Comment #: 7

National Retail Federation
The Voice of Retail Worldwide

March 29, 2004

Federal Trade Commission
Office of the Secretary
Room 159–H
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Advance Notice of Proposed Rulemaking: Alternative Forms of Privacy Notices, Project No. P034815

The National Retail Federation appreciates the opportunity to present these comments with respect to the agencies' deliberation over the issue of shortened notices under Gramm-Leach-Bliley ("GLB").

By way of background, NRF is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.4 million U.S. retail establishments, more than 23 million employees - about one in five American workers - and 2003 sales of $3.8 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations. NRF was very much involved in the concluding negotiations of GLB and in the subsequent rulemaking process. Sections of the final law, and provisions within the regulations, recognize that the extension of credit and the use of information in a retail environment differs significantly from that of other institutions. Consumers' interaction with retailers could be greatly derogated if the flow of information were unnecessarily impeded.

Retailers would like to see shortened and/or simplified privacy notices made available to consumers. It would be a desirable result. However, many retailers have considerable reservations as to whether this rulemaking can accomplish that goal.

There are various reasons consumers do not read existing privacy notices. They do not read some because they are too long. They do not read some because they are too confusing or too complicated. They do not read some because they are not viewed as providing important benefits. They do not read some because collectively, they receive too many notices from too many different institutions, too often.

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Most of these problems are the fault of the underlying legislation. Congress attempted to shoehorn a common set of disclosures onto too many differing, complex business models. There was at its implementation no persuasive, comprehensive argument as to why the government would want to suppress dissemination of the various types of information governed by the law in so many unique contexts. Thus, despite the several exceptions written into the underlying legislation, the rules they necessitated were insufficiently discrete as to encompass the multitude of manners in which businesses use information or in which consumers implicitly expect (or explicitly oppose) companies' use of information.

In their rulemaking, the agencies made efforts to accommodate some of the considerations Congress had not fully resolved. While those efforts resulted in rules that likely were more consistent with the majority of individuals' expectations, it did not result in simple notices, in pari because individuals' views on the use of information are not simple.

It is our experience that most consumers want information they provide to a company they trust to be used in a manner that reflects their mutual investment in, and understanding of, each other. Typically this is in the form of the company using the information to provide better service. Equally so, if the relationship is to be rewarding, consumers do not want to feel that they need to demand good service in order to receive it.

Thus, for example, a customer who shops regularly in a high end department store for shoes typically does not object if the company uses the knowledge of those purchases to inform her of the arrival of accessories matching her purchases. This is true regardless of whether the information must cross arbitrary corporate or divisional lines in order to accomplish the service goal. Nor, in our experience, do consumers have even a passing interest in learning the nature of those corporate or division lines, much less an interest in analyzing the pros and cons of the informational flows between them in a retail environment.

Yet most of the proposals for simplification contained in the ANPR assume that a consumer will make a better informed choice if the nature of the information sharing can be reduced to either a shorter or more schematicized statement. The difficulty lies in part in the choice presented to the consumer. If it is presented, as is the case with most short forms, as a choice between abstracts, such as between "privacy" and "service," many individuals will choose the former over the latter – especially if they have not had the opportunity to sample the service experience. On the other hand, if reduced to concrete circumstances, such as "if you purchase more than $300.00 in sport-specific clothing from us within a certain period of time, we will send you our sporting goods catalog and give you a substantial discount on your first purchase," that customer's choice is likely to shift. Retailers want to serve their best customers. It is to their customers' advantage that they

do so. But most retailers do not want to set service triggers so firmly, nor reveal them so publicly. Aside from competitive disadvantage, they do not want to alienate customers (by denigrating the service of those) who are unable to immediately reach specific thresholds.

While recognizing that very few consumers read them in depth, for those who are truly interested, these tradeoffs of costs and benefits can better be explained in a detailed GLB notice. For those who are not as interested, the 20,000-foot perspective offered by short form notices, also short changes historically revealed consumer expectations.

A second major concern for retailers is that the information flows within well known corporate identities is far more complicated than most individuals realize. Some large retailers are organized as simple corporate entities. The may operate under a single name or have multiple division names under the same corporate parent. Others, either due to acquisitions or for other necessary structural reasons, may be composed of corporate affiliates. Some grant credit from within the primary corporate structure (i.e. traditional retail credit). Others may grant proprietary credit through a privately held bank, which is legally required to be a separate affiliate. Still others offer private label credit through third party credit grantors.

