encrypted or truncated account numbers should be permitted, and the account number disclosure prohibition should be otherwise clarified (Section__.13).

- The definition of "nonpublic personal information" should be narrowed (Section __.3(n).

- A disclosure should only be necessary for one accountholder in the case of joint accounts (Section __.4)

- A customer relationship should end after 12 months of no communication (Section __.5); and the retention of opt-out status information should be limited (Section __.8(e)).

- Oral consent to information sharing should be permitted (Section __.11).

- Services agreements should not be subject to requirements that were intended to apply only to joint marketing agreements (Section __.9)

- The exception for subsequent delivery of the initial privacy notice disclosures should be expanded (Section ___.4(d)(2)).

- There should be no duty to police redisclosure by third parties (Section _.12).

- The clear and conspicuous example should conform to other consumer regulations (Section ___(b)(2)(iii)).

- The use of examples is very helpful and should be expanded (Section __.2).

We appreciate the opportunity to comment on these proposed regulations.

Sincerely,

Stanley S. Stroup

Stanley S. Stroup
Executive Vice President and
General Counsel

WELLS FARGO & COMPANY PRIVACY COMMENTS

ATTACHMENT I

THE DEFINITION OF "CUSTOMER RELATIONSHIP" IS TOO BROAD AND VAGUE; A "SAFE HARBOR" EXCEPTION IS NEEDED (SECTION __.3(i)).

Potentially excessive compliance burdens will result if the Agencies do not narrow the definition of "customer," since "customer" status triggers the initial and annual privacy policy disclosure requirement.

The proposed regulations distinguish between "consumers" and "customers." "Customers" are consumers who have established a "continuing relationship". We believe that the concept of "continuing relationship" is too vague and overly broad. The proposed regulations do not define the term "relationship." The examples in Section __.3(i), although helpful, are too specific and oversimplified in some cases. We have set forth below some of our specific concerns in four contexts, personal trust services, employee benefit services, insurance agency activities and mortgage loan securitization and servicing, that illustrate the significant costs and compliance burdens that will be created if the definition of "customer" is not narrowed. We believe that these examples illustrate the need to provide a bright line test for determining the point at which the significant burden of initial and annual disclosures is triggered. The existence of a "continuing relationship" is *not* a bright line.

We urge the Agencies to apply a different framework to the definition of "customer" that we believe would resolve the problems associated with the breadth of the current proposed definition, and that would provide an objective test for determining whether a consumer is a "customer." That framework would be to provide that a consumer is not a "customer" of a financial institution if: (a) the financial institution was not a party (or a successor by operation of law to a party) to the initial contract directly with the consumer for the provision of products or services to the consumer, and (b) the financial institution does not in fact provide nonpublic personal information about the consumer to third parties (either affiliated or nonaffiliated) except pursuant to the exceptions at Sections __.10 and __.11 of the proposed regulations.

Under our proposal, all individuals who obtain products and services from a financial institution would still be "consumers" under the regulation. But, if the individual never contracted directly with a particular financial institution to obtain the products or services, no privacy disclosure would need to be provided to those individuals by such a financial institution as long as no information about them is shared (even with an affiliate) for marketing or other non-exempt purposes. We submit that requiring financial institutions to send initial and annual disclosures to millions of individuals having tangential "relationships" and whose information is not shared (other than for servicing and other routine purposes) would serve no purpose and would impose significant costs on financial institutions. Furthermore, the privacy interests of consumers would be protected under our proposal since a privacy disclosure would be required before nonpublic information is shared with any third party for marketing or other non-exempt purposes; if a financial institution chose to provide nonpublic personal information about certain consumers for those purposes, it would simply treat those consumers as "customers" subject to required disclosures.

We believe this framework is consistent with Section 503(a) of the Act, which requires that a privacy disclosure be provided "at the time of establishing a customer relationship with a consumer and not less than annually during the continuation of such relationship" [emphasis added]. We believe that the clearest test for determining when a customer relationship is "established" is when a financial institution enters into a direct contract with an individual to provide a product or service.

Our proposed exception would resolve the definitional problems illustrated below in various lines of business. If this or an equivalent exception is not provided, we have suggested more limited clarifications to eliminate unintended consequences in specific contexts. However, this case-by-case approach is much less useful than the adoption of a more broadly applicable safe harbor such as the one we suggest.

Personal trust services

According to the examples, a consumer has a continuing relationship if the consumer has a "trust account" with the financial institution. Read narrowly, the example would limit the application to trustors only. However, the examples are not intended to be exhaustive. Trust beneficiaries may have varying degrees of interest in a trust account ranging from current income and principal rights to contingent interests that may never vest. A bright line test is needed to allow financial institutions to determine what the boundaries of a "continuing relationship" are in the context of personal trust services. Specifically, we believe that because trust beneficiaries have no direct contractual relationship with the financial institution, they should be treated as "consumers," not "customers," provided that nonpublic personal information about them is not shared with affiliates or non-affiliates of the financial institution except under Sections __.10 or __.11. Our proposed exception would exclude trust beneficiaries on that basis.

