



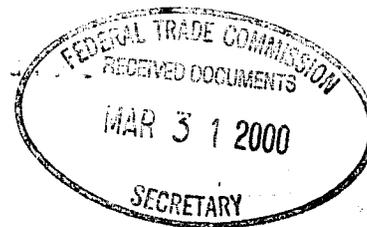
National Association of Mutual Insurance Companies

Headquarters: 3601 Vincennes Road ~ Indianapolis, Indiana 46268-0700

Telephone: (317) 875-5250 ~ Facsimile: (317) 879-8408 ~ www.namic.org

Washington: 122 "C" Street, NW ~ Ste. 540 ~ Washington, D.C. 20001-2109

Telephone: (202) 628-1558 ~ Facsimile: (202) 628-1601



Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

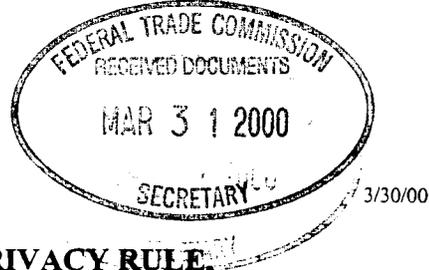
Dear Secretary:

The National Association of Mutual Insurance Companies (“NAMIC”) respectfully submits these comments on the Federal Trade Commission’s notice of proposed rulemaking on the Privacy of Consumer Financial Information.

We would be pleased to answer any questions or discuss our comments at any time.

Very truly yours,

Pamela J. Allen
Vice President – Federal Affairs



GRAMM-LEACH-BLILEY ACT PRIVACY RULE
16 CFR PART 313 – COMMENT
OF THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

The National Association of Mutual Insurance Companies (NAMIC) submits these comments on the Notice of Proposed Rulemaking¹ issued by the Federal Trade Commission (“FTC”) proposing a rule to implement the privacy provisions of Title V of the Gramm-Leach-Bliley Act (the “GLB Act”).²

Application of Proposed Rule to Insurance Companies

Subtitle A of Title V of the GLB Act applies to all financial institutions. “Financial institution” is defined as “any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956.”³ The following insurance activities are defined as financial in nature under section 4(k), “Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State.”⁴ Thus, insurance companies clearly are financial institutions for purposes of Title V.

Various Federal agencies, after consultation with representatives of State insurance authorities, are required to issue rules to implement Title V with respect to the financial institutions subject to their jurisdiction under section 505 of the GLB Act.⁵ Section 505 provides that Title V and the rules prescribed thereunder shall be enforced, in the case of any person engaged in providing insurance, by the applicable State insurance authority of the State in which the person is domiciled.⁶ Accordingly, the FTC’s rule will not apply directly to insurance companies.⁷ However, because the FTC’s interpretation of Title V as reflected in the proposed rule will affect insurance holding companies and the insurance companies that affiliate with financial institutions for which the FTC has enforcement and regulatory authority, and because insurance companies will look to the FTC’s rule for guidance pending the adoption of privacy rules by State insurance regulators, NAMIC has chosen to comment on the proposed rule.

¹ 65 Fed. Reg. 1174 (March 1, 2000) (“PR”).

² Pub. L. No. 106-102 (1999).

³ Pub. L. No. 106-102 § 509(3)(a) (1999).

⁴ 12 U.S.C. § 1843(k)(4)(B).

⁵ Pub. L. No. 106-102 § 504(a)(1) (1999).

⁶ We note that the regulatory and enforcement authority granted to each state insurance regulator under sections 504 and 505 of the GLB Act appear to be limited to insurance companies domiciled in that state. Of course, a state can enact laws regarding the protection of nonpublic information, and the state insurance regulator can promulgate rules to implement those laws, that would apply to any insurance company doing business in that state, subject to section 104 of the GLB Act.

⁷ See PR § 313.1(b).

State insurance regulators are authorized to adopt rules to implement Title V of the GLB Act and Congress intends for them to exercise that authority.⁸ NAMIC encourages State insurance regulators to issue rules that are uniform among states and consistent and comparable to the FTC's proposed rule, differing only to the extent needed to accommodate the differences between insurance products and services and other financial products and services and the differences among the regulatory schemes of financial entities.

COMMENTS

Section 313.2 Rule of Construction.

