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September 13, 2001

Office of the Comptroller of the Currency
Public Information Room, 250
250 E Street, S.W.
Third Floor, Mail Stop 1-5
Washington, D.C. 20219
Attention: Docket No. 01-15

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th and C Streets, N.W.
Washington, D.C. 20551
Attention: Docket No. R-1105

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

Manager, Dissemination Branch
Information Management and
Services Division
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attention: Docket No. 2001-41

Re: Request for Comment on Section 729 of the Gramm-Leach-Bliley Act

Dear Sirs and Madams:

This letter is submitted on behalf of Providian Financial Corporation ("Providian") pursuant to a request for comment on section 729 of the Gramm-Leach-Bliley Act (the "GLB Act"). The GLB Act requires the Federal Reserve Board ("FRB"), the Office of the Comptroller of the Currency ("OCC"), the Office of Thrift Supervision ("OTS") and the Federal Deposit Insurance Corporation ("FDIC") (collectively, the "Agencies") to conduct a study of banking regulations regarding the online delivery of financial services. The Agencies must also report to Congress recommendations on adapting existing legislative or regulatory requirements to online banking and lending. To assist in their review of the various financial services regulations, the Agencies issued requests for comments on whether any regulations should be amended or removed in order to facilitate online banking.

Providian is a leading U.S. consumer finance company that provides loan and deposit products to customers nationwide through its wholly owned bank subsidiaries, Providian National Bank and Providian Bank, and also offers credit cards in the United Kingdom and Argentina. Providian has $36 billion in assets under management and over 18 million customer

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accounts. With a commitment to 100 percent customer satisfaction, Providian's mission is to help its customers build or rebuild, protect, and responsibly use credit by providing a quality borrowing experience that leads to active and lasting customer relationships. In recognition of this commitment, Providian was recently awarded the Rochester Institute of Technology/USA TODAY Quality Cup for the quality of its customer service. Providian also maintains a substantial electronic commerce and online banking presence serving its customers through such websites as www.providian.com and www.getsmart.com.

We encourage both the Congress and the Agencies to take proactive initiatives to foster electronic commerce and online banking. Congress and the Agencies must guard against the tendency to be suspicious of new technologies and new ways of doing business and, in particular, should avoid implementing prophylactic rules unsupported by evidence of actual harm. Moreover, the most significant impediment in current Agency rules to online banking and lending is the public e-mail alert and related delivery requirements under the FRB's interim final rules on electronic communications ("Interim Final Rules").

Below Providian has identified some examples of regulations or laws that not only impede the delivery of online banking and lending products, but also hinder the actual development of such products.

Public E-Mail Requirement Under the FRB's Interim Final Rules

The public e-mail requirement under the FRB's Interim Final Rules states that electronic disclosures may be delivered to a public e-mail address or made available at a Web site. If made available at a Web site, the institution must send an alert notice to the customer's e-mail address. For the following reasons, the alert requirement significantly impedes the operation of established online banking programs and the development of future electronic commerce initiatives.

First, sending information to a customer's current public e-mail address is problematic. The frequency of e-mail address changes is a major problem--more than twice as many e-mail addresses as postal mailing addresses change each year; 34% of e-mail addresses, compared to 17% of postal addresses, change each year. And while the U.S. Postal Service mail-forwarding program has its limitations, there currently is no similar program for changed e-mail addresses. Not only is it difficult to identify the customer's current e-mail address, but there are more intermediaries for a message to pass through in an open system, and each stop poses the risk that a message will be terminated in error.

Second, the public e-mail alert requirement could adversely impact, if not make ineffective, many online outreach programs. Many consumers do not have e-mail addresses, but have gained access to online banking through special bank-initiated programs, such as mobile computer programs for customer use, bank lobby computers, grocery store computers, retail store kiosks, and Web-based ATMs, designed to address the technology divide. Many of these programs would be threatened, or precluded altogether, by the public e-mail requirement.

Third, the alert requirement is inconsistent with the E-Sign Act, which was intended to promote electronic commerce. Under the E-Sign Act, Section 104 prohibits a federal agency from adopting regulations that add to the requirements of the E-Sign provisions. In addition, Section 104 prohibits a federal agency from specifying specific technology to deliver electronic documents. The alert requirement, however, adds to the requirements of the E-Sign Act, requires the use of a specific technology, and increases the difficulty of complying with the E-Sign Act's reasonable demonstration requirement.

In addition, under the FRB's Interim Final Rules, it is not clear what the disclosure requirements are when a consumer accesses disclosures online in connection with an event, such as instant credit approval. For example, initial disclosures must be provided before the consumer becomes obligated, or before the first purchase, on the account. The Rules state that the initial disclosures must appear on the screen, or the institution must provide a non-bypassable link to the disclosures before the consumer becomes obligated on the account. When a consumer has consented to receive and is receiving disclosures in "real time," that is, the disclosures appear on the screen or a link to the disclosures is provided to the consumer, creditors should have no additional obligation to deliver the disclosures to a consumer's electronic address or make the disclosures available at a Web site for 90 days <u>and</u> send an alert notice to the consumer's public e-mail address. Any requirement to send alert notices to a public e-mail address would impede the ability of financial institutions to create such account relationships in an online environment. At a minimum, the rules should allow the alternative of sending paper disclosures within a certain number of days while allowing account openings and transactions in the interim.