Creating an exception such as we suggest has particular value in the trust context because of the high risk of confusion. A trust relationship is a fiduciary relationship and, therefore, one of a confidential nature. By common law, and sometimes by statute, a trustee is prohibited from sharing information, with affiliates or third parties, without the consent of its customers. Thus, there is thus little reason from a policy standpoint to subject trustees to the burdens of the regulation. The privacy policy disclosure required by the regulations is unnecessary and will be confusing to trust customers. It is unnecessary because it requires trustees to restate the law that already is applicable to the trust business. It will be confusing to trust beneficiaries because they may believe that trustees are bound only by the disclosure instead of by the duties of confidentiality that already apply.

At a minimum, if our proposed exception from the "customer" definition is not adopted, we urge that in the context of personal trust services the definition of "customer" should be limited (by way of an example) to *current* income and/or principal beneficiaries of a trust in which a financial institution acts as a trustee. Although a financial institution acting as trustee provides services that ultimately will affect both current and remainder beneficiaries of a trust, the relationship with each type of beneficiary is different. Current beneficiaries are identifiable, receive statements and may receive distributions from the trust. Alternatively, remainder beneficiaries often are not identifiable until the death of a current beneficiary. They do not currently receive distributions and often do not receive statements. As drafted the regulation arguably apples to remainder beneficiaries; this is an impractical and unintended result.

Employee Benefit Plan Services

The status of employee benefit plan participants is not addressed in the regulations at all, yet this is a very large business for many financial institutions. Do participants in an employee benefit plan as to which a financial institution acts as trustee or in some other capacity have a "continuing relationship" with that financial institution? We submit that employee benefit plan participants do not establish relationships with a financial institution; their employers do. But the proposed regulation does not make that conclusion obvious.

The role of a trustee of an employee benefit plan can vary widely. In some cases nonpublic personal financial information may be kept by the employer or other record keeper and transmitted to the trustee at the time of payment or distribution. Again, the vagueness of the concept of a "relationship" creates a problem in determining at what point (if any) an employee benefit plan participant would become a "customer" of a financial institution that provides fiduciary or other services to the plan. It is essential to provide reasonable and manageable limits to the "customer" definition in this context.

We believe that employee benefit plan participants should not be treated as "customers" of a financial institution providing fiduciary or other services to an employee benefit plan under the regulations, if such participants have no direct contractual relationship with the financial institution (as would typically be the case), and nonpublic personal information about the participant is not shared with third parties (whether affiliates or non-affiliates) other than pursuant to Sections __.10 or __.11.

To the extent that employee benefit plan participants are deemed to be "customers" of a financial institution providing services to a plan, the regulations create difficult and unique challenges for the timing of disclosures because the "customer relationship" may have been established at a different time from the time at which the financial institution receives any information. Individuals may become participants in employee benefit plans at the time of employment or some time thereafter and yet the financial institution trustee or custodian may not have any nonpublic personal information about the participant until a contribution is made, or until it is provided by the plan sponsor or other recordkeeper. If employee benefit plan participants are deemed to be "customers," the regulations should clarify that this customer relationship begins only at the time the financial institution first communicates with the participant.

We have included specific examples of the unintended consequences resulting from the imprecision of the term "relationship" in the employee benefit plan context in Appendix A to this letter.

Insurance agency business

For the insurance agency business, we recommend that the Agencies exclude from the definition of "customer relationship" (through an example) an arrangement in which an insurance agency has merely facilitated a direct solicitation by the underwriter pursuant to a joint marketing effort, or sold a single purchase annuity or other insurance policy in a one-time transaction. In these situations, the direct relationship is between the customer and underwriter and the agency's role is incidental and isolated. Duplicative disclosure, particularly annual disclosures, should not be necessary where the policy is serviced by, and the primary relationship is between, the underwriter and its customers and not the insurance agency. This clarification is essential since the proposed regulation provides as an example of a "customer relationship" the purchase of an insurance product. Yet this "purchase" may be no more than a one-time transaction where there is no further contact between the financial institution and the consumer. The current proposed example suggests that any purchase of an insurance product creates a "customer relationship" between a consumer and an insurance agency in every case.

Furthermore, insurance agencies, managing general agencies and insurance administrators in many cases perform duties that are merely that of a service provider. Does an insurance agency or administrator have a "customer relationship" with a consumer simply because it provides (as an agent for, and under contract with, an insurance company) premium collection or claims administration services? As in the trust and employee benefit plan context, the vagueness of the concept of a "relationship" creates uncertainty in this area of the insurance business.

We believe that a consumer should not be a "customer" of an insurance agency or insurance administrator if there is no direct contractual relationship between the institution and the consumer, and the agency or administrator does not in fact share nonpublic personal information with third parties (whether affiliates or non-affiliates) except pursuant to Sections __.10 or ___.11. We note that consumers in the insurance context would receive privacy disclosures from the insurer; we see little benefit from also requiring parties (such as an agent or administrator) who are providing services to the insurer but who have no independent contractual relationship with the consumer to provide a separate disclosure unless those parties in fact plan to share nonpublic personal information for a non-exempt purpose.