NAMIC finds the examples used by the FTC in the proposed rule to be helpful. NAMIC encourages state insurance regulators to use examples to demonstrate the application of their rules to insurance products and services. We note, however, that the examples are general; an agency cannot describe or anticipate every application of the proposed rule. Accordingly, we assume that the failure or apparent failure to comply with an example does not necessarily establish a failure to comply with the rule.

Section 313.3 Definitions.

Insurance companies operate and are regulated differently from banks and other financial institutions. Accordingly, the definitions of and examples for many terms in the proposed rule will need to be modified by state insurance regulators in their rules. For example, the proposed rule presumes control at 25% or more ownership of voting securities.⁹ However, under the insurance laws of most states, "control" of an insurance company is presumed upon ownership of 10% or more of voting securities.¹⁰ The differences between the definitions of control in the final rules and in insurance laws and regulations will affect the determination of affiliates for other financial institutions and insurance companies under the rules. As another example, the definitions of "consumer" and "customer relationship" will need to be modified in insurance regulations to reflect the differences between the relationships of insurance companies and their consumers and other financial institutions and their consumers.

State insurance regulators also will use additional terms in their rules, and those terms will need to be defined. For example, the NAIC Insurance Information and Privacy Protection Model Act ("NAIC Model Privacy Act") contains definitions of many terms unique to the insurance industry, including "adverse underwriting decision," "insurance support organization," "insurance transaction," "policyholder," etc. Presumably, those terms and other insurance terms will be used in rules proposed by state insurance regulators to implement Title V.

⁸ Pub. L. No. 106-102 § 505(c) (1999).

⁹ PR § 313.3(g).

¹⁰ See, e.g. Indiana Code § 27-1-23-1(e) (Burns 1999).

NAMIC focuses its comments on the terms and definitions in the proposed rule that are not unique to the FTC or the entities subject to its jurisdiction. We note where relevant the likely need for state regulators in their rules to define additional terms or modify the definitions found in section 313.3 of the proposed rule.

- **§ 313.3(b) Clear and conspicuous.** The Fair Credit Reporting Act (FCRA)¹¹ and other banking and insurance laws and regulations currently use “clear and conspicuous” or similar language as the standard for notices and disclosures.¹² This is an appropriate standard and the examples helpfully demonstrate its application.
- **§ 313.3(c) Collect.** Does one collect information if it is passively received as opposed to “obtained” in response to questions or otherwise gathered? Consumers may provide information to financial institutions simply by virtue of the medium they use to correspond with the institution. For example, a consumer’s e-mail address would be displayed in an e-mail message to the financial institution. A consumer’s home address and telephone number may be displayed on the consumer’s letterhead. A consumer might leave his or her home or business telephone number in a phone message to a financial institution. The rule should clarify whether information received in this manner is collected for purposes of the rule.
- **§ 313.3(e) Consumer.** A consumer is defined in section 313.3 as an individual “who obtains or has obtained a financial product or service.” Since the proposed rule defines the evaluation of an application as a “financial service,”¹³ an applicant would be a consumer under the proposed rule. NAMIC does not dispute the treatment of applicants as consumers for purposes of the Title V. In fact, section 13 NAIC Model Privacy Act requires certain privacy disclosures to be given to applicants and policyholders. However, the plain reading of the proposed definition would not suggest that an applicant is a consumer. Accordingly, to more clearly state the requirements of the rule, NAMIC suggests amending the proposed definition of “consumer” to explicitly include an individual who applies or has applied for a financial product or service.
- **§ 313.3(h) Customer**
- **§ 313.3(i) Customer relationship.** As discussed above, the proposed definitions of “customer” and “customer relationship” will need to be modified by insurance regulators in their rules to reflect the contractual relationship between insurance companies and their customers. For example, a third party claimant is not a customer of the insurance company to whom the third party claim is made.

¹¹ 12 U.S.C. § 1681 *et seq.*

¹² *See, e.g.*, 15 U.S.C. § 1681a(d)(2)(A)(iii) (notice of affiliate information sharing under the Fair Credit Reporting Act); 12 U.S.C. § 4302 (interest rate disclosures under Truth in Savings Act); 12 U.S.C. § 2803(k)(2) (HMDA disclosures); 12 C.F.R. 213.7(b) (consumer leasing advertising standards); 12 C.F.R. 330.14(h) (notices of deposit insurance coverage).

¹³ PR § 313.3(k)(2).

