March 31, 2000

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

Re: Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313 – Comment

Dear Secretary:

Please accept this comment letter on behalf of the North American Securities Administrators Association, Inc. ("NASAA")[1]. NASAA appreciates the opportunity to comment on this very important issue of privacy of consumer financial information. In light of the growing consolidation and affiliation among the various industries and entities that offer financial services to consumers, the sharing of consumer financial information among such entities is going to increase and can be lucrative when sold to nonaffiliated entities. In many respects, a conflict can develop. The sharing of such information may be helpful and efficient for consumers, but such sharing could also result in unwanted access to personal information.

Federal Trade Commission's Authority Under Gramm-Leach-Bliley

Under the Gramm-Leach-Bliley Act ("GLBA"), Congress charges several federal agencies with developing privacy rules for entities within their functional regulatory authority. As you know, the Federal Trade Commission (the "Commission") was selected as the "omnibus" federal agency to develop privacy rules for financial institutions not otherwise specifically assigned to any of the other federal agencies. As a result, the Commission is responsible for developing privacy rules under GBLA for two businesses also regulated by state securities regulators: (1) investment advisers with under $25 million in assets under management ("State-Level Investment Advisers") and (2) intrastate broker-dealers. State-Level Investment Advisers and intrastate broker-dealers interact with consumers in a manner that by definition require that they have

[1] NASAA, the oldest international organization devoted to investor protection, was organized in 1919. It is a voluntary association with a membership consisting of the 66 state, provincial and territorial securities administrators in the 50 states, the District of Columbia, Canada, Mexico and Puerto Rico. In the U.S., NASAA is the national voice of the 50 state securities agencies responsible for investor protection and the efficient functioning of the capital markets at the grassroots level.

access to consumer's personal financial information. It is principally for this reason that we comment on the privacy rules proposed by the Commission.

The Commission's rules are very similar to the Securities and Exchange Commission's (the "SEC") rules, as mandated by GLBA. Therefore, in many instances, we cross reference to the attached letter from Bradley Skolnik, President of NASAA to Jonathan Katz, Secretary of the SEC, commenting on Proposed SEC Regulation S-P, Privacy of Consumer Financial Information dated March 31, 2000 ("NASAA Letter to the SEC ").

Please consider the following section by section comments listed in the order the sections appear in the Commission's rules.

Section 313.2 – Rules of Construction

Section 313.2 reads in pertinent part that "Compliance with an example, to the extent applicable, constitutes compliance with this part [of the Commission's privacy rules]." We are concerned that financial institutions may use these examples as safe harbors in creating compliance programs. For an explanation of why we believe examples should be used as guidance rather than safe harbors, please see EXAMPLES AS GUIDANCE; NOT SAFE HARBORS in the NASAA Letter to the SEC. Under certain provisions, however, we recommend to the SEC that criteria in examples should be integrated into the rule as *minimal* standards of conduct needed to ensure consumer privacy protection.

Section 313.3(j) Financial Institution

The Commission invites comment on whether an individual who otherwise meets the definition of financial institutions can be a financial institution. We think it is critical that the Commission require an *individual* who otherwise meets the definition of financial institution to comply with the proposed rules. Under state securities laws, an individual who provides financial advice is an investment adviser representative but also may be the investment adviser. In order to provide customers and consumers of that investment adviser representative privacy rights under the proposed rules, the investment adviser representative must be deemed to be a financial institution under the definition.

Section 313.3(n) Nonpublic Personal Information; Section 313.3(o) Personally Identifiable Financial Information; and Section 313.3(p) Publicly Available Information

The Commission presents two alternative definitions for sections 313.3 (n), 313.3(o), and 313.3(p). NASAA supports Alternative A because it applies the privacy protections under the proposed rules to all personal information financial institutions collect from customers and consumers. In contrast, Alternative B allows financial institutions to collect personal information from its customers in an application or by tracking transactions without having to comply with the privacy provisions if the information the financial institution collects is available elsewhere in some public record. We note

Alternative B does not even require that the financial institution *know* that the information it collected from a customer was available from a public source before it shared this information with nonaffiliates without providing the customer the opportunity to opt out.

For a more detailed discussion of NASAA's support of the approach taken under Alternative A, please see the discussion on section 248.3(t) Nonpublic Personal Information; Personally Identifiable Financial Information; Publicly Available Information of the NASAA Letter to the SEC.

Section 313.4(c)(2)(i) Initial Notice to Customers and Consumers of Privacy Policies

Under section 313.4(c)(2)(i) a financial institution must provide a customer notice *prior* to the time that a financial institution establishes a customer relationship. The timing of the notice provides teeth to the privacy provisions because the individual can choose not to enter into a contract with a financial institution if the individual does like the way or with whom the financial institution shares information.

One troubling example provided in the Commission's discussion under this section indicates that a customer relationship is established when a consumer opens a credit card account. The release provides that an account will not be considered to be opened until an individual makes the first purchase, receives the first advance or becomes obligated for any fee or charge under the account other than an application fee or refundable membership fee. Thus, an individual is not required to be provided notice of a financial institution's privacy policies under these criteria until well after the financial institution has obtained personal information about the individual from the application. We believe this example defeats the purpose of GLBA notice requirements.

While this example applies to credit cards, a State-Level Investment Adviser or an intrastate broker-dealer might try to apply the example by analogy to its services. If an individual applied for an account with a State-Level Investment Adviser or an intrastate broker-dealer, using the logic of the credit card example, the account may be deemed not opened until the first trade on the account is effected. This would be contrary to a specific example in the SEC privacy rules.