Mortgage Loan Securitization and Servicing

Borrowers under mortgage loans who do not have a direct contractual relationship with a service provider or investor may also be considered "customers" of the service provider or investor under the regulations as currently proposed. The examples in the proposed regulation state that a consumer will have a customer relationship with both the financial institution that makes a loan and retains servicing rights and the financial institution that buys it.

We submit that significant unintended compliance burdens and a blizzard of duplicative disclosures will be created if the regulation sweeps in any party that merely acquires a loan or an interest in a loan to a consumer, or any party who merely provides loan servicing for consumer loans. We don't think that consumers view themselves as "customers" of such entities. If the loan purchaser does not disclose nonpublic personal financial information to third parties for purposes other than those permitted by statutory or regulatory exceptions; we see no reason to treat the consumer as a "customer" of the purchaser. The same should be true for loan servicers. This would avoid duplication of initial and annual disclosures, and yet the consumer's expectation that his or her personal financial information would not be shared would be met. Again, the vagueness of the term "customer relationship" is the core of the problem. Appendix B illustrates the unintended consequences of the current proposed definition of "customer relationship" in the mortgage lending process from origination through securitization.

We believe that our suggested exemption from the customer definition resolves these unintended consequences. A subsequent loan purchaser or loan servicer would not need to treat that consumer as a "customer" as long as it does not disclose nonpersonal financial information to affiliated or nonaffiliated third parties other than for exempted purposes.[1]

THE EXCESSIVE AND UNREASONABLE BURDEN OF MAILING ANNUAL DISCLOSURES TO CUSTOMERS MUST BE REDUCED (SECTION__ .5).

Section 503(a) of the Act provides in part that "...not less than annually during the continuation of [a customer] relationship, a financial institution shall provide a clear and conspicuous disclosure...in writing or in electronic form <u>or other form permitted by the regulations prescribed under Section 504</u>... [emphasis supplied]."

Wells Fargo estimates that it has approximately 40 million separate customer accounts and approximately 30 million individual customers (including joint account holders). Depending on whether annual disclosures are provided by statement stuffer or by a consolidated customer-based mailing, the total number of disclosures that will have to be mailed ranges in our case from 25 million to 40 million. The annual cost of providing this disclosure may be as much as $30 million for Wells Fargo alone. This cost must be multiplied by many hundreds or even thousands to appreciate the magnitude of this on-going expense to the now very broadly defined financial services industry.

We believe that the costs of requiring financial institutions to distribute a privacy policy disclosure each year in this manner far exceeds any possible benefit.

We urge the Agencies to permit financial institutions to comply with the statutory requirement to provide the privacy policy annually by: (1) posting a current copy of the policy on the institution's Web site; and (2) affirmatively notifying customers at least once per year, via a statement message or short notice that would appear on customer account statements, that the customer may request a copy of the policy by contacting the financial institution at a toll-free telephone number or post office box. We believe that the Agencies have this flexibility under Section 504 of the Act. Taking this step would save the financial services industry (and

[1] By limiting disclosure of nonpublic personal information to those circumstances exempted under Sections __.10 and __.11, the subsequent loan purchaser or loan servicer would in effect apply a privacy policy that is much more protective of the consumer's privacy interests than is required by the Act and the proposed regulations. If the loan purchaser or loan servicer wanted to share information for other purposes, including marketing by affiliates, it could do so by electing to treat the consumer as a "customer" and providing required disclosures.

ultimately, consumers) untold millions of dollars annually and would not diminish the protections contemplated by the Act.

DETAILED DISCLOSURES OF "CATEGORIES" OF INFORMATION SHOULD NOT BE REQUIRED (SECTION __.6).

We very are concerned about the level of detail required by the proposed regulations for Section 503 disclosures. The result will be disclosures that are lengthy, difficult to maintain in an accurate fashion, and that are not meaningful to consumers. Moreover, unless the level of required detail is reduced, different disclosures will be necessary for different product lines provided by the same or affiliated institutions.

One way to avoid duplication and the potential for frequent disclosures of changes in terms would be to make clear that disclosure of particular categories or subcategories of information that may not actually be collected or disclosed in the case of a particular customer (but that could be disclosed) would not make the disclosure inaccurate. This would permit the overdisclosure of information in order to be able to provide a disclosure for a number of affiliates and lines of businesses and to minimize, frequent, costly and confusing change in term notices. However, unless the level of required detail is greatly reduced, the result will be a longer, less meaningful disclosure.

In this regard, Section __.6(c) should make it clear that if a financial institution discloses that it reserves the right to collect or disclose different categories of nonpublic personal information, or to disclose such information to different categories of affiliates or non-affiliates, it need not provide a change in terms if it subsequently elects to exercise that right. This would create an expensive and unnecessary burden on financial institutions.

We believe that customers will be less likely to read lengthy, detailed disclosures. The final regulations should revise the examples and greatly reduce the level of detail required in notices and disclosures. Model disclosures would be of particular value so as to provide "safe harbors" regarding the content of disclosures.

