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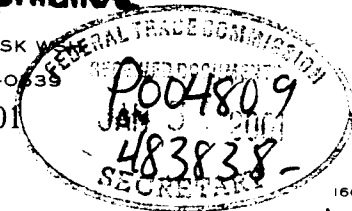
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January 30, 2001

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By Hand

Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: Response to Request for Comments  
Fair Credit Reporting Act Interpretations  
16 CFR Part 600

Dear Secretary:

Gibson, Dunn & Crutcher LLP ("GD&C") is pleased to have the opportunity to respond to the Commission's request for public comments on its proposed Fair Credit Reporting Act Interpretations, 16 CFR Part 600.

*Introduction*

This comment seeks clarification of the interplay between the Commission's Fair Credit Reporting Act Interpretations ("Interpretations"), the Fair Credit Reporting Act<sup>1</sup> ("FCRA") itself, the Gramm-Leach-Bliley Act<sup>2</sup> ("GLBA") and the Electronic Signatures

<sup>1</sup> 15 U.S.C. §§ 1681-1681u.

<sup>2</sup> Pub. L. No. 106-102, 113 Stat. 1338, enacted November 12, 1999. Codified in non-consecutive sections of Titles 12 and 15, United States Code, regarding banking and financial law.

Secretary, FTC

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in Global and National Commerce Act<sup>3</sup> ("E-SIGN Act"). Specifically, this comment seeks clarification that the Interpretations would not apply the E-SIGN Act to electronic notices already permitted under the GLBA.<sup>4</sup>

GD&C is a full-service international law firm with offices worldwide, including nine offices in the United States. We represent a diverse array of financial and non-financial businesses that collect, share and use financial information. The firm advises clients concerning the application of federal information-sharing, privacy and fair credit laws. Because of the importance of protecting individual privacy in the context of electronic commerce, and the difficulty of designing the financial compliance programs that our clients require, we have a keen interest in clarifying financial laws and agency practices at an early stage.

### *Analysis*

Section H of the Interpretations, which solicits comments on how the E-SIGN Act impacts notices required under the FCRA, includes a footnote 7 stating that the E-SIGN Act "contains general rules governing the use of electronic records for providing required information to consumers (such as disclosures and acknowledgements required by the GLBA)." We are concerned that footnote 7 may indicate that the Commission also believes that the E-SIGN Act applies to privacy notices required under Title V of the GLBA (consumer/customer notices and opt-out). We submit that such an interpretation would be error, and asks the Commission to clarify its views on this point. We submit that the E-SIGN Act has no application to privacy notices required under GLBA Title V because the GLBA does not require opt-out notices in writing.

By its own terms, the E-SIGN Act's notice and consent requirements apply only to the delivery of electronic records in lieu of providing a written notice where such a writing is specifically required by law.<sup>5</sup> In contrast to the E-SIGN Act, GLBA Title V does not discuss mandatory "in writing" notices.<sup>6</sup> GLBA Title V uses the term "writing" to mean a tangible paper copy, and provides that a paper copy is not the only permissible method of notice: the GLBA states that all privacy notices may be delivered "in writing or in electronic form or other form" permitted by regulatory agencies.<sup>7</sup> Congress clearly contemplated circumstances where notice requirements could be satisfied without the

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<sup>3</sup> Pub. L. No. 106-229, 114 Stat. 464, enacted June 30, 2000. Codified at Title 15, United States Code, sections 7001-7005, 7021 and 7031.

<sup>4</sup> While GD&C recognizes that the FCRA and GLBA are separate laws, FCRA and GLBA notices will generally be combined for ease of understanding by customers and for ease of administration by businesses. GD&C's clients advise it that FCRA and GLBA notices will usually be provided in a single document, often in a single electronic notice to customers.

<sup>5</sup> E-SIGN Act Section 101(c)(1), 15 U.S.C. § 7001(c)(1).

<sup>6</sup> See GLBA sections 502(b)(1)(A) and 503(a), 15 U.S.C. §§ 6802(b)(1)(A), 6803(a).

<sup>7</sup> *Id.*

provision or availability of any written materials whatsoever. In short, the E-SIGN Act only applies to documents that are required to be in writing. The GLBA permits many types of electronic notices that are not required to be in writing. Thus, electronic notices already permitted by the GLBA are not affected by the E-SIGN Act and do not have to meet the E-SIGN Act's requirements as to form and procedure.

There is no evidence that Congress intended to use the E-SIGN Act to increase the burdens imposed by the GLBA. The E-SIGN Act's goal is the reduction of administrative burdens, and the E-SIGN Act specifically states that it does not affect any requirement "other than a requirement that contracts or other records be written, signed, or in a nonelectronic form."<sup>8</sup> The GLBA was landmark legislation and even its smallest details represent a carefully crafted regime agreed to by the financial industry, the regulatory agencies and Congress. When Congress passed the E-SIGN Act (enacted June 30, 2000), the GLBA (enacted November 12, 1999) was fresh in legislators' minds and Congress would have stated specifically any alterations to the GLBA. Congress did not so state, and no alterations were intended.

### *Conclusion*

The plain meaning of these 1999 and 2000 laws demonstrates that GLBA Title V notices are not the type of notices covered by the E-SIGN Act. The E-SIGN Act provides no indication, either express or implied, that Congress intended to apply its E-SIGN Act consent regime to the particular system of providing privacy notices under the GLBA. Given that financial institutions face extensive compliance challenges in meeting GLBA Title V, we respectfully request that the Commission clarify that the E-SIGN Act was not intended to apply to GLBA notices, and do so well in advance of the GLBA's July 1, 2001 compliance date.

We thank the Commission for the opportunity to provide this comment. Should the Commission or its staff have questions concerning this comment or desire additional information to assist the Commission in preparing the adopting release, please do not hesitate to contact me.

Sincerely,



Robert C. Eager  
Gibson, Dunn & Crutcher LLP

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<sup>8</sup> E-SIGN Act section 101(b)(1), 15 U.S.C. § 7001(b)(1).