State insurance regulators also will need to address the status of the relationship between policyholders and reinsurers. Policyholders should not be considered to be customers of reinsurers for purposes of Title V of the GLB Act (even recognizing the exception under section 502(e) of the Act for disclosures of information for reinsurance purposes).

- **§ 313.3(n) Nonpublic personal information.**
- **§ 313.3(o) Personally identifiable financial information.**
- **§ 313.3(p) Publicly available information.**
 - **Adopt Alternative B.** NAMIC strongly encourages the FTC to adopt Alternative B. Under Alternative B, information is not considered to be nonpublic personal information if it is publicly available, even if the information is not actually obtained by the financial institution from a public source. NAMIC believes that Alternative B expresses the common sense meaning of the terms “nonpublic” and “publicly available” and so most certainly reflects the intent of Congress in using those terms. We do not think that consumers expect or reasonably should expect publicly available information to be treated as nonpublic personal information. Consumers recognize that a substantial amount of information about them is readily accessible and in the public domain. For example, consumers clearly understand that phone numbers are publicly available; otherwise, people would not request unlisted numbers. It would be unreasonable and it would not promote the public policy expressed in Title V to require financial institutions to treat as private information that is, and is understood by consumers to be, easily available to the public.

Adopting Alternative A would require financial institutions to track the source of publicly available information or to categorize such information on the basis of its source. This would be an extremely difficult and costly endeavor. It may require financial institutions to take the absurd step of obtaining from a public source information that they currently possess. Given that all publicly available information, by definition, can be obtained from public sources, we do not see how requiring financial institutions to actually obtain the information from public sources enhances consumer privacy or otherwise promotes the purposes of Title V.

- **Limit to financial information.** As the FTC notes in its section by section analysis,¹⁴ Congress did not define the term “personally identifiable financial information” in the GLB Act. As currently defined in section 313.3(o)(1), “personally identifiable financial information” includes any information:
 - (i) provided by a consumer to obtain a financial product or service;
 - (ii) about a consumer resulting from any transaction involving a financial product or service between the financial institution and the consumer; or

¹⁴ 65 Fed. Reg. 11178 (March 1, 2000).

(iii) otherwise obtained by the financial institution in connection with providing a financial product or service.

NAMIC believes the proposed definition is too broad. The definition of “personally identifiable financial information” should be limited to financial information provided by or about a consumer.

The proposed definition is not required by or consistent with section 509 of the GLB Act. Section 509(4)(A) defines “nonpublic personal information” as

“[P]ersonally identifiable financial information:

- (i) provided by a consumer to a financial institution;
- (ii) resulting from any transaction with the consumer or any service performed for the consumer; or
- (iii) otherwise obtained by the financial institution.¹⁵

The proposed rule uses essentially that same language to define “personally identifiable financial information.”¹⁶ The effect of this substitution of definitions is to completely omit from the definition of “personally identifiable financial information” the meaning of and the limitations implied by the use of the word “financial.” One can reasonably assume that Congress used the term “financial” because it intended to provide the protections of Title V to financial information. By failing to limit personally identifiable financial information to financial information, the rule proposes a definition that is too broad and inconsistent with Congressional intent.

- **Status of customers.** The fact that an individual is or has been a customer of a financial institution or has obtained a product or service from a financial institution is provided as an example of “personally identifiable financial information.”¹⁷ NAMIC believes the example evidences an unreasonable interpretation of personally identifiable financial information. The effect of the proposed definition, as interpreted by the FTC in its examples, would be to treat virtually all information possessed by a financial institution as personally identifiable financial information. We believe Congress intended to provide the significant protections of Title V to financial information only, and further intended to balance those protections against the legitimate needs of financial institutions to collect and use information. The status of an individual as a customer of a financial institution is not inherently private and should not be treated as personally identifiable financial information in the final rule.
- **Clarify relationship between “nonpublic personal information” and “personally identifiable financial information.”** Assuming the adoption of Alternative B, it is not clear from the proposed rule whether personally identifiable financial information is considered to be nonpublic personal information even if the personally identifiable financial information is publicly

¹⁵ Pub. L. No. 106-102 § 509(4)(A).

¹⁶ PR § 313.3(o).

¹⁷ PR § 313.3(o)(2)(C) and (D).

available. Certain information could be both publicly available information and personally identifiable financial information as those terms are defined in the proposed rule.¹⁸ “Personally identifiable financial information” is included in the definition of “nonpublic personal information.”¹⁹ However, publicly available information is excepted from the definition of “nonpublic personal information” by operation of section 313.3(n)(2), consistent with the section 509(4) of the GLB Act.

