

March 31, 2000

Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th and C Streets, NW
Washington, DC 20551

Re: Proposed Privacy Regulations Under Title V of the Gramm-Leach-Bliley Act
(Docket No. R-1058)

Ladies and Gentlemen:

The Financial Services Coordinating Council is pleased to provide comments to the Board of Governors of the Federal Reserve System in connection with its request for public comment on the proposed rule implementing the privacy provisions of title V of the Gramm-Leach-Bliley Act (the "GLB Act"). The Financial Services Coordinating Council is a Washington D.C. trade group composed of the nation's principal trade organizations for the banking, securities and insurance industries. The constituent members of these groups include major insurance companies, banking organizations and securities firms in the United States. These financial institutions will be dramatically affected by your proposed rule.

We will not be providing detailed comments on the proposed rule. Rather we wish to make the following observations about some of the more important issues presented in your proposed rule. In this regard, we support the extensive comments provided to you by our members, the American Bankers Association, the American Insurance Association, the American Council of Life Insurers, the Investment Company Institute, and the Securities Industry Association.

We urge you to provide as much flexibility in the final rule as you can. The provisions of title V of the GLB Act are complex to implement. Financial institutions will require as much latitude as possible to implement the final rules in an orderly fashion. Further, we strongly request that you co-ordinate with the other federal agencies and strive to achieve as much uniformity as possible in all of the agencies final rules. Such harmonization will benefit financial institutions which are affiliated with companies in other financial industries, as well as consumers, who will be in a better position to compare financial institutions' privacy policies. We hope that you will modify your final rule to take into account these suggestions and comments.

For ease of presentation of a uniform submission to each of the agencies which have proposed privacy rules, the following generically references the relevant sections of your agency's rule.

§ __.3(n) and (o) Definitions of nonpublic personal information and personally identifiable financial information.

You have requested comment on two alternatives with regard to the above definitions. Alternative A of § __.3(n) of the proposed rule provides that the term "nonpublic personal information" includes the name, address and telephone number of a consumer which is provided by the consumer, as well as any list, description or other grouping of customers (and publicly available information pertaining to them) that is derived using personally identifiable financial information. Under Alternative A, the term "personally identifiable financial information" includes the fact that a consumer is a customer of the financial institution or has obtained a financial product from the financial institution, unless that information actually is actually derived from publicly available sources.

Alternative B of § __.3(n) of the proposed rule would not treat information provided by a consumer as nonpublic personal information if such information was available from public sources, even if the financial institution did not actually obtain such information from the public source.

We strongly support adoption of Alternative B. We believe that the fact that information is available from a public source is more than sufficient to give that information the status of publicly available information regardless of how the financial institution obtained the information. If a consumer's name, address and telephone number are widely available, the consumer has no expectation of privacy with regard to such information. It makes little sense to say that information that is otherwise available to virtually everyone is not publicly available information under the GLB Act simply because it was provided to the financial institution by the consumer.

In addition, § __.3(o)(2)(C) of the proposed rule provides that the fact that an individual has been a customer of the financial institution is "personally identifiable financial information." We strongly object to this characterization. Customers do not regard the fact that they do business with a financial institution to be confidential. Indeed, every time a customer engages in a financial transaction with another person, the customer reveals the financial institution he or she deals with. For example, a credit card indicates which financial institution the customer has an account with. When a customer writes a check, the name of the financial institution is disclosed. We do not believe that the fact that a customer has a continuing relationship with a financial institution should be regarded as personally identifiable financial information.

We also do not believe that a list comprised solely of customers' names, addresses and telephone numbers should be regarded as nonpublic personal information. A list of information that is otherwise publicly available, such as names, addresses and telephone numbers, cannot logically be regarded as nonpublic simply because it is presented in the form of a list.

§ __.4 Initial notice to consumers of privacy policies and practices required.

The proposed rule requires a financial institution to provide an initial disclosure notice to a consumer prior to the time the consumer establishes a customer relationship with the financial institution. We believe that this requirement is not justified and is not in accord with the GLB Act, which provides that a financial institution must provide the initial notice at the time of establishing a customer relationship. The proposed rule does not explain or justify why the agency is not following the clear and unambiguous terms of the GLB Act. We believe that it would prove extremely difficult, if not impossible, for financial institutions to comply with a standard calling for disclosures “prior” to the time the customer relationship is established. We urge you to apply the “at the time the account relationship is established” standard as provided for in the GLB Act.