MODEL DISCLOSURES SHOULD BE PROVIDED (SECTION __.6).

Wells Fargo believes that the required privacy policy disclosure should be simple, straightforward, and concise. However, the scope and complexity of the proposed regulations, which go beyond what the statute requires, will not result in simple, concise disclosures that can be used by each of the financial service subsidiaries of a single holding company. In our view, the proposed regulations require disclosures with a far greater level of detail than is necessary.

In this regard, we urge the Agencies to provide model disclosures for typical types of relationships as part of the final regulations issued in May. Model disclosures were adopted after several attempts to otherwise simplify and clarify Truth in Lending disclosures under Regulation Z. We believe that it will be useful for the Agencies to undertake the exercise of providing model disclosures, to help many thousands of financial institutions avoid countless hours of analysis and drafting. We believe that financial institutions, so as to avoid the risk of litigation and in the absence of "safe harbor" model disclosures, will tend to provide disclosures that are more detailed than the Agencies may have contemplated. It is essential for the Agencies to provide an objective standard, through model disclosures, so as to avoid costly litigation and disputes over the appropriate level of disclosure detail.

DISCLOSURE OF ENCRYPTED OR TRUNCATED ACCOUNT NUMBERS SHOULD BE PERMITTED, AND THE ACCOUNT NUMBER DISCLOSURE PROHIBITION SHOULD BE OTHERWISE CLARIFIED (SECTION __.13).

Comment is requested regarding the prohibition on disclosure of account numbers. The Act gives the Agencies the authority to grant additional exceptions. We recommend that this prohibition apply only to transaction account numbers and credit card numbers or similar access numbers as required by the statute. Encrypted or truncated transaction account numbers should be able to be disclosed for marketing purposes if the key is not provided to the marketer. Not being able to provide such encrypted or truncated numbers actually works against the interests of consumers by making it more difficult for them to effect payment for third party products or services they choose to buy.

The regulations should not extend the prohibition to mortgage account numbers and other similar identifying numbers that are not transaction account numbers or credit card account numbers. The purpose of Section 502(d) of the Act was to prevent unauthorized debiting of a deposit or open-end credit account. Providing a mortgage account number to a third party in no way permits that third party to effect a charge to a customer's account.

Of particular concern is the unintended scope of the account number prohibition as it relates to servicers and processors. Read literally, the prohibition would seem to apply whenever marketing literature is included in an account statement prepared by a third party service provider. It is not the sharing of the information with a third party service provider that gives rise to the concerns that lead to this prohibition. Third party service providers obviously need account numbers as part of a statement preparation and mailing. We do not believe that the prohibition was intended to cover the disclosure of account numbers to a service provider in the ordinary course of business merely because marketing literature is included in the mailing. In that situation, there is no use of the information by the third-party service provider outside the scope of its role as a service provider. The service provider is acting for the financial institution in a non-marketing capacity and receives the account number in a non-marketing capacity. The mere inclusion of marketing literature should not change this analysis or trigger the statutory prohibition.

Finally, we believe that customers should always have the right to consent to the disclosure of an account number. This consent should be informed but it should not have to be in writing.

THE DEFINITION OF "NONPUBLIC PERSONAL INFORMATION" SHOULD BE NARROWED (SECTION __.3(n)).

The proposed regulations define "nonpublic personal information" far too broadly. We believe it is clear under the Act that nonpublic personal information must relate to an individual's financial condition and not merely be information such as name and address provided to a financial service provider. To conclude otherwise would result in the word "financial" having no meaning. As a matter of statutory construction, the word "financial" should be given its plain meaning, i.e., information about *financial condition* of an individual, and not *any* information provided in connection with an application, or information that is otherwise publicly available. The legislative history supports our view. The colloquy between Senator Allard and Senator Gramm on Title V makes clear that Congress only intended the term "personally identifiable financial information" to include information that describes a customer's financial condition.

For the reasons stated above, we believe that both proposed Alternatives A and B are more restrictive than Congress intended, and may exceed the Agencies' authority. Given a choice between the two, we clearly favor Alternative B. Alternative A would put a financial institution at risk of violation of the regulation any time that it obtained and used information from public sources regarding customers. Moreover, the Securities and Exchange Commission and Board of Governors of the Federal Reserve System did not even include Alternative A in their proposals. Adoption of Alternative A by some Agencies could lead to different and inconsistent disclosures to a customer based on product type, even within the same financial services organization. The Act mandates that the regulations be consistent and comparable to the extent possible. Consistency in this critical area is essential.

Comment is also requested on whether the term "nonpublic personal information" should include information about a customer that contains no indicators of a customer's identity when it is communicated to third parties. Information that contains no indicators of a customer's identity when communicated to third parties clearly would not compromise an individual's privacy or fall within an individual's expectation of privacy. Disclosure of this information is very useful in developing market studies, financial modeling and the development of scorecards. The final regulations should make clear that this "depersonalized information" is not subject to the regulations.

A DISCLOSURE SHOULD ONLY BE NECESSARY FOR ONE ACCOUNTHOLDER IN THE CASE OF JOINT ACCOUNTS (SECTION __.4).