NAMIC suggests amending the rule to clarify that publicly available information (as defined in Alternative B) and any list derived from publicly available information are not nonpublic personal information even if the publicly available information is personally identifiable financial information.²⁰ This interpretation is supported, if not mandated, by section 509(4) of the GLB Act. Publicly available information is excluded from the definition of nonpublic personal information by section 509(4)(B) of the GLB Act. Section 509(4)(C) further excludes any list, description or other grouping of consumers that is derived using any nonpublic personal information other than publicly available information or that is derived without using any nonpublic personal information.²¹

- **E-mail addresses.** It is not clear whether e-mail addresses would be considered to be publicly available information under the rule. We encourage the FTC to consider e-mail addresses to be publicly available and to clarify the definition or expand the examples accordingly.
- **Internet sites.** The proposed rule includes in the example of widely distributed media, “an Internet site that is available to the general public without requiring a password or similar restriction.”²² NAMIC believes the example suggests an unduly narrow interpretation. Many Internet sites require a password or user name, but any person seeking access to the site can obtain the password or user name. In other words, the password is required but is not used to restrict access. The example should distinguish between Internet sites that are available to the general public even though a password is required and sites that restrict access of the general public through the use of passwords or other means. The former should be included in the example of widely distributed media.

¹⁸ PR §§ 313.3(o) and 313.3(p).

¹⁹ PR § 313.3(n)(1)(i).

²⁰ NAMIC recognizes that the fact that an individual is or was a customer of a financial institution would have to be specifically included in the definition of “nonpublic personal information” if the FTC retains its proposed interpretation as expressed in section 313.3(o)(2)(C) of the proposed rule.

²¹ Pub. L. No. 106-102 § 509(4)(B) (1999) (emphasis added).

²² PR § 313.3(p)(2)(ii).

Section 313.4 Initial notice to consumers of privacy policies and practices required.

Section 313.4 of the proposed rule establishes the time and manner of delivery of the initial privacy policy notice. A financial institution must provide written notice of its privacy policy to individuals prior to the time that a customer relationship is established, and to a consumer prior to the time that any nonpublic personal information is disclosed to any nonaffiliated third party.²³ The notice must be provided in written or, if the consumer agrees, in electronic form; an oral notice is insufficient.²⁴ NAMIC has several comments on the notice section.

Section 503 of the GLB Act requires a financial institution to make the requisite privacy disclosure to the customer, "at the time of establishing a customer relationship with a consumer."²⁵ The proposed rule, on the other hand, requires the institution to make the disclosure to an individual who becomes a customer, prior to the time that a customer relationship is established.²⁶ The requirements of the rule exceed the statute and introduce a nearly unmanageable timing element into the transactional process. Generally, a financial institution easily can determine the time a customer relationship is established - when the contractual relationship between the parties is consummated or the consumer pays for the product or service. However, without the benefit of hindsight, it is difficult to know if a customer relationship will be established or to uniformly fix or identify a point in time that is prior to the time the contractual or customer relationship is established. This is especially true in the property/casualty insurance industry where insurers often are asked for policy quotes, but the consumer ultimately purchases coverage elsewhere.

Requiring the notice to be given prior to, as opposed to upon, the establishment of a customer relationship provides no additional protections to customers and places significant administrative costs and compliance burdens on companies. The proposed rule requires an institution to provide a privacy notice to a consumer prior to the disclosure of nonpublic personal information to any nonaffiliated third party. Congress obviously determined that a customer's ability to opt out or take his or her business elsewhere if the customer is unhappy with an institution's privacy policy was sufficient protection. NAMIC recommends that the FTC amend the proposed rule to require the initial privacy notice to be provided at the time a customer relationship is established. The final rule could also require institutions to provide an initial privacy notice to an individual at any time prior to the time that a customer relationship is established, upon the individual's request.

Applicants for insurance (and other financial products) often complete a written application prior to the time they become insured, i.e. prior to the time a customer relationship is established. The application may be completed with the assistance of or

²³ PR § 313.4(a).

²⁴ PR § 313.4(d).

²⁵ Pub. L. No. 106-102 § 503(a) (1999) (emphasis added).