We also believe that you should confirm in your rule that if affiliated financial institutions send one notice to customers which reflects the required disclosures for all of the financial institutions, this would satisfy the initial and annual notice requirements under the GLB Act. The option to send one notice for affiliated financial institutions has the potential to reduce compliance costs rather dramatically. It also benefits consumers, who will assured that all members of the same corporate family adhere to the same privacy policies.

§ __.5 Annual notices.

The proposed rule states that notices must be provided annually to customers, and annually means at least once during any period of twelve consecutive months during which the relationship exists. We believe that this permits a financial institution to provide an annual notice to all customers at one time each year, rather than upon the anniversary of the customer’s relationship with the financial institution.

However, the language of the proposal could prove problematic in certain situations. For example, if a consumer becomes a customer on January 25, 2001, he or she should receive an initial notice by that date. The financial institution sends annual notices to all customers on February 1, 2001. Under the proposed rule, the customer may have to be sent another notice on February 1, 2001 in order to ensure that the customer receives the annual notice within 12 months. This result seems to impose an unreasonable burden on financial institutions, for it requires the financial institution to send far more disclosures than seems appropriate or desirable. From the consumer’s standpoint, he or she has already received the notice during that calendar year. Little purpose is served in requiring financial institutions to provide two notices during the calendar year in order to get all of the customers on the same annual cycle. Accordingly, we request that the rule permit annual notices to be provided to customers at least once during each calendar year in which the relationship continues rather than during each 12 month period.

____.6 Information to be included in initial and annual notices

The proposed rule provides that a financial institution must inform consumers of the categories of information that the institution collects and the categories of information the institution discloses to third parties. However, the examples provided in connection with categories of information collected do not match the examples of the categories of nonpublic personal information the institution discloses. Examples given of the former include information such as application information and information about a deposit, loan or credit card account. Examples given of the latter are far more detailed, e.g., name, address, social security number, account balance and payment history. We believe that the greater detail for information disclosed is inappropriate. The GLB Act provides for the disclosure of categories of nonpublic personal information disclosed. The examples provided are not categories; they are the information disclosed. Accordingly, we believe the agency should retain only the examples of categories of information collected which appear in the proposed rule, and use those examples for categories of information disclosed as well.

§____.8 Form and method of providing opt out notice to consumers

The proposed rule requires a financial institution to provide consumers with a reasonable means by which he or she may exercise the opportunity to opt out. While many financial institutions may be quite flexible in how they permit customers to opt out, we believe that operational considerations may limit the methods by which financial institutions can process opt out notices received from consumers. Financial institutions should not be required to change their operational procedures if the consumer chooses to use a procedure that the financial institution has not, or is unable to accommodate.

§____.9 Exception to opt out requirements for service providers and joint marketing

This section of the proposed rule provides that with regard to nonaffiliated third parties who provide services to the financial institution, as well as in connection with joint agreements, a financial institution is required to enter into a contract under which the third party agrees to maintain the confidentiality of the nonpublic personal information received by the third party. In view of the numerous service relationships and service agreements financial institutions have entered into with third parties, it would prove exceedingly difficult for financial institutions to review and, where necessary renegotiate these agreements. Indeed, because of the term of some of these agreements, it may constitute a breach to attempt to renegotiate the arrangements. Prohibiting the sharing of information under these circumstances would serve no useful purpose, and could expose the financial institution to a claim for damages by the third party. In many instances, these agreements already require the third parties to maintain the confidentiality of the information they receive. To avoid additional potential confusion and burden on financial institutions and vendors, we believe it is appropriate for the agency to grandfather the existing service agreements financial institutions have entered into and not require that new contract terms be negotiated.