Joint accounts and related notice and disclosure requirements are not addressed in the proposed regulations except in the Section-by-Section analysis regarding the provision of opt-out notices. The regulations should make clear that initial and annual disclosures provided to any holder of a joint account are effective as to all of the holders of the account. This is consistent with normal banking practices, specifically authorized in other consumer regulations, (for example, Regulations E and Z) and would avoid duplication and the significant costs of having to provide separate disclosures to each account holder.

A CUSTOMER RELATIONSHIP SHOULD END AFTER 12 MONTHS OF NO COMMUNICATION (SECTION __.5); RETENTION OF OPT-OUT STATUS INFORMATION SHOULD BE LIMITED (SECTION ___.8(e)).

We oppose using state statutes for dormant accounts as the basis for determining whether a customer relationship has ceased for privacy regulation purposes. This could result in inconsistent provisions or multiple versions of a disclosure. This is especially true if a customer has accounts with subsidiaries located in different states. Wells Fargo favors a simple approach under which an individual would be deemed to cease to have a customer relationship with a financial institution if the customer's account has been closed by the customer, or if there is no communication with the customer by the institution for 12 consecutive months. This will avoid unnecessary mailings, particularly of annual notices, which will further burden the postal system and create customer confusion.

We also urge that Section __.8(e) of the proposed regulation make it clear that a financial institution need not retain a record of a consumer's opt-out request if the financial institution ceases to retain any nonpublic personal information regarding the consumer. The proposed regulation now provides that a consumer's direction to opt out of information sharing with nonaffiliated third parties is effective until revoked by the consumer in writing, or if the consumer agrees, in electronic form. Interpreted literally, under this standard, if a consumer opts out of information sharing with nonaffiliated third parties, ceases to have any contact with the financial institution for thirty or more years and then becomes a customer of the financial institution again, the financial institution is obligated to keep a record that the consumer opted out thirty or more years ago. It is unreasonable to expect financial institutions to retain that kind of information indefinitely.

ORAL CONSENT TO INFORMATION SHARING SHOULD BE PERMITTED (SECTION __.11).

The proposal asks whether safeguards should be added to the consent exception. Wells Fargo believes that oral consent to sharing of information with third parties should be permitted and that requiring written consent would be both burdensome and unnecessary. Oral consent should be clear and specific, but a customer should be able to consent orally to the sharing of information with third parties. For example, documenting a consumer's oral consent to disclosure of the consumer's name and address to a third party nonfinancial services provider in connection with a loan application (for example, a home moving service for new mortgage loan applicants) would result in unnecessary delay and inconvenience to the consumer. This would be particularly burdensome in the context of telephone applications.

SERVICES AGREEMENTS SHOULD NOT BE SUBJECT TO REQUIREMENTS THAT WERE INTENDED TO APPLY ONLY TO JOINT MARKETING AGREEMENTS (SECTION __.9)

Section 502(b) of the Act gives consumers the right to direct that a financial institution generally may not disclose nonpublic personal information to nonaffiliated third parties (the right to "opt out"). Paragraph (2) of subsection 502(b) establishes the following exception to the consumer's right to opt out:

(2) EXCEPTION: This subsection shall not prevent a financial institution from providing nonpublic personal information to a nonaffiliated third party to perform services for or functions on behalf of the financial institution, including marketing of the financial institution's own products or services, or financial products or services offered pursuant to joint agreements between two or more financial institutions that comply with the requirements imposed by the regulations prescribed under section 504, <u>if the financial institution fully discloses the providing of such information and enters into a contractual agreement with the</u>

third party that requires the third party to maintain the confidentiality of such information [emphasis added].

Section __.9 of the proposed regulations applies the underlined language above to both service providers and joint marketing agreements. We believe that the underlined language above was intended to apply only to joint marketing agreements and not to third parties that perform services for or functions on behalf of financial institutions.

If the Agencies do not change the proposed regulation and the requirements of the language underlined above continue to apply to service providers, the Agencies should provide an exception for services provided or functions performed under contracts that are already in existence on the date the regulations become effective. If the contract is already in existence, the financial institution may not have the right to require the third party to amend the contract to satisfy the requirements of the underlined language above. The Agencies should not put financial institutions in a position where they are required to amend existing contracts but the other parties to the contracts are not required to cooperate. This reasoning also supports the application of Section _.9 only to new joint marketing agreements entered into after the effective date of the regulations, or, alternatively, after the date of enactment of the Act.

THE EXCEPTION FOR SUBSEQUENT DELIVERY OF THE INITIAL PRIVACY NOTICE DISCLOSURES SHOULD BE EXPANDED (SECTION ___.4(d)(2)).

Section __.4(d)(2)(i) allows delayed delivery of the privacy notice in the following situation:

> (2) Exceptions to allow subsequent delivery of notice. You may provide the initial notice required by paragraph (a)(1) of this section within a reasonable time after it establishes a customer relationship if:
>
> > (i) You purchase a loan or assume a deposit liability from another financial institution and the customer of that loan or deposit account does not have a choice about your purchase or assumption.

