WILMER, CUTLER & PICKERING

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SELECTED RECENT DEVELOPMENTS REGARDING CONSUMER FINANCIAL PRIVACY: VERMONT REGULATIONS AND FEDERAL AGENCY FAQS

The cascade of new developments regarding consumer financial privacy has continued unabated in recent months. This Newsletter focuses on two developments of particularly wide-ranging importance: (1) regulations promulgated in November by the Vermont Department of Banking, Insurance, Securities & Health Care Administration ("BISHCA"), and (2) frequently asked questions ("FAQs") released in December by the staffs of several federal agencies.

Vermont's "Opt-In" Regulations

In early November, BISHCA adopted three sets of consumer financial privacy regulations — applicable to banking, securities, and insurance firms, respectively ("Vermont Regulations").[1] The banking regulations, like most of the privacy regulations promulgated under the Gramm-Leach-Bliley Act ("GLBA Regulations"), state that they apply to any entity the business of which is engaging in activities that are financial in nature or incidental to such activities, as described in section 4(k) of the Bank Holding Company Act of 1956. The securities regulations apply to broker-dealers and investment advisers registered with Vermont. The insurance regulations generally apply to insurers and producers licensed or required to be licensed with Vermont.[2] *Each covered entity must comply with the applicable Vermont Regulations in its transactions with Vermont consumers, regardless of the entity's jurisdiction of domicile*. Vermont Regulations, § 2.

Although all the Vermont Regulations generally track the GLBA Regulations, they diverge from the GLBA Regulations in several key respects. Of particular importance:

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[1] See the following URLs for the following regulations:

- Banking: http://www.bishca.state.vt.us/Regs&Bulls/bnkregs/REG_B2001_01.pdf;
- Securities: http://www.bishca.state.vt.us/Regs&Bulls/secregs/REG_S2001_01.pdf; and
- Insurance: http://www.bishca.state.vt.us/Regs&Bulls/insregs/REGIH_2001_01.pdf.

[2] The Vermont Regulations differ from one another not only in the scope of their application but also in their substantive provisions. For example, section 10 of the banking and securities regulations states (unlike the GLBA Regulations) that a financial institution that delivers privacy notices to a customer electronically must deliver them in a form that the customer can download and print. Section 10 of the insurance regulations, consistent with the GLBA Regulations, omits this requirement. To take another example, the appendix to each Vermont regulation includes sample clauses that may be used, as applicable, to meet the requirement for notice regarding disclosures of protected information to service providers or under joint marketing agreements. In the securities regulations, the first such sample clause states that it covers both these types of disclosure. In the banking and insurance regulations, by contrast, the corresponding clause refers only to disclosures to service providers. Vermont Regulations, App., Sample Clause A-5, Alternative 1.

- The Vermont Regulations require financial institutions to obtain a consumer's "opt in" before sharing protected information about the consumer with nonaffiliated third parties (outside certain exceptions); by contrast, the GLBA Regulations generally condition information sharing on the consumer's decision not to "opt out." Vermont Regulations, §11.[3]

- The GLBA Regulations create an exception from consumers' opt-out rights for information sharing under joint marketing agreements; the Vermont Regulations establish a similar exception from consumers' rights to opt in. However, the exception in the Vermont Regulations covers less data than the exception in the GLBA Regulations. Specifically, the Vermont Regulations' exception covers only the consumer's name, contact information, and "own transaction and experience information," within the meaning of the federal Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and the VFCRA. Vermont Regulations, § 14. The GLBA Regulations' exception applies, instead, to all protected information.

- The Vermont Regulations expressly bar the disclosure of encrypted account numbers to nonaffiliated direct marketers. Vermont Regulations, § 13. The GLBA Regulations, by contrast, although generally prohibiting such disclosures, also explain that the prohibition does not cover account numbers in encrypted form, so long as the disclosing financial institution does not provide the recipient with the key to unlock the encryption.

The Vermont Regulations took effect November 17, 2001, with compliance required beginning February 15, 2002. No later than the compliance date, a covered institution must provide initial notices to consumers who were its customers on the effective date, unless one or more of a number of specified exceptions applies.