Section 313.4(d)(2)(i) Initial Notice to Customers and Consumers of Privacy Policies

Section 313.4(d)(2)(i) allows a financial institution to purchase certain customer loans and not provide initial notice of its privacy policies for a reasonable time. While we understand that this rule will assist those institutions that purchase loans, it also defeats the notice provision of the rule.

Consider the following example: A large financial institution advertises its policy of not sharing information. Based on this promise and description of the privacy policy on an initial application, an individual opens an account and applies for a loan with this financial institution.

The loan is later purchased by another financial institution that has affiliates in the direct catalog mailing and phone company industry. Under section 313.4(d)(2)(i), the financial institution that purchased the loan could *immediately* share a customer's information with any of its affiliates, which is the precise event the customer sought to avoid when he originally entered the customer relationship with the original financial institution. We believe that under such circumstances the purchasing financial institution should be precluded from sharing personal information with either affiliates or non-affiliates until such time as the customer receives actual notice (1) that his or her loan has been sold, (2) that the purchaser of the loan is in possession of all of his or her personal information, and (3) of the privacy policies of the financial institution that purchased his or her loan.

Loans are an important issue for state securities regulators because loans are used in a variety of ways by financial institutions which state securities commissions regulate. For example, when a customer trades on margin or sets up a margin account, the customer is effectively taking out a loan from the institution. Also, sometimes when an individual sets up an account with a financial institution, the account may provide an investment advice component and a loan component.

Section 313.6 Information to be Included in Initial and Annual Notice of Privacy Policies and Practices.

The Commission requests comments on how joint accounts should be treated. We believe each individual in a joint account should be afforded the same privacy protections as any other account holder. For more discussion on this position, please see section INFORMATION TO BE INCLUDED IN INITIAL AND ANNUAL NOTICES OF PRIVACY POLICIES AND PRACTICES. (Section 248.6) of the attached NASAA Letter to the SEC.

Section 313.8 Form and Method of Providing Opt Out Notice to Consumer

We support allowing companies to set up toll-free numbers, provide self-addressed envelopes or develop other common sense approaches that allow customers and consumers to *easily* exercise their privacy rights. We believe that if toll-free numbers are used to allow customers or consumers the ability to opt out of sharing their information, the toll-free program must be appropriately staffed or automated to ensure minimal waiting time.

We also believe customers should be able to choose the method by which they communicate their desire that the financial institution not share their information with non-affiliates. For this reason, the first line on page 20 of the Commission's release ought to be changed from "[ ] although an institution *may* honor such a [opt out] letter if received" to "[ ] although an institution *must* honor a [opt out] letter if received".

Section 313.11 Other Exceptions to Notice and Opt Out Requirements

In assigning the federal government functional regulators the responsibility of implementing and enforcing privacy rules, GLBA did not include state securities regulators. In 1996, the National Securities Market Improvement Act (NSMIA) bifurcated the regulation of investment advisers between the SEC and the state securities regulators. The SEC registers investment advisers having more than $25 million in assets under management and the states register investment advisers having less than $25 million in assets under management, although each regulator retains anti-fraud authority over all investor advisers. States also have exclusive registration authority over intrastate broker-dealers. Investment adviser regulation essentially consists of licensing investment adviser firms and their representatives, conducting exams at the investment adviser's place of business, and bringing enforcement actions against investment advisers.

As mentioned previously, the privacy rules adopted by the Commission will apply to State-Level Investment Advisers and intrastate broker-dealers. Section 313.11(a)(4) provides an exception to the privacy rules to permit companies to share customer information with regulators during examinations and investigations. These regulators, of course, are not affiliated with the financial institution. Without the exception contained in this provision, it can be inferred that a financial institution may be required to provide a customer or consumer an opt out opportunity before the financial institution allowed the regulator access to information.

We recommend that Section 313.11(a)(4) of this rule be amended after the reference to Self-Regulatory Organizations, to include a specific reference to state securities regulatory agencies. State securities regulators should be included in Section 313.11(a)(4) to codify their existing regulatory role and prevent financial institutions from withholding information from state regulators examining State-Level Investment Advisers or intrastate broker-dealers under the guise of GLBA privacy rules.

Section 313.12 Limits on Redisclosure and Reuses of Information

The Commission invites comment on whether the Rule should require a financial institution that discloses nonpublic personal information to a nonaffiliated third party to develop policies and procedures to ensure that the third party comply with the limits on redisclosure of that information.

We believe the Commission's rules should obligate the financial institution to inform the non-affiliate of its obligations and to the extent possible the financial institution should be responsible if information is subsequently disseminated in violation of these or other agencies' privacy provisions. For example, if a financial institution sells its customers' information to non-United States companies or companies not normally regulated by the entities defined in section 3.13(l) of the rule, the financial institution should have some burden of educating the company purchasing the information about their duty to comply with GLBA privacy provisions.

Please consider that: (1) GLBA requires that a financial institution's annual and initial notices inform a consumer and customer on what *categories* of companies may receive their information, therefore the customer or consumer will not know which specific entity is in possession of his or her information; and (2) the choice to sell or otherwise share a customer's information with non-affiliated third parties is likely the financial institution's choice not the customer's choice

We congratulate the Commission on proposing rules addressing this very important subject of consumer privacy rights. If you have any questions about our comments, please do not hesitate to call me at (317) 232-6690 or Karen M. O'Brien, NASAA General Counsel at (202) 737-0900.

Sincerely,

Bradley W. Skolnik
Indiana Securities Commissioner
NASAA President