²⁶ PR § 313.4(a) (emphasis added).

under the review of an insurance agent. The applicant retains a copy of the application. It would be logical for a financial institution to provide a consumer with the initial privacy notice at the time the application for insurance or other financial product is taken. NAMIC does not read the proposed rule to preclude notice on an application form. However, we suggest adding an example indicating that the initial privacy notice can be a part of an application form or packet if the disclosure is clear and conspicuous and a copy can be retained by the applicant.

NAMIC believes that the limitations in section 313.4(d)(3) on oral descriptions of privacy notices are too restrictive. Many financial products are marketed over the telephone and personally identifiable financial information may be obtained during those calls. It may not be clear at the time of the call if the financial institution and the consumer will eventually enter into a customer relationship. In such instances, oral notice of the privacy policy should be sufficient. A written confirmation of the notice should not be required unless and until a customer relationship is established or the institution intends to disclose the information to a nonaffiliated party. Where the customer relationship actually is established orally, subsequent written confirmation of the privacy notice provided in a timely manner should be permitted under the final rule.

NAMIC also suggests that the FTC and state insurance regulators consider developing a sample initial and annual privacy notice for inclusion in the final rules. Sample notices will assist companies in their efforts to comply with the privacy provisions of the GLB Act and the rules implementing it.

The FTC invited comment on who should receive a notice when there is more than one party to an account. Since joint or multiple account holders, or policyholders in the case of insurance policies, generally have a personal, business, or legal relationship among themselves, NAMIC believes it should be sufficient to provide one notice to all account holders at the address provided by the consumer to the financial institution as his or her address of record. Additional notices would have to be provided upon the request of any account holder. The rule should make clear that separate notices to each account holder are not required in the absence of any such request.

Section 313.5 Annual notice to customers of privacy policies and practices required.

The FTC invited comment on the regulatory burden of providing the annual notices and on the methods financial institutions anticipate using to provide the notices. NAMIC encourages the FTC to allow financial institutions to provide the annual privacy notice to customers with or as a part of any other type of statement or notice that institutions provide to customers at least annually. Allowing annual privacy statements to be included with other notices would reduce the regulatory burden on institutions without impairing the timeliness or efficacy of the annual notice to customers.

Section 313.6 Information to be included in initial and annual notices of privacy policies and practices.

If a financial institution discloses nonpublic personal information to a nonaffiliated third party under section 313.9 (service providers and joint marketing), the financial institution must include in its initial and annual privacy notices "a separate description of the categories of information you disclose and the categories of third parties with whom you have contracted."²⁷ The meaning of "a separate description" is not clear. Assuming it means separate from the disclosures required by section 313.6(a)(2) and (3), the authority for or rationale behind the additional, separate disclosure is not clear.

Section 502(b)(2) of the GLB Act creates an exception from the opt out requirement for information provided to a nonaffiliated third party that performs services for or functions on behalf of the financial institution, including marketing financial products or services offered pursuant to joint agreements between two or more financial institutions, if the financial institution "fully discloses the providing of such information." The proposed rule requires initial and annual privacy notices to include:

(2) The categories of nonpublic personal information about your consumers that you disclose;

(3) The categories of affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information about your consumers, other than those parties to whom you disclose information under §§313.10 and 313.11.²⁸

Proposed section 313.6(a)(5) requires disclosure of the same information required by section 313.6(a)(2) and (3), but separate from those other disclosures. This separate disclosure does not provide additional information to the consumer, in fact it may be confusing. As noted above, the GLB Act does not require separate disclosures for section 502(b)(2) exception. NAMIC urges the FTC to treat information sharing under the service provider and joint marketing exceptions the same as other nonaffiliated third party information sharing for purposes of the initial and annual privacy notices and to allow financial institutions to include the requisite information as part of the disclosures required under sections 313.6(a)(2) and (3) of the rule.

Section 313.7 Limitation on disclosure of nonpublic personal information about consumers to nonaffiliated third parties.

Section 313.8 Form and method of providing opt out notice to consumers.

Section 313.8 of the proposed rule establishes the content of the opt out notice and the method for providing that notice to consumers. The proposed rule permits a financial institution to provide the opt out notice together with or on the same form as the initial privacy notice provided in accordance with section 313.4.²⁹ Section 313.7(a) provides that a financial institution meets the conditions for disclosure of information to nonaffiliated third parties if it provides the initial notice required under section 313.4, the opt out notice as required in section 313.8, and the consumer does not opt out after

²⁷ PR § 313.6(a)(5).

²⁸ PR §§ 313.6(a)(2) and (3).