Frequently Asked Questions

On December 12, 2001, the five federal banking agencies[4] and the Federal Trade Commission ("FTC") issued long-awaited guidance in the form of FAQs regarding compliance with the GLBA Regulations.[5] The five banking agencies issued identical FAQs, and each has posted an electronic copy of the FAQs on its website.[6] For its part, the OCC issued the FAQs as one section of a Small Bank Compliance Guide ("Guide"), which also includes a brief overview and a more detailed summary of the OCC's GLBA Regulations, as well as a "privacy preparedness checklist" previously issued by the OCC in January 2001. The FTC issued FAQs that are identical to those of the banking agencies except for minor differences of terminology and differences relating to the scope of coverage under the FTC's GLBA Regulations and to the FTC's proposed rule establishing standards for safeguarding customer information.

The FAQs are the most recent of many agency issuances over the past eighteen months regarding the GLBA Regulations — for example, several rounds of

[3] For many years, the Vermont Fair Credit Reporting Act ("VFCRA") has generally required a consumer's opt in before a person could obtain a credit report on the consumer or share it with affiliates. See 15 U.S.C. § 1681t(b)(2).

[4] The Board of Governors of the Federal Reserve System ("Board"), the Federal Deposit Insurance Corporation ("FDIC"), the National Credit Union Administration ("NCUA"), the Office of the Comptroller of the Currency ("OCC"), and the Office of Thrift Supervision ("OTS").

[5] The Securities and Exchange Commission and Commodity Futures Trading Commission did not join in the issuance of the FAQs, although their staffs were consulted in the drafting process. Nor do the FAQs speak for state authorities such as insurance commissioners.

[6] See the following URLs for the following agencies:

- Board: http://www.federalreserve.gov/BoardDocs/Press/general/2001/200112122/attachment.pdf;
- FDIC: http://www.fdic.gov/news/news/press/2001/pr9301a.html;
- NCUA: http://www.ncua.gov/ref/consumer_privacy/FAQPrivacyReg.htm;
- OCC: http://www.occ.treas.gov/ftp/bulletin/privacy%20rule20small%20bank%20compliance%20 guide.pdf;
- OTS: http://www.ots.treas.gov/docs/48890.pdf; and
- FTC: http://www.ftc.gov/privacy/glbact/glb-faq.htm.

questions and answers ("Q&As") issued by staff of the OCC.[7] Some FAQs represent interagency adoption of OCC Q&As; others modify those Q&As or address issues that the Q&As do not cover. Some FAQs reiterate or elaborate on points that are reasonably clear from the GLBA Regulations; others assert new agency positions.

The following discussion of the FAQs begins with a brief overview of the scope and limits of the recent guidance, followed by a discussion highlighting selected FAQs. It concludes by identifying some areas relating to the GLBA Regulations that remain to be addressed by the agencies.

Overview

The FAQs address issues under ten functional headings, such as "Providing notices to joint account holders," and "Disclosing nonpublic personal information under the exceptions to the notice and opt out provisions." In addition, as described above, the OCC's Guide includes summaries of the GLBA Regulations and other materials. These materials set forth, for example, some additional guidance, beyond that in the GLBA Regulations, regarding techniques that can be used to meet the "clear and conspicuous" requirement for notices.[8]

With a few exceptions, the FAQs generally do not address the interaction of the GLBA Regulations with other provisions of federal or state law, such as the FCRA. Also, the agencies caution that the FAQs "do not necessarily address all provisions [of the GLBA Regulations] that may apply to any given situation."

The OCC has not expressly clarified the relationship between the FAQs and its existing Q&As. Presumably, the Q&As survive where not in conflict with the FAQs. For example, the Q&A strongly recommending that each bank have a board-approved privacy compliance program — which was not picked up in the FAQs — presumably remains in effect with respect to OCC-regulated entities.[9] The situation may be more ambiguous where, as in a few instances described below, a FAQ represents a modification of a previous Q&A or other agency guidance that has not been expressly withdrawn.

The agencies' staffs expressly reserve the right to revise or supplement the FAQs. In addition, unlike the staff commentary or guidance issued under other regulations such as the Board's Regulation Z, the FAQs do not specify the extent to which an institution is protected from liability by compliance with an applicable FAQ. Compare, e.g., 12 C.F.R. Part 226, Supp. I, ¶ 1 (impact of good faith compliance with staff commentary on Regulation Z); GLBA Regulations, § 2 (impact of compliance with applicable example or use of applicable sample clause).

Discussion of Selected FAQs

The following discussion tracks the ten functional topics addressed in the FAQs, briefly identifying which FAQs reflect or modify existing OCC Q&As and which address matters that those Q&As do not cover. A few notable FAQs are discussed in more detail.