This exception is too narrow. It is common for financial institutions to purchase credit sale accounts from retailers and others. The same considerations that require an exception to allow delayed delivery of privacy notices for purchased loans also require an exception for purchased credit sale accounts. These considerations should apply to any purchased account.

The exception is written so as to require that the account be purchased from another financial institution. This also makes the exception too narrow. For example, a financial institution may purchase a single mortgage loan from an individual who sold his or her personal residence and took a mortgage from the buyer. The fact that the seller of the mortgage loan is not a financial institution does not make it any easier for the financial institution purchasing the loan to provide the privacy notice at the time required by paragraph (a)(1) of Section _.4.

This subsection should be revised to read as follows:

> (2) Exceptions to allow subsequent delivery of notice. You may provide the initial notice required by paragraph (a)(1) of this section within a reasonable time after it establishes a customer relationship if:
>
> (i) You purchase a loan, credit sale obligation or other obligation from another person or entity or assume a deposit liability from another financial institution and the customer of that loan, credit sale obligation, other obligation or deposit account does not have a choice about your purchase or assumption.

We also recommend that a further example be added to make it clear that a financial institution has a reasonable time to provide an initial disclosure if it acquires another financial institution and, as a result, must provide a different initial notice because the acquiring financial institution's privacy policy is different than that of the acquired financial institution.

THERE SHOULD BE NO DUTY TO POLICE REDISCLOSURE BY THIRD PARTIES (SECTION __.12).

The regulations should not require a financial institution that disclosed nonpublic personal information to a non-affiliated third party to develop policies and procedures to ensure that the third party complies with the limits on redisclosure of that information. While it is acceptable to require financial institutions to require contractual covenants from third parties to limit redisclosure, it would be virtually impossible for a financial institution to ensure compliance on a continuing and ongoing basis with the limits on redisclosure of that information. Responsibility for ensuring a third party's compliance could give rise to liability on behalf of the financial institution for organizations over which it has no effective control. Enforcing such compliance would be very expensive. Moreover, we question whether such an obligation could legally be imposed under the Act.

THE CLEAR AND CONSPICUOUS EXAMPLE SHOULD CONFORM TO OTHER CONSUMER REGULATIONS (SECTION __.3(b)(2)(iii)).

Section __.3(b)(2)(iii) gives the following example to illustrate when the privacy notice is clear and conspicuous:

> (iii) If you provide a notice on the same form as another notice or other document, you design your notice to call attention to the nature and significance of the information contained in the notice if you use:
>
> (A) Larger type size(s), boldface or italics in the text;
> (B) Wider margins and line spacing in the notice; or
> (C) Shading or sidebars to highlight the notice, whenever possible.

The example has the effect of requiring that the privacy notice must be more conspicuous than any other notice given on the same form. Most of the other notices that might be given with the privacy notice, such as Truth in Lending disclosures, must also be clear and conspicuous. There is nothing to indicate that Congress intended the privacy notice to be more important than other required notices or disclosures. It is a mistake to require that the privacy notice be more conspicuous than other notices or disclosures, especially when the other notices or disclosures also must comply with a clear and conspicuous standard. We urge that the Agencies provide an example similar to the following, based on the Official Staff Commentary to Section 226.5(a)(1) of the Federal Reserve Board's Regulation Z:

> (iii) If you provide a notice on the same form as another notice or other document, the "clear and conspicuous" standard requires that the notice be in a reasonably understandable form. It does not require that the notice be segregated from other material or located in any particular place on the document.

THE USE OF EXAMPLES IS VERY HELPFUL AND SHOULD BE EXPANDED (SECTION __.2).

We welcome the provisions of the proposed regulations under the "rule of construction" at Section __.2 regarding the use of examples. Wells Fargo believes that the examples in the proposal are helpful, although there are not enough of them as we discuss elsewhere. We strongly support the rule of construction that examples are not exclusive or exhaustive, and that compliance with an example constitutes compliance with the rules. We urge the Securities and Exchange Commission to also adopt this rule of construction. Disclosure statements using examples should also be encouraged. In this regard, examples in model disclosure statements, if provided as we urge elsewhere, should be afforded the same treatment as examples in the regulation itself.

WELLS FARGO & COMPANY PRIVACY COMMENTS

Appendix A

(Employee Benefit Plan Services)

Wells Fargo would like clarification and guidance with respect to the definition of "consumer," "customer" and the timing of disclosures in the context of its role as a trustee in various typical circumstances arising in the employee benefit plan services business as described in the examples below.

Example 1: The bank is appointed a trustee of a trust by an unrelated employer (a business). Pursuant to the terms of the trust agreement or ancillary agreements, the trustee pays trust assets to a third party, such as a recordkeeper or the employer. Even though the trustee holds assets in trust for the benefit of individuals, the trustee does not have any information (including name, social security number or any financial information) about the trust beneficiaries.