<u>Regulation E (Electronic Fund Transfer Act)</u>

Certain requirements under Regulation E, which implements the Electronic Fund Transfer Act, have impaired the development of many e-commerce initiatives. Many institutions have found that due to the sweeping definitions of "financial institution" and "account," many non-traditional financial products or services might or might not fall under the scope of Regulation E. Numerous electronic initiatives, such as stored-value products, account aggregation services, and person-to-person payment services, have been delayed due to the difficulty or burden of complying, or uncertainty regarding the necessity of complying, with some of the requirements under Regulation E.

The following are some examples of Regulation E requirements that impede electronic initiatives:

- Section 205.10(b) requires preauthorized electronic fund transfers from a consumer's account to be authorized by a writing that is signed or similarly authenticated by the consumer. In particular, the requirement that an advance notice be sent to customers when transfers vary in amount from the previous transfer, or from a specific preauthorized amount has caused many institutions to restructure e-commerce products and payment arrangements. The rule should be revised to allow institutions

the flexibility to debit a consumer's account based on a computable amount or percentage, as opposed to a specific dollar amount or range of dollar amounts, or by reference to the entire balance of the total amount currently due. Also Section 205.10(b) as currently worded might be broad enough to cover preauthorized transfers of interest to a consumer's deposit account at another institution even though it was probably not intended to and shouldn't cover that situation. (For example monthly interest payments could vary solely because of the different number of days in each month, yet such variance could subject the institution to section 205.10(b).)

Regulation Z (Truth in Lending Act)

As creditors attempt to implement electronic commerce initiatives, such as instant credit, they have struggled to understand how to comply with such paper-based rules in an electronic environment. For example, the FRB recently revised the disclosure requirements for credit card applications and solicitations. The revisions require certain format requirements, such as the annual percentage rate for purchase transactions to be disclosed in 18-point type. It is unclear how creditors will meet this requirement in an electronic environment. Creditors have no control over how disclosures will appear on the consumer's computer screen. (To the extent that this requires as a practical matter the use of Adobe .pdf format, this would constitute in effect mandating the use of particular technology, which ESIGN specifically prohibits.) Institutions should have no duty to ensure that a consumer views the disclosures in the context of such format and type sizes requirements.

Regulation P (Title V of the Gramm-Leach-Bliley Act)

Under the GLB Act, privacy notices are required to be provided in writing or electronically. On this point, the final rules implementing the GLB Act vary slightly from the GLB Act itself. Regulation P, which implements the GLB Act, permits initial privacy notices to be provided in writing, or electronically if the consumer agrees to receiving, and acknowledges having received, such privacy notices electronically. The Agencies should clarify that providing privacy notices electronically does not trigger the consumer consent and reasonable demonstration provisions of the E-Sign Act.

Federal Law v. State Law

The Agencies specifically requested comment on whether there are differences between federal and state laws or regulations that impede the delivery of online financial services. They also asked whether there are particular aspects of conducting online banking and lending activities that could benefit from a single set of legal standards that could be applied uniformly nationwide. The E-Sign Act is the primary federal law applicable to electronic signatures. The Act requires that consumers be given detailed disclosures of what is involved in doing business

electronically before consent is given. However, institutions cannot disregard state laws, such as the Uniform Electronic Transaction Act ("UETA"), which has been adopted in varying forms by twenty-seven states. The inherent tension between the E-Sign Act and state laws, and the ambiguity of ESIGN's preemption provisions, are significant impediments to online banking and lending.

In addition, the Agencies have interpreted the E-Sign Act, and have provided exceptions to the rules. For example, in several of its regulations, the FRB interpreted the E-Sign Act to exclude certain application, solicitation, and advertising disclosures from the consent provisions because such activities do not relate to transactions. The problem arises, for instance, when a state law requires consumer consent for such disclosures. Typically, consumer protection statutes provide that state law requirements that are inconsistent with federal law are preempted to the extent of the inconsistency. Many states believe that if the state law is more protective, then the federal law is not inconsistent and therefore the state law is not preempted. The lack of uniformity will significantly impede the development of online banking and lending.

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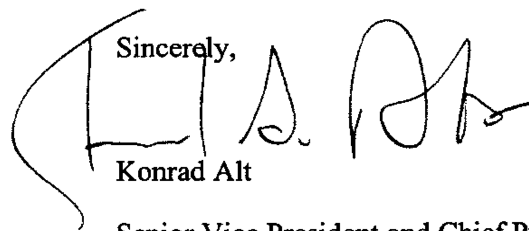
Once again, we appreciate this opportunity to comment on this important matter. If you have any questions concerning these comments or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact Susan Lau at (415) 278-4845.

Sincerely,



Konrad Alt

Senior Vice President and Chief Public Policy Officer