²⁹ PR § 313.8(b)(3).

having been provided a reasonable opportunity to do so. A revised privacy notice, opt out notice, and a reasonable opportunity to opt out must be provided to a consumer whenever there is a change in terms from the initial privacy notice.³⁰ Otherwise, the financial institution is not required to provide subsequent opt out notices to consumers.³¹ NAMIC believes these provisions of the proposed rule are consistent with the requirements of the GLB Act and would oppose any amendment to the proposed rule that would require an opt out form to be included in the annual privacy notice.

NAMIC also would oppose any amendment to the proposed rule that would require a consumer to acknowledge receipt of the opt out notice before a financial institution could disclose nonpublic information. Congress endorsed an "opt out" system in Title V of the GLB Act instead of an "opt in" system. Congress determined that the opt out model appropriately balances consumers' privacy concerns with the legitimate need of financial institutions to share information in order to serve their customers and develop new and better products and services. Conditioning information sharing by financial institutions upon receipt of an acknowledgment of receipt of the opt out notice would in effect convert the opt out system to an opt in system, in direct opposition to the letter and spirit of the GLB Act.

The FTC requested comment on how the right to opt out should apply in the case of joint accounts. As noted in the discussion of section 313.4 above, NAMIC recommends that the FTC require financial institutions to provide only one privacy and opt out notice for all account holders, or in the case of insurance policies, all policyholders, at the address of record. NAMIC suggests that, in the case of multiple account holders, the opt out notice either should allow the person completing it to indicate which account holders are opting out, or the notice should provide a reasonable means for each of the account holders to exercise his or her opt out right, such as the check off boxes described in section 313.8(a)(2)(ii). The exercise of an opt out right by any account holder would preclude the sharing of any information about that account holder. Depending on the categories of information collected and shared by a financial institution, if one account holder exercises his or her right to opt out and the other account holder does not, the financial institution either may recognize only the exercised opt out or may treat all account holders as having opted out. A financial institution may choose to do this because of the administrative difficulties involved in determining whether the information to be disclosed is about either or both account holders or tracking which of the multiple account holders have exercised their right to opt out. In other words, a consumer does not have the right to require or allow a financial institution to share information about the consumer. Of course, state insurance regulators will have to provide guidance in their regulations for situations involving joint policyholders or insureds. NAMIC suggests that state insurance regulators conform their rules to the FTC's final rule to the greatest extent possible, while taking into account differences between insurance policies and other types of financial products and services.

³⁰ PR § 313.8(c)

³¹ Of course, the annual privacy notice must explain the consumer's right to opt out of the disclosure, including the methods by which the consumer may exercise the opt out right, and the consumer may exercise the right to opt out at any time. PR §§ 313.6(a)(6); 313.8(d).

Finally, NAMIC believes an example of the partial opt out would be helpful.³² The partial opt out will be an attractive option for many financial institutions, since it will enhance a consumer's ability to more precisely express his or her instructions with respect to information sharing.

Section 313.9 Exception to opt out requirements for service providers and joint marketing.

Section 313.10 Exceptions to notice and opt out requirements for processing and servicing transactions.

Section 313.11 Other exceptions to notice and opt out requirements.

NAMIC has several comments regarding the third party servicing and joint marketing exceptions. First, NAMIC encourages the FTC to provide a more detailed interpretation of the section 502(b)(2) and section 502(e)³³ exceptions from the disclosure and/or opt out requirements of Title V. As NAMIC reads Section 502(b)(2) of the GLB Act, it allows a financial institution to disclose information to a nonaffiliated third party in order for the third party to perform services for or functions on behalf of the financial institution. Those services can include marketing the financial institution's own products or services or marketing products or services offered pursuant to joint agreements between two or more financial institutions. The financial institution must disclose to its consumers that it provides the information and it must enter into a contract with the third party that requires the third party to maintain the confidentiality of the information. However, the financial institution does not have to give the consumer the opportunity to opt out of the disclosure.

Section 502(e) of the GLB Act allows financial institutions to disclose nonpublic personal information as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer or in connection with servicing or processing a financial product or service requested or authorized by the consumer. There is no requirement that the institution disclose the providing of information to consumers or grant them an opportunity to opt out.