- The final regulations should make clear that in such circumstances the participants in the plan (beneficiaries of the trust) are not "customers" of the trustee. The regulation should not impose an obligation on the trustee to identify participants in order to make a disclosure about what it will do with such information. In this example, the trustee has no direct contractual relationship with the plan participants and has no information that could be shared. We do not think that the proposed regulations are clear on this point; arguably, the participants do have a "customer relationship" with the trustee since the trustee is providing services to the employee benefit plan.

- We do not think Congress intended the Act to apply this broadly. However, without clarification from the Agencies, many financial institutions may conclude that this fact pattern does create a "customer relationship" requiring the trustee to provide initial and annual disclosures to plan participants.

Example 2: Same as Example 1, except that the trustee is directed from time to time to issue payments or to send a payment election form to a participant of the plan. The payments may be a single payment, such as a participant loan or a single sum distribution, or a series of payments, such as a pension distribution. As in Example 1, even though the trustee holds assets in trust for the benefit of the participants, it does not have any information (including name, social security number or any financial information) about plan participants until it is given such information in connection with such a direction.

- The only difference in the relationship between the participant and the trustee in this example is that in Example 2, the trustee obtains limited information about the participant for a specific purpose. In this example, the trustee obtains a payment election form from the participant. Arguably, under the proposed regulations, this is a "financial service" provided by the trustee to the participant, and it is not an "isolated transaction" since the trustee will continue to provide plan-related services to the participant. While the trustee now has "nonpublic personal information" about the participant, there is no direct contractual relationship with the participant, and in this context (as a matter of fiduciary law) trustees would not share this information with affiliates or non-affiliates for marketing purposes.

- The vagueness of the term "customer relationship" again makes it difficult to determine whether, in this fact pattern, there is now such a relationship where there might not have been one in Example 1.

Example 3: Same as Example 1 except the trustee also provides participant recordkeeping and/or other services to the employer pursuant to the terms of an agreement between the trustee and the employer. Participant information may be provided to the trustee by the employer after the employer makes contributions to the trust.

- This example differs from Example 2 in that the trustee has received participant information in the aggregate and not in connection with a specific transaction. The same ambiguity exists regarding whether there is a "customer relationship" between the trustee and each participant.

Wells Fargo urges the Agencies to clarify that individual employee benefit plan participants are not "customers" of a financial institution that provides fiduciary or other services to an employee benefit plan sponsor.[1] We believe that our suggested approach to the definition of "customer" in the body of our comments is an appropriate general framework for addressing this problem.

[1] Alternatively, if such participants are deemed to be "customers," the regulations should clarify that the initial privacy notice need be provided only at the time that the financial institution first communicates with the participants (as a result of a distribution or otherwise), which would be the time at which the "customer relationship" would begin.

WELLS FARGO & COMPANY PRIVACY COMMENTS

Appendix B

(Mortgage Loan Securitization)

The following fact pattern sets out a fairly standard series of events surrounding the creation of a home mortgage loan and its securitization in the secondary mortgage market. Although these facts involve a first mortgage loan asset, for the purposes of the analysis below they could just as well describe any of the array of other consumer receivables that routinely are monetized through the capital markets (e.g., credit card debt, auto loans, home equity lines of credit, etc.).

In some cases, the obligations of the parties in the fact pattern are fairly clear under the law and the proposed regulation. In others, we believe that they are not, and we seek clarification in the regulation. It is also our view that the law and regulation as proposed may, in certain cases, create obligations that are overly burdensome and costly to secondary market participants without furthering the privacy interests of individual consumers.

Facts:

Mortgage loan originator ("O") originates a first lien residential mortgage loan ("Loan") to borrower ("B").

Two months later, O sells the Loan to unaffiliated mortgage lender ("M"), but retains the right to service the Loan.

M discloses nonpublic personal information about B and the Loan to rating Agencies and Wall Street underwriters in connection with the securitization transaction described in the following paragraphs.

A month later, M sells the Loan to its affiliate ("SPC"), which is a special purpose corporation created solely to act as a depositor of loans into securitization trusts.

SPC simultaneously conveys the Loan to the trustee ("T") of a trust formed for the purpose of creating mortgage pass-through certificates ("Certificates") evidencing undivided interests in a pool of residential mortgage loans that includes the Loan. The Certificates are then sold to numerous investors ("Certificateholders"), who are the beneficiaries of such trust.

O will continue to service the Loan for the ultimate benefit of the Certificateholders pursuant to an agreement with the master servicer of the securitization transaction ("MS"), which is another affiliate of M and SPC.

M, on an on-going basis for the duration of the securitization transaction, will report updated aggregate and loan level data on the mortgage pool and the Loan, respectively, via an information-reporting web-site where Certificateholders and prospective investors in the Certificates can receive information regarding the performance of the mortgage pool as well as distributions to and allocations of losses on the Certificates. Data regarding the Loan is periodically updated, in part, by the reporting of servicing information by O to MS, who then transmits the data to M.