A. Financial institutions, products, and services that are covered by the Privacy Rule

The FAQs in this section address matters not covered in the Q&As, but generally reiterate

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[7] Other issuances include: Q&As issued by staff of the Securities and Exchange Commission; interpretive letters issued by the banking agencies; the banking agencies' examination procedures; and other documents intended to educate consumers about the Regulations or to help institutions prepare to comply with them. Agency staff have also given many speeches and other presentations on various aspects of the Regulations such as, for example, their impact on aggregation. The agencies' filings in *Individual Reference Services Group, Inc. v. FTC*, 145 F.Supp. 2d 6 (D.D.C. 2001) provide further insight into their views on certain issues.

[8] All the agencies recently held a joint conference on drafting effective privacy notices. A transcript of that conference, as well as the materials distributed, is available on each agency's website.

[9] Institutions regulated by other agencies should not necessarily conclude, however, that those agencies disagree with the OCC Q&As that were not incorporated into the interagency FAQs. Some Q&As may have been omitted because while several agencies concurred with them, others did not, and consensus could not be reached. Other Q&As may have appeared self-evident; and some — relating to institutions' responsibilities to send initial privacy notices to existing customers by July 1, 2001 — would seem to be moot.

points that were already clear from the GLBA Regulations.[10]

B. Individuals who are entitled to receive notices
FAQs B.3-4 reflect OCC Q&As; FAQ B.2 modifies a Q&A; FAQs B.1 and B.5 address other matters. Notable FAQs in this section include:

- *FAQ B.2 - Sole Proprietors*. FAQ B.2 states that sole proprietors need not be provided with privacy notices. This reflects the first part of an OCC Q&A, which goes on to state that there are instances in which information obtained about a sole proprietor may nevertheless be protected under the GLBA Regulations, and that persons should consult the FTC's GLBA Regulations as to whether sole proprietors may be "financial institutions."

- *FAQ B.3 - Guarantors/Endorsers of Consumer Loans*. FAQ B.3 provides that a "guarantor or endorser of a consumer loan is your customer because the individual assumes secondary liability on the loan he or she guarantees or endorses and thereby receives an extension of credit from you." This harmonizes with the agencies' position for purposes of the FCRA. See, e.g., letter from Julie L. Williams et al. to Joel Winston (May 31, 2001) (in the FCRA context, "a "credit transaction involves an extension of credit [to any consumer who] is legally liable for repayment of the credit"). The FAQ goes on to state that an institution may "treat the primary borrower and the guarantor or endorser as joint account holders," which should simplify compliance with the delivery rules.

- *FAQ B.4 - Foreign Customers*. FAQ B.4 reiterates that the GLBA Regulations apply to all U.S. offices of covered institutions, regardless of where their consumers reside.

C. Delivering your privacy notices
FAQ C.2 reflects OCC Q&As; FAQ C.9 modifies a Q&A; FAQs C.1 and C.3-8 address other matters. Also, several of these FAQs — such as C.2 and C.6 — echo SEC Q&As. Notable FAQs in this section include:

- *FAQ C.5 - Definition of "Annually."* FAQ C.5 attempts to resolve the tension between the GLBA Regulations and their preamble regarding how often institutions must send customers annual notices. The GLBA Regulations require financial institutions to send annual notices at least once in each successive period of twelve months, with those periods to be defined by the financial institutions themselves and applied by them consistently. GLBA Regulations, § 5(a)(1). Under this rule, an institution could send "annual" notices more or less than twelve months apart. The preamble, by contrast, states that if "Alison Individual opens a checking account with a bank on July 2, 2001 . . . Bank must provide an annual notice to Alison by December 31, 2002. If Bank provides an annual notice to Alison on October 1, 2002, as it does for other customers, then it must provide the next annual notice to Alison no later than October 1, 2003" — i.e., no more than twelve months after the prior annual notice (emphasis added). The FAQ repeats the GLBA Regulations' statement that "annually" means at least once in each successive twelve-month period. But the FAQ then adds that institutions are expected to provide annual notices on a consistent basis (whereas the GLBA Regulations require them to apply their twelve-month periods on a consistent basis). The FAQ goes on to caution that any "period of more than 12 months between annual notices should have an appropriate business justification." In short, the FAQ does not seem to resolve the tension between the GLBA Regulations and preamble, or provide the public with clear guidance.

