THE FINANCIAL SERVICES ROUNDTABLE

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March 29, 2004

Communications Division
Public Information Room, Mailstop
Office of the Comptroller of the Currency
250 E Street, S.W.
Washington, D.C. 20219
Attention: Docket No. 03-27

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attention No. 2003-62

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Ave., N.W.
Washington, D.C. 20551
Docket No. R-1173

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Attn: Comments/Exec. Secretary Section

Office of the Secretary
Federal Trade Commission
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Attn: "Alternative Forms of Privacy
Notices Project No. P034815

Jean A. Webb
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W
Washington, D.C. 20581

Jonathan G. Katz
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549
File No. S7-30-03

Becky Baker
Secretary of the Board
National Credit Union Admin.
1775 Duke Street
Alexandria, VA 22314-3428

Re: Interagency Proposal to Consider Alternative Forms of Privacy Notices Under the Gramm-Leach-Bliley Act

Dear Sir or Madam:

The Financial Services Roundtable[1] (the "Roundtable") appreciates the opportunity to comment on the advanced notice of proposed rulemaking

[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine accounting directly for $18.3 trillion in managed assets, $678 billion in revenue, and 2.1 million jobs.

("ANPR") to consider alternative forms of privacy notices under the Gramm-Leach-Bliley Act ("GLB") issued by the Office of the Comptroller of the Currency ("OCC"), Board of Governors of the Federal Reserve System (the "Board"), Office of Thrift Supervision ("OTS") and the Federal Deposit Insurance Corporation ("FDIC"), Commodity Futures Trading Commission ("CFTC"), Federal Trade Commission ("FTC"), National Credit Union Administration ("NCUA"), and the Securities and Exchange Commission ("SEC") (collectively, the "agencies").

A. Background

The ANPR of December 23, 2003 seeks to amend the regulations that implement Section 502 and 503 of GLB with respect to possible alternative types of privacy notices. GLB requires such notices to be provided at the inception of the relationship, annually, and when there is a substantial change in a company's privacy policy. The questions posed by the ANPR reveal the many considerations that must be taken into account in deciding the elements of a privacy notice that should be included and how the notices are given.

The ANPR describes various approaches that the agencies could pursue to allow or require financial institutions to provide alternative types of privacy notices that would be more readable and useful to consumers. It also seeks comment on whether differences between federal and state laws pose any special issues for developing a short privacy notice.

Section 503 of GLB requires financial institutions to provide a notice that describes to each customer the institution's policies and practices about the disclosure to third parties of nonpublic personal information. In 2000, the agencies published consistent final regulations that implement these provisions, including sample clauses that institutions may use in privacy notices. However, the regulations do not prescribe any specific format or standardized wording for privacy notices.

The Roundtable's position on the ANPR is as follows:

- The Roundtable strongly opposes the proposed rule unless the simplified privacy notices are uniform and preempt state privacy laws.
- The Roundtable recommends that the agencies first focus their efforts on affiliate sharing notices required under the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), and then pursue GLB simplification.
- The Roundtable urges the agencies to produce a model notice that gives financial institutions the flexibility to tailor notices to their individual

businesses. This model notice should act as a safe harbor which, if followed, will satisfy a financial institution's compliance requirements under GLB and Fair Credit Reporting Act ("FCRA").

- We recommend that the agencies created simple, short-form privacy notices that include a convenient, meaningful opt-out for consumers.
- The Roundtable requests that the multiple privacy notices required by law to be provided to consumers (*i.e.*, GLB, FCRA, HIPAA, *etc*.) be consistent in format and contents, whenever possible. We believe that excessive notice requirements confuse consumers and adversely impact financial institutions' business models.

B. The Roundtable Strongly Opposes the Proposed Rule Unless the Privacy Notices Are Uniform and Preempt State Privacy Laws

The Roundtable strongly opposes simplified privacy notices without having them clearly preempt inconsistent state laws. We believe that simplified notices can not be achieved without uniform national standards and preemption of state privacy laws. Both GLB and FCRA provide national standards for the protection of a consumer's financial information and to benefit consumers. Federal preemption of inconsistent state privacy laws is of critical importance to consumers and the financial services industry.

Several states are actively engaged in enacting their own privacy laws which will affect federal privacy notices. Currently, California and Vermont mandate specific privacy notices to residents of those states. California requires that its privacy notice not be separate from the GLB notice. Seven other states, including Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, and Utah, are considering proposals that, if enacted, would require separate notices to residents of those states.

Section 507(b) of GLB permits states, by statute or regulation, to provide for "greater protections" than those provided under GLB. That provision allows states to adopt their own privacy notices. The result is state privacy notices that add to consumer confusion and frustration. These additional state notices will be especially chaotic for consumers who wish to do business with financial institutions in various states.

Both the consumer and the industry would benefit from preemption. Preemption of state laws will assist the consumer by alleviating the number of different forms and notices they receive. Uniformity in notices would allow the customer to better understand the information provided to them.