§__.12 Limitation on redisclosure and reuse of information

The proposed rule states that a financial institution or nonaffiliated third party which receives nonpublic personal information from a financial institution may only use the information for the purposes for which such information was provided. We are concerned that this is not consistent with the GLB Act. Section 502(c) of the GLB Act provides that a nonaffiliated third party that receives nonpublic personal information from a financial institution shall not disclose such information to another person unless the disclosure would be lawful if made directly to the other person by the financial institution. Notwithstanding this clear language, the proposed rule provides a limitation on the recipient of such information that is not justified by the GLB Act. There is no reason to impose further restrictions upon recipients since they are permitted by the GLB Act to disclose such information only to the extent the financial institution which had provided the information is permitted to disclose it.

As a practical matter, a recipient may need to use the information it receives to pass on to a service provider or for some other operational reason which is unrelated to the purpose for which the entity received the information. Under the proposal, a receiver could not use the information to respond to a subpoena or to prevent or detect fraud unless the person had received it for those purposes. Accordingly, we request that the proposed rule reflect the provisions of the GLB Act, and permit the recipient of the information to use it for any permissible purpose.

You have also asked whether this provision would restrict a nonaffiliated third party from using information obtained in accordance with the exceptions if the information is not used in a personally identifiable form, such as by credit scoring vendors using information to improve credit scoring models. We believe that the removal of personally identifiable information in connection with the use of nonpublic personal information should not be restricted because the information should not be regarded as personally identifiable financial information. Such use of the information would have no adverse consequences for consumers because once the identifying information is removed it is impossible to determine who the person is. Such use of information, however, could be of considerable benefit to financial institutions and consumers because it has the potential for improving various predictors such as credit scoring or other behavioral models. We urge you to determine that such use is not prohibited by this section of the rule.

§__.13 Limits on sharing of account number information for marketing purposes

You have asked whether you should adopt an exception to the prohibition on disclosing account numbers or access codes to nonaffiliated third parties for marketing purposes. We strongly urge you to adopt an exception for the disclosure of encrypted, reference or truncated account numbers by financial institutions to nonaffiliated third parties which are used for identification purposes. The prohibition in § 502(d) is intended to prevent potential abuse by limiting the ability of nonaffiliated third parties to make direct use of a consumer's account numbers. The use of an encrypted, reference number or truncated account number to identify the consumer satisfactorily responds to the concerns which § 502(d) was intended to address.

It is important for marketing purposes that nonaffiliated third parties be able to accurately identify potential customers by unique numerical identifiers. Encrypted account numbers, reference numbers and truncated account numbers serve the purpose of providing third parties with a means of associating the consumer with a particular account without compromising the security and integrity of the consumer's account. Accordingly, we urge that the final rule adopt an exception which provides that the term "account number or similar form of access number or access code" does not include an encrypted account number, a reference number or a truncated account number which is provided to a nonaffiliated third party for use in marketing.

§__.16 Effective date and transition rule

The proposed rule indicates a scheduled effective date of November 13, 2000. While many financial institutions belonging to the FSCC's member associations will meet the scheduled effective date, we are concerned that many of the nation's more than 41,000 financial institutions will not have sufficient time in which to implement operational changes, reprogram computers, identify all of the sources and uses of consumer and customer information, prepare disclosure policies and train staff. It has been estimated that as many as 2.4 billion notices will be required to be sent to consumers and customers by November 13th. The scope and scale of the task is unprecedented, and it is highly likely that many institutions will not be able to implement all of the changes by November 13th. In order to provide an orderly transition, we strongly urge that the effective date be extended for six months until May 14, 2001.

If the effective date is not extended, we are concerned that the manner in which initial notices are required to be provided this November will effectively require that notices be provided by October 13th so as not to disrupt existing disclosure practices of financial institutions. The October 13th date reflects the latest date that notices can be sent to consumers and customers so that they will have an opportunity to opt out. Unless these notices are in the mail on October 13th, financial institutions will have to cease making disclosures to nonaffiliated third parties come November 13th until such time as customers have had a reasonable opportunity to opt out. This result is due to the initial timing for implementation of the GLB Act. Financial institutions will have a difficult enough time meeting the November 13th effective date. You should not impose an additional burden which would require considerable effort to get disclosure notices in the mail to customers by October 13th. Accordingly, the proposed rule should be modified to permit a financial institution to continue to make disclosures for 30 days beginning November 13th unless the customer opts out before the 30 day period has run.

We appreciate the opportunity to comment on your proposed privacy rule.

Sincerely,

Allen R. Caskie
Executive Director
Privacy Project

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