[10] FAQ A.4. addresses the question of whether an individual who owns an Individual Retirement Arrangement ("IRA") has a customer relationship with the IRA's custodian. The agencies confirm that the individual does have a customer relationship with the custodian. See GLBA Regulations, § 3(i)(2)(i)(E). The agencies go on to state: "By contrast, an individual who is a participant or a beneficiary of an employee benefit plan that you sponsor or for which you act as trustee or fiduciary is *not* your customer because your relationship in that case is with the plan." (Emphasis in original.) Not only is there no customer relationship in that case, there is, without more, no consumer relationship. Id., § 3(e)(2)(viii).

- *FAQ C.9 - "Agent Bank" Arrangements*. FAQ C.9 addresses the situation in which one bank provides its customers with applications for credit cards issued by another bank, with the first bank's name and logo prominently displayed on the front of the card. In this situation, the customers submit their applications directly to the issuing bank. The agencies conclude that the issuing bank establishes customer relationships with holders of the cards, and thus must comply with the GLBA Regulations' customer-notice requirements. The other bank, however, does not incur additional notice obligations because it does "not appear to be providing any financial product or service . . . in connection with this credit card product." This FAQ addresses a simpler fact pattern than the corresponding OCC Q&A, in which the customers return their completed applications to the non-issuing bank, which then makes "recommendations" about them to the bank that issues the cards.

D. Providing notices to joint account holders

The FAQs in this section, which address matters not covered in the Q&As, provide examples of delivery options with respect to joint account holders. These FAQs generally confirm points already reasonably clear from the GLBA Regulations.

E. Complying with the opt out provisions for joint account holders

The FAQs in this section address matters not covered in the Q&As. For example:

- *FAQ E.3 - Opt Out Forms Provided to Joint Accountholders.* This FAQ addresses the question of whether an institution that permits joint accountholders to make independent opt out elections may require each joint accountholder to opt out in a separate response. The agencies state that an institution must "allow both account holders a reasonable opportunity to opt out in one response, such as one opt out form or in one call." Although not entirely clear, the FAQ could be interpreted to require that such an institution must not only enable one accountholder to opt out on behalf of all accountholders in a single response but also enable any subset of accountholders to opt out on a single response form or in a single telephone call. For example, there could be three accountholders, of whom only two choose to opt out; yet the opt out response form would need to contain a means to identify both those accountholders. Implementing this requirement could prove difficult, given that most opt out forms contain space for only one set of identifying information.

F. Delivering opt out notices and providing consumers with a reasonable opportunity to opt out

FAQ F.3 restates an existing OCC Q&A; the remaining FAQs in this section address matters not covered in the Q&As. Notable FAQs in this section include:

- *FAQ F.2 - Reasonable Means to Opt Out.* This FAQ reiterates the regulatory requirement that, if an institution identifies a specific opt out means, the means chosen must be reasonable "for that consumer." GLBA Regulations, § 7(a)(2)(iv). This language could be read to require a consumer-by-consumer determination of what opt out means would be reasonable. However, the FAQ goes on to suggest that a means is "reasonable" for this purpose if expressly sanctioned by the GLBA Regulations. This leaves open the question of whether an exclusive means is reasonable for a particular consumer where, even though the GLBA Regulations sanction that means, the consumer cannot utilize it — as, for example, where the institution requires that customers opt out by calling a toll-free number but a deaf customer is unable to use that method. The agencies add, however, that the examples of reasonable means in the GLBA Regulations are not exhaustive and that there may be other reasonable means depending upon the situation.

- *FAQ F.3 - Return Envelopes.* This FAQ confirms that an institution need not include a postage-paid envelope if it allows a consumer to opt out by mail.

- *FAQ F.4 - Placement of Opt Out Form on Paper Notice.* This FAQ specifies that if a detachable opt out form is included on a privacy notice, then the customer must be able to detach the form without removing any text

from the privacy policy. The FAQ does not specify whether the word "text" refers solely to required text under the GLBA Regulations or extends to discretionary text that an institution chooses to include in its privacy policy. One possible interpretation would be that it includes all text in the privacy notice, given that even discretionary provisions could create binding obligations on the institution. To the extent existing notices have detachable forms that would remove text from the privacy policy, the institution is directed to either redesign its notice or have procedures in place to provide a customer with the complete text of the privacy notice upon request.

