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## Memo

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Date: April 24, 2007

To: Members of the Senate Committee on Commerce, Science & Transportation

From: Floyd E. Stoner, Executive Director, Congressional Relations & Public Policy

RE: S. 1178, the Identity Theft Protection Act

I am writing to you on behalf of the American Bankers Association (ABA) to express our concerns over S. 1178, the Identity Theft Protection Act, which is scheduled to be marked up by the Senate Commerce Committee on Wednesday, April 25, 2007.

The ABA strongly believes that any data security bill should establish a national rule with respect to the regulation of consumer protection in data breach situations. Importantly, many types of business entities have never been subject to such rules, and we recognize that it may be necessary to establish both new responsibilities and new enforcement regimes for such entities.

We strongly urge the Committee to clearly recognize in S. 1178 that financial institutions are already subject to comprehensive statutory and regulatory security and notice rules under the Gramm-Leach-Bliley Act (GLBA). Financial institutions are also subject to significant new rules under the Fair and Accurate Credit Transactions Act (FACTA) that protect consumers who are victims of identity theft.

As background, the GLBA requires financial institutions to protect the security and confidentiality of customer information. Detailed regulatory guidance pursuant to this statutory mandate has been issued and implemented, with banks required to establish both mandatory security programs and notice requirements for breach situations. Financial regulators possess wide-ranging enforcement tools to ensure compliance with this Act.

In addition to GLBA, the Fair Credit Reporting Act (FCRA), as amended by FACTA in 2003, contains many new protections for identity theft victims. For example, consumers may place fraud alerts on their credit reports when they are victims of identity theft, telling potential creditors that an identity theft situation may be present and putting certain protections in place so that fraudulent new credit lines are not opened. Moreover, FACTA requires banks to take precautions when identifying consumers to ensure that someone is not, for example, fraudulently applying for credit or opening a new account. Further, banks must assist identity theft victims in the victims' efforts to obtain information necessary for investigation

and law enforcement. As recently debated, endorsed, and enacted by Congress, these new protections correctly balance the need to protect consumers while not inappropriately restricting commerce.

We are concerned that S. 1178, in its present form, does not recognize this comprehensive statutory and regulatory system. Specifically, the overly cumbersome security freeze provisions included in Section 4 may lead to substantial consumer inconvenience and restricted credit availability. Moreover, these provisions do not effectively preempt inconsistent state laws. Further, the very important prescreening exception to the freeze requirement that was included in the bill (S. 1408) reported by the Committee in the 109<sup>th</sup> Congress, was not included in S. 1178.

In addition, Section 8 attempts to provide that financial institutions subject to the GLBA notice, and subject to the GLBA and FCRA data security provisions, are deemed to be in compliance with the Act. However, this language is more restrictive and less clear than the language the Committee included in S. 1408. We strongly believe that the language included in S. 1408 should be used in S. 1178.

Language prohibiting private rights of action that was included in S. 1408 has also been dropped from S. 1178. We are very concerned that this raises the very real threat of class action lawsuits and request that the Committee restore the language included in S. 1408.

The ABA strongly believes it is appropriate for Congress to establish national security protection and notice standards for entities that gather consumer financial information. However, in doing so, we urge the Committee to more fully recognize in the explicit language of S. 1178 that existing law requirements and enforcement mechanisms applicable to financial institutions are sufficient to satisfy compliance with the Committee's initiative.

In conclusion, we request that the Committee refrain from upsetting the careful balance established in FACTA by striking the security freeze provisions in Section 4. We also urge the Committee to reject any proposed amendments that would undermine the regulatory structure already in place for financial institutions and that are unrelated to the substance of S. 1178, such as those impacting the credit card industry and restrictions on the use of Social Security numbers.

It is important that the Committee work closely with the Senate Banking Committee in addressing these issues, as that Committee has broad jurisdiction over financial institutions and the regulatory structure within which they operate.

Thank you for considering our views on this important subject.