Without preemption, it would be impossible to keep notices simple. In addition, financial institutions would be faced with a serious burden and economic hardship

as they attempt to comply with privacy laws in fifty states. Costs for preparing different forms would be astronomical. And, new operations systems, policies and procedures would be required for compliance, and additional personnel would be needed for this task.

The Roundtable encourages the agencies to continue their evaluation of alternative privacy notices, but we would oppose any final rule on the subject until the preemption issue has been resolved by Congress.

C. The Roundtable Recommends That Regulators Postpone Notice Simplification under GLB and Focus on the FACT Act Regulations

Section 214(b)(4) of the FACT Act requires that regulations be issued in final form within nine months after the date of enactment of the FACT Act (December 4, 2003), and that such regulations become effective not later than six months after they are issued in final form. The Roundtable recommends that regulators act pursuant to this legislative authority granted by Congress.

The timeframes prescribed in Section 214(b)(1) reflect a mandate from Congress that issues relating to affiliate sharing notices under the FACT Act should be a priority for the regulatory agencies. These notices deserve careful deliberation, exposure for comment and thoughtful decision-making. The regulations in question will determine, among other things, the content and format of notices that must be sent to consumers in order to comply with Section 214(a)(1), what (if any) enclosures must accompany that notice, and other requirements that pertain to the notice and the process by which consumers may make elections pursuant to Section 214(a)(1)(B).

Until the regulations to be promulgated under Section 214 are in final form, companies will not know the final requirements or what resources will be necessary to implement them. The Roundtable recommends that the agencies, in accordance with the statutory authority granted to them by Congress, make the privacy notices under the FACT Act a priority over the current proposal. Then, once completed, the agencies should consider to what extent these notices can serve as a template for simplified notices under Section 503 of GLB.

D. Model Notices Should Give Institutions Flexibility in Preparing Notices While Also Providing a Safe Harbor

The Roundtable strongly urges that the federal regulatory agencies develop model privacy and opt-out notices that would satisfy the requirements of GLB and FCRA. The Roundtable believes that financial institutions should be given some

flexibility in creating privacy notices that are tailored to their business. Companies should be allowed to add their own privacy messages to the format prescribed, including, for example, "do not solicit" opt out choices, explanations of the company's security practices, tips for the consumer on responding to identity theft, and explanations of reasons for and advantages of the company's information sharing practices.

Model disclosures would list the basic information required in the privacy notices. While institutions should not be compelled to use the model notice, the model disclosures would serve as a safe harbor for financial institutions which would be deemed to be in compliance with GLB or FCRA if they chose to use the model.

Model notices would assist the consumer by creating uniformity in the notices they receive. This would help avoid the confusion of receiving multiple notices in various formats. With model disclosures, the customer would be assured that the same elements and information would be presented in each notice.
In addition, creating a safe harbor would reduce the burdens on financial institutions. Safe harbor language is important to avoid senseless litigation and prevent individuals from taking advantage of inadvertent errors that might occur as financial institutions attempt to comply with these regulations. It also allows financial institutions to draft notices once rather than having to adjust the language after facing legal challenges against them for improper notices.

E. The Roundtable Recommends Simplified, Short-Form Notices

The Roundtable believes that the regulatory agencies should develop model privacy notices that would be easy to understand and written in plain English. These notices should be conspicuous and readily understandable. The notices would contain a convenient, meaningful opt-out notice, and could incorporate notices (and choices) required under the FACT Act.

Simplified Notices

Simplified notices would benefit the consumer and better meet their needs. Shorter, less complicated notices would also be less burdensome and less costly for financial institutions.

In December 2001, the federal agencies responsible for GLB privacy compliance convened a workshop to discuss privacy notices. It was suggested that a shorter form of notice would be more effective and useful to customers, and better enable them to compare practices among various institutions.

There has been extensive independent research supporting the need for simplified notices. Research indicates that individuals have difficulty processing notices that (i) contain more than seven elements, and (ii) require the reader to translate the vocabulary used in the notices into concepts they understand. Another study stated that over 60 percent of consumers would prefer a shorter notice to receiving a company's full privacy policy. Part of the reason consumers favor short-form notices is they have indicated that, because of their relationship with their financial institution, they are not overly concerned with the detailed information currently mandated for privacy notices.

The Roundtable supports developing a short-form notice that contains basic elements. These notices would (1) identify the financial institutions or group of institutions to which the notice applies, (2) identify, in general terms, how the institution collects or obtains data about the consumer, and (3) explain, in general terms, how the institution uses or shares information about the consumer. We have included examples of privacy notices that we believe will benefit the consumer.[2]

A short-form notice would better serve the majority of customers while those consumers who want more detailed information about a bank's privacy policies and practices could be given a brief explanation about where to find that additional information upon request (*i.e.*, web site, publications, toll-free telephone number, *etc.*).