- *FAQ F.7 - Prohibition Against Sharing Prior to Expiration of Reasonable Time to Opt Out.* FAQ F.7 specifies that, after providing an initial privacy notice to a new customer or consumer, an institution may not disclose information to nonaffiliated third parties if it receives an opt out within the reasonable opt-out time period (generally 30 days after providing the notice), even if it has not yet processed the opt out election. As a practical matter, this means that the freeze on sharing of information regarding new customers or consumers is not the 30 day period for a reasonable opportunity to opt out set forth in the GLBA Regulations, but the combination of that 30 day period plus the institution's processing time for opt outs. So, for example, if an institution takes 45 days to process opt outs, it may not be able to share information about its new customers or consumers until 75 days after it provides notice. Although perhaps questionable in its interpretation of the plain language of the GLBA Regulations, this approach is consistent with the agencies' existing policy of discouraging institutions from having long processing schedules to create a window in which to share information about a new customer or consumer.

G. Complying with limitations on redisclosure and reuse of nonpublic personal information

The FAQs in this section address matters that, while not covered by the OCC Q&As, seem reasonably clear from the GLBA Regulations.

H. Complying with the limitation on disclosing account numbers

The FAQs in this section address matters not covered in the Q&As (although, as discussed below, one FAQ generally reflects prior guidance from the banking agencies). These FAQs are:

- *FAQ H.1 - Prohibition Against Disclosure of Account Numbers for Marketing.* FAQ H.1 addresses the disclosure of account numbers to direct marketers in a situation somewhat different from the one discussed in OCC Interpretive Letter 910 (May 25, 2001). There, the financial institution, under a joint marketing agreement, provided a third party marketer with the names and addresses of the financial institution's customers, along with encrypted versions of their account numbers. When a customer accepted the product being marketed, the customer signed an authorization for the financial institution to provide the marketer with the customer's unencrypted account number, and, on receiving that number, the marketer charged the customer's account. The FAQ simplifies this scenario by omitting the joint marketing agreement and the signed customer authorization. The agencies reach the same result, however — that the financial institution may not provide the marketer with the unencrypted account number. As in Interpretive Letter 910, the agencies take the position that — subject to a number of exceptions that are not applicable in this case — section 12 of the GLBA Regulations prohibits financial institutions from disclosing account numbers to third party marketers even after the customer accepts the product being marketed.

- *FAQ H.2 - Prohibition Against Disclosure of Account Numbers To Affiliate to Initiate Marketing-Related Charges.* FAQ H.2 adds that section 12's prohibition against the disclosure of account numbers applies not only to a financial institution's disclosure of account numbers to a direct marketer, but also to the disclosure of those numbers to an affiliate of the marketer whose only role in the arrangement would be to initiate charges to the customers' accounts with the financial institution. The agencies state that, in this scenario, the affiliate's activity would be "an integral

part" of the financial institution's arrangement with the marketer, so the institution's disclosure of the account numbers to the affiliate would be a prohibited disclosure "for use in" direct marketing.

I. Disclosing nonpublic personal information under the exceptions to the notice and opt out provisions

FAQs I.1, I.2, I.5, I.7-10, and I.12 largely reflect OCC Q&As; the remaining FAQs in this section address other matters. Notable FAQs in this section include:

- *FAQs I.5 and I.8 - Disclosures to Third Parties that Request Information Under the Exceptions*. FAQ I.5 addresses the question of whether a consumer has the right to opt out of a financial institution's disclosure of nonpublic personal information about the consumer to a nonaffiliated financial institution that is attempting to collect a loan on which the consumer has defaulted. The agencies conclude that the consumer has no opt-out right in this case. First, the exception for disclosures to a party with "a legal or beneficial interest relating to the consumer" covers disclosures to the consumer's creditors. GLBA Regulations, § 15(a)(2). Second, the exception for disclosures to "prevent actual or potential fraud . . . or other liability" does not refer only to fraud against the disclosing institution, but also to fraud against the recipient of the information. Id. FAQ I.8 makes a similar point regarding exceptions in section 14 — for disclosures in connection with processing a financial product or service that the consumer has requested or authorized, or that are required, or are a usual, appropriate or acceptable method to carry out a transaction that the consumer has requested or authorized. FAQ I.8 points out that these exceptions apply not only where the consumer has requested the product, service or transaction from the institution disclosing the information, but also where the consumer's request was directed to the institution seeking the information.