Analysis under proposed regulations

Under the proposed regulations, O would be required to provide B with the initial notice of O's privacy policy upon the establishment of the customer relationship (B's execution of the loan documents), and annually thereafter during the continuation of such relationship (as long as O is still the loan servicer). The proposal suggests that when O sells the Loan to M, servicing-retained, both O and M will have a customer relationship with B, and therefore M would also be required (according to the proposal) to provide the initial privacy policy notice to B.[2] Although (in our example) M later sells the Loan to SPC and therefore apparently would have no obligation to provide annual disclosures, this conclusion is not obvious since M will continue to have access to data regarding the payment status of B under the Loan.

We submit that even though M purchased the Loan, it did so with a view to selling and securitizing it in relatively short order (by selling it to SPC). Therefore, no continuing customer relationship between M and B would ever arise. In our example, M only discloses nonpublic personal information about B and the Loan before the securitization to rating agencies and underwriters, and after the securitization to investors via the web-based reporting system, in each case pursuant to the "[i]n connection with a proposed or actual securitization..." exception set forth in Section __.10(a)(4), which reflects Section 502(e)(1)(C) of the Act (the "Securitization Exception").

We believe that in this and analogous circumstances M should be treated in the final regulation in the same way that the proposed regulation treats a financial institution that does not establish a customer relationship and does not intend to disclose nonpublic personal information to an unaffiliated third party except as authorized by one or more of the specified exceptions set forth in sections __.10 and .11 of the regulations. While M purchased the Loan (and therefore falls within the Agencies' example of a "customer relationship"), B is in fact unaware of that fact as M has not acquired any servicing rights. It would be extremely confusing to B to receive privacy notices from M where B has no reason to know that M (or for that matter, any of the other parties except O) is involved with the Loan.

On the date of the closing of the securitization transaction, M sells the Loan to SPC who immediately sells it (together with hundreds or even thousands of other loans to be included in the mortgage pool) to T for the benefit of the holders of the Certificates. SPC clearly does not

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[2] The Section-by-Section analysis on this point in the banking Agencies' proposal states:

> The examples also clarify that a consumer will have a customer relationship with a financial institution that makes a loan to the consumer and then sells the loan but retains the servicing rights. In that case, the person will be a customer of both the institution that sold the loan and the institution that bought it [emphasis supplied]. 65 FR 8772 (2/22/00).

The examples themselves are not as clear as this statement suggests.

establish a customer relationship with B, and for the same reasons that M should not be required to send an initial privacy policy notice to B, SPC (who has no contact with B whatsoever) should not have to send one either.

Under the above facts, the securitization trust (represented by T as trustee) has become the "long-term" legal title owner of the Loan and the other loans deposited therein, and the *numerous* Certificateholders (as they may change from time to time via secondary market trades of the Certificates) are the beneficial owners of the Loan and such other loans. In our view, it would be neither consistent with the spirit of the statute and regulation nor practical to require either each Certificateholder or T on behalf of the trust to create a privacy policy and send notice of it to B and each of the thousands of other borrowers whose loans have been placed in that trust.

With regard to the beneficial owners of the loans, not only might the market for asset-backed securities grind to a halt if each Certificateholder were required to do this, it is improbable that Congress contemplated consumers receiving perhaps hundreds of privacy notices with respect to a single consumer transaction. We request specific clarification in the regulation that, in the circumstances described above, the Certificateholders have no obligation to create and send notices of their privacy policies to the borrowers.

Although the trust (through T) will be the "long-term" legal owner of the Loan, like M and SPC, T will not have a "customer relationship" with B or any other borrower as that concept is contemplated in the law or regulation. Indeed, the trust is a passive legal vehicle required to facilitate the transaction. Under the facts, the only entity B will be in contact with on an ongoing basis is the servicer of its Loan, O. If T were to even come upon or need to use any nonpublic personal information regarding B or the Loan, it would be in its capacity as trustee in the securitization and therefore such use should fall within the Securitization Exception or some other exception.

For the foregoing reasons, we believe that T should not be required to create a privacy policy and send notice of it initially and annually to the thousands of borrowers in each of the numerous securitization trusts for which it acts as trustee. We request specific clarification in the regulation that, in the circumstances described above, T on behalf of the trust has no obligation to create and send notice of its privacy policy to the borrowers.

In recognition of the unique nature of securitization transactions and the critical importance of information flow to the liquidity and borrower benefits such transactions produce, Congress saw fit to include a Securitization Exception. Consistent with that recognition, we believe that, under the facts presented above, with the sole exception of initial notices and annual privacy policy notices to be provided by O to B (since O has both originated the loan and retained servicing rights), no other participant in the securitization need create and deliver a privacy policy notice to B.

We believe that numerous notices to B every year simply stating that B's nonpublic personal information will only be disclosed as permitted by law will not benefit, and may even confuse, B because he or she does not have a right to prohibit such disclosure. Equally important, requiring disclosures by multiple participants in a loan securitization will inevitably result in increased borrowing costs to B. Clearly, neither effect is in the best interest of B or any other mortgage borrower.

We urge that the Agencies provide an exemption from the "customer" definition that will reduce the over-broad scope of the proposed regulation in the mortgage securitization context while still protecting individual privacy expectations, as suggested in the main body of our comment letter.