Furthermore, the member companies of the Roundtable believe that current privacy notices contain unnecessary information. We believe that the following content is superfluous and can be removed from the notices while still adequately informing customers about their rights.

- The regulations should not require that affiliates be categorized or that the information shared with them be categorized. There is no such requirement in either the GLB or FCRA statutes. This unnecessarily complicates and lengthens the notices and is not particularly meaningful information for consumers.
- The regulations should not require financial institutions to categorize the companies that perform services on their behalf and the categories of information that are disclosed to them. Companies use vendors for many marketing-related functions. GLB does not give consumers a right to opt-out of this sharing. To include this information in notices confuses consumers and distracts from the real choice of whether to opt-out.

[2] Appendix A - "Sample Privacy Notices."

- Listing examples of categories is not required by GLB. Removal of examples from the notices would allow for shorter, more concise sentences that are easier for consumers to read. If consumers want an explanation of the categories, they can contact their institution for more information. If regulators believe the examples are important for consumers to understand the categories, they could be required only in the initial notices.

Reducing the current requirements would benefit the consumer. Roundtable member companies believe that simplified notices would be more meaningful to consumers who are inundated with notices from several financial institutions.

Convenient, Meaningful Opt-Out Notices

The Roundtable recommends an opt-out provision that is meaningful and easy to exercise. The opt-out notice should be simple, direct and include readily understandable terms. This opt-out notice would (1) explain the consumer's right to opt-out and how that right may be exercised, (2) be conspicuously presented in written or electronic form, and (3) give the consumer a choice of one or more methods to exercise the opt-out right, such as a mailing address or a toll-free telephone number. The simplified opt-out notice should be provided to the consumer whenever the notice is required to be provided. The Roundtable recommends that privacy notices be provided to customers at the time the customer relationship is established and annually thereafter, or when a particular privacy policy undergoes a significant change, except for those customers who choose to opt-out. In that case, no additional notice would be required.

The Roundtable also suggests that the FCRA opt-out notice should not be part of the annual privacy notice, only the initial notice. The original FCRA opt-out had no statutory requirement that it be given more than once. GLB specifically stated its intent not to modify or alter FCRA. However, that is exactly what the federal regulators did by requiring that the FCRA opt-out be in the annual notice. Now that we have a new FCRA opt-out that needs to be given every five years, the same should hold true under the GLB regulations. The current regulatory interpretation of GLB is clearly inconsistent with the five year notice period for the opt-out under FCRA. There should be a uniform opt-out for both regulations to avoid confusing the consumer.

F. Excessive Notice Requirements Would Confuse Consumers and Greatly Impact Financial Institutions' Business Models

Financial institutions are currently required to produce several privacy notices under regulations such as GLB, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and FCRA. We believe that there should

be uniformity among all privacy notices. The Roundtable recommends that all privacy notices be consistent in format and, if possible, content elements. We also propose that the regulations allow financial institutions to consolidate these notices where possible.

The Roundtable contends that having varying privacy notices and choice regimes that are required under different regulations, or under different state laws, confuses consumers. Consumers receive numerous notices from multiple institutions. Variations in methods to execute choices make the entire regime less meaningful. The result is a numbing effect that reduces the value of the overall message. More uniformity would benefit the consumer who is burdened and confused by multiple forms.

Institutions are currently required to send separate notices in different formats. Institutions are also required to send these notices at different time periods. As a result, financial institutions have to contend with enormous costs to prepare these notices. These costs include data systems and software to gather and store information, personnel to manage the process, printing the materials, mailing, and legal costs associated with research and compliance. Any effort to simplify notices and create a uniform format would reduce these expenses and this savings could be passed on to the consumer.

G. Conclusion

The Roundtable applauds this interagency effort to improve privacy notices. We support the regulatory agencies in their desire to provide consumers with clear, concise information about their rights.

The Roundtable strongly opposes any changes to existing privacy notices unless the notices are uniform and preempt state privacy laws. Without preemption, customers would be faced with multiple notices from different jurisdictions. In addition, financial institutions would have the burden of complying with different state requirements.

Assuming that preemption is attainable, the Roundtable recommends simple, shorter privacy notices that include convenient, meaningful opt-out for consumers. These notices should provide basic information to the consumer in a language that is easy to understand. We urge the agencies to produce a model notice that is simple and flexible enough to allow financial institutions to adjust it to their individual business models. More importantly, an institution's compliance with the model notice, should act as a safe harbor, thereby, satisfying the privacy notice requirements under GLB.

Finally, the Roundtable recommends that the agencies focus their efforts on notices under the FACT Act regulations before pursuing GLB simplification. Congress has issued a mandate to propose notices under Section 214(b)(4) of the FACT Act within nine months of enacted (December 4, 2003). This should be a priority in the overall process of providing consumers with shorter, less confusing notices.

If you have any further questions or comments on this matter, please do not hesitate to contact me or John Beccia at (202) 289-4322.

Sincerely,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel

<u>Appendix A</u> – Sample Short-Form Privacy Notices

See Attached