J. Complying with the exception to the opt out provisions for joint marketing arrangements

FAQ J.5 updates and restates an OCC Q&A; the remaining FAQs in this section address matters not covered in the Q&As. Notable FAQs in this section include:

- *FAQ J.3 - Indirect Disclosure Via Transmission of Third Party Marketing Materials (Data Leakage)*. FAQ J.3 addresses the question of whether a financial institution may include marketing materials for a third party vendor's products along with the financial institution's periodic statements to its customers. (The financial institution is assumed not to have a joint marketing agreement with the vendor.) The agencies state that "you must be careful not to facilitate your customer's unwitting disclosure of his or her nonpublic personal information by the vendor by virtue of a response to the marketing materials." For instance, the inclusion of a bar code on the materials may reveal that the consumer is a customer of the financial institution. "In that case," the agencies write, "you would have disclosed nonpublic personal information about the customer to the vendor." The agencies go on to state that:

  > *To comply with the Privacy Rule under these circumstances, you must either describe these types of marketing arrangements in your initial, annual, or revised privacy notice and provide your customer with a reasonable opportunity to opt out or obtain your customer's specific consent to such arrangements. Alternatively, you may structure the marketing materials so your customer knows that by responding he or she would be disclosing certain categories of nonpublic personal information about himself or herself.*

  Although the FAQ deals with statement stuffers, the agencies would presumably take the same position with respect to other forms of advertising, such as banner advertisements on Web sites. Because placing a disclosure on each marketing piece is unlikely to be a practical approach, especially where the piece has limited space (such as, for example, a small coupon or an Internet banner ad), the least problematic form of compliance may be obtaining the customer's specific consent to the arrangements.

- *FAQ J.5 - Service Providers*. FAQ J.5 provides a useful summary of the different substantive and timing rules regarding contracting with service providers that are set forth in those GLBA Regulations and in the "Interagency Guidelines Establishing Standards for Safeguarding Customer Information." E.g., 12 C.F.R. Part 30, App. B.

Remaining Subjects for Agency Guidance

Further agency guidance should be expected in at least two areas. First, many ambiguities in the GLBA Regulations remain to be addressed. To take one example, Section 4(e)(1) provides in part that a financial institution may provide a customer with an initial privacy notice after establishing the customer relationship if doing so earlier would substantially delay the customer's transaction and if the customer agrees to receive the notice at a later time. However, Section 4(e)(2) arguably indicates that this rule applies when a financial institution establishes a customer relationship with an individual under a student-loan program where loan proceeds are disbursed promptly "without prior communication" between the lender and the customer.

Second, the proliferation of federal and state laws and regulations relating to privacy — not least the Vermont Regulations — makes it increasingly important for the agencies to publicly clarify how the GLBA Regulations interact with these other authorities. The agencies have already committed to some consultations in this regard that may or may not result in issuances to the public. For example, the preamble to the GLBA Regulations states that after the Department of Health and Human Services ("HHS") publishes its final rules regarding the privacy of health information, "the agencies will consult with HHS to avoid the imposition of duplicative or inconsistent requirements." E.g., 65 Fed. Reg. 35164 (Jun. 1, 2000) (bank and thrift agency regulations); see 65 Fed. Reg. 82462 (Dec. 28, 2000) (HHS' HIPAA regulations).

James E. Anderson	(202) 663-6180	Christopher R. Lipsett	(212) 230-8880
Philip D. Anker	(202) 663-6613	David A. Luigs	(202) 663-6451
Robert G. Bagnall	(202) 663-6974	James H. Mann	(212) 230-8843
Ursula C. Bass	(202) 663-6133	Eric Mogilnicki	(202) 663-6410
Brandon Becker	(202) 663-6979	Lester Nurick	(202) 663-6419
Russell J. Bruemmer	(202) 663-6804	David Ogden	(202) 663-6440
J. Beckwith Burr	(202) 663-6695	Matthew P. Previn	(212) 230-8878
Matthew A. Chambers	(202) 663-6591	Victoria E. Schonfeld	(212) 230-8874
David S. Cohen	(202) 663-6925	Marianne K. Smythe	(202) 663-6711
Ricardo R. Delfin	(202) 663-6912	Daniel H. Squire	(202) 663-6060
Ronald J. Greene	(202) 663-6285	Natacha D. Steimer	(202) 663-6534
Franca Harris Gutierrez	(202) 663-6557	Todd Stern	(202) 663-6940
Stephen R. Heifetz	(202) 663-6558	Manley Williams	(202) 663-6595
Satish M. Kini	(202) 663-6482	Soo J. Yim	(202) 663-6958
Michael D. Leffel	(202) 663-6784		