Within each of these structures, some departments within a single store may be distinct corporate entities (e.g. a beauty salon) or may be completely separate, third party operated leased or licensed departments (e.g. jewelry or cosmetics). To the customer, these departments are operationally indistinguishable from the store itself. They may share common signage, floor space, operating hours, return policies, credit acceptance and service benefits. But legally they are distinct. In these instances, in order to provide a "seamless" customer experience, information may need to flow not only across affiliate lines, but across third party lines as well. The customer does not really care if the individual behind the counter is not an employee of the department store but rather is an employee of a company that specializes in the types of products she is explaining. Nor do retailers want to establish artificial barriers to customers' movement and treatment among and between the various departments in the store.

While information sharing across these lines is necessary in order for department stores[1] to function in the manner consumers have come to expect, they are not the kind of third party sharing that conform to most people's understanding when asked whether they are willing to deal with an entity that shares information with third parties. Encouraging consumers to withdraw permission for such sharing or not to patronize retailers that engage in them will unwittingly cause consumers to diminish the very reason they may have

[1] While this discussion specifically references department stores, other retail formats have similar operations.

chosen to shop in a department store in the first instance. For this reason too, shortened notices could prove difficult for many retailers to adopt.

Third, in light of the explicit requirements in GLB for an annual notice containing a considerable array of specific information, it is unlikely that the agencies would be able to eliminate the cumbersome GLB notices, even if a satisfactory short form notice could be adopted. As was noted above, we believe the effectiveness of the existing notice regimen is undercut by the multiplicity of notices customers already receive. Few individuals have the time to review each of the notices they receive, much less overlay it on the corporate format of the sending entity and thoughtfully consider the consequences of an opt-out election. As was mentioned above, at least in the case of retail operations, shortening the notice is likely to provide even less valuable information for consideration. What may happen, however, is that consumers could find themselves inundated with twice the amount of information they now receive: a new short form explanation of a firm's policy AND the longer GLB required notice. Nevertheless, we would encourage the agencies to explore other options for disseminating the GLB required notice, such as substituting a statement of the notice's availability, for the need to mail full unchanged notices to those who have received them in the past, or eliminating the need to send notices to those who have opted out.

Fourth, we would ask that the agencies consider the consequences of any change to a new format on legal certainty. Most companies have had a few years experience with the existing requirements. Rewriting notices to meet a new standard, especially if it entails removing information previously deemed important, either to compliance or to consumer understanding of the consequences of a choice is not without risk. Aversion to risk, particularly legal risk, will be a significant factor in the willingness of companies to adopt alternative, revised rules of disclosure.

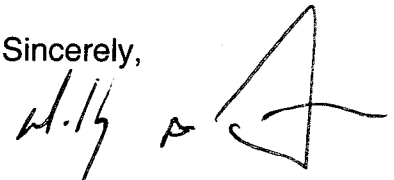
In closing, we believe that a better approach than attempting to create a relatively inflexible model or short form would be the development of standards designed to make the existing notices more readable. One private label credit grantor has found that it has been able to reduce the length of its notices from six panels to four through judicious elimination of language. The agencies may wish to encourage companies to do the same by providing an enforcement "safe harbor" for notices that encompass the major considerations within less than a specified number of words. For example, such companies may be granted prosecutorial leniency in the event they made good faith efforts to include the significant GLB requirements within a limited format.

Alternatively, the agencies may wish to provide incentives to make notices easier to understand. One major retailer was able to simplify its privacy notices by modifying its practices slightly and undertaking an effort to rewrite its existing notices at a lower junior

high school grade reading level. The changes had no substantial effect on the retailers' opt-out rate and allowed it to reduce consumer confusion the earlier notices may have engendered. Establishing an enforcement benefit for those firms who convey their GLB notices at an eighth grade reading level, for example, may accomplish some of the goals envisioned by shortened notices.

In closing, while we believe shortened notices are a worthy goal, retailers do not believe they can meaningfully be achieved so long as the existing GLB law governs company liability without further complicating consumer understanding and further increasing the cost of compliance. We appreciate the opportunity to comment and ask that the agencies consider our views in their deliberations.

Sincerely,



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