Sections 502(b)(2) and 502(e) both except certain disclosures to third party service providers. However, the requirements for the exceptions differ greatly. NAMIC requests the FTC to explain the differences between the exceptions in sections 502(b)(2) and 502(e) of the GLB Act with respect to disclosures to service providers. Is section 502(b)(2) of the Act limited to disclosures for marketing purposes? Are their differences between the two sections with respect to subsequent disclosures of information?

Section 502(e)(2)(B) of the Act permits disclosures to maintain or service the consumer's account with the financial institution. Disclosures can also be made to maintain or service the consumer's account with another entity as part of a private label

³² PR § 313.7(c).

³³ Pub. L. No. 106-102 §§ 502(b)(2); 502(e).

credit card program or other extension of credit on behalf of such entity.³⁴ Does the requirement that the disclosure be made in connection with a private label credit card program or other extension of credit modify the first part of section 502(e)(2)(B), i.e. “maintaining or servicing the consumer’s account with the financial institution”?

The FTC invited comment on whether third party contractors should be permitted to use information received pursuant to §313.9 to improve credit scoring models or analyze marketing trends, as long as the third parties do not maintain the information in a way that would permit identification of a particular consumer. We think such use should be permitted. Improvements in credit scoring models and marketing benefit consumers and financial institutions; if the consumer cannot be identified, his or her privacy concerns are not implicated by the disclosure.

The FTC also invited comment on whether additional requirements should be imposed on service providers and, if so, what those requirements should address. NAMIC believes sufficient requirements are contained in the proposed rule. Section 502(b)(2) of the GLB Act requires the financial institution to fully disclose the information sharing and to enter into a contractual agreement with the third party that requires it to maintain the confidentiality of the information. The third party's use of the information is limited solely to the purposes for which the information is disclosed. The third party marketing exception is important to many insurers and other financial institutions for which financial affiliations are not desirable or feasible. The third party marketing exception will allow such companies to offer their customers an attractive menu of financial product and services, allowing those companies to compete with entities that are part of a financial services holding company. Consumers will be fully informed about the information sharing and are free to take their business elsewhere if they object. NAMIC urges the FTC not to impose additional requirements or restrictions on the third party servicing and joint marketing exceptions; the proposed rule strikes an appropriate balance between consumer protection and the business needs of financial institutions.

Communications of information by, between or among insurance companies, law enforcement authorities, and entities such as the National Insurance Crime Bureau ("NICB"), for the purposes of reporting, investigating, or preventing actual or potential fraud and preventing unauthorized transactions, claims or other liability are excepted from the initial notice and opt out requirements of Title V.³⁵ Under proposed section 313.6(b), an insurance company releasing information pursuant to the exceptions in sections 313.10 and 313.11 must state in its annual notice to customers only that it makes disclosures to other nonaffiliated third parties as permitted by law. NAMIC supports the Agencies' interpretation of sections 313.10 and 313.11 regarding disclosures of information to the NICB and similar entities. NAMIC believes the proposed customer notice under section 313.6(b) provides adequate notice to customers without impairing insurance fraud detection and prevention efforts.

³⁴ Pub. L. No. 106-102 § 502(2)(e)(1)(B) (1999).

³⁵ PR §§ 313.10, 313.11.

Section 504(b) of the GLB Act authorizes regulators to include such additional exceptions to the notice and opt out requirements of sections 502(a) through (d) as the FTC or State insurance regulators deem to be consistent with the purposes of Title V. The FTC does not propose additional exceptions in its proposed rule. While NAMIC generally encourages the adoption of uniform regulations by all financial institution regulators, we urge State insurance regulators to consider exercising their authority to create additional exceptions where those exceptions would allow insurance companies to better serve consumers without diminishing the privacy protections granted to consumers by Title V of the GLB Act.

The FTC requested comment on whether safeguards should be added to the exception for consent, including, for instance, a requirement that consent be written. We do not believe such additional safeguards are necessary. The proposed rule prohibits blanket consent - the disclosure can be made only for a limited specific purpose - and can be revoked by the customer at any time. Generally, a customer directs or consents to such disclosures for the customer's convenience. Such consent often is given orally. To require written consent will inconvenience the customer and impose an unnecessary administrative burden on financial institutions.

Section 313.12 Limits on redisclosure and reuse of information.

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 the information to any other nonaffiliated third party unless the disclosure would be lawful if made directly by the financial institution. The FTC notes in its preamble that the Act appears to place the receiving institution into the shoes of the disclosing institution for purposes of determining whether redisclosures by the receiving institution are "lawful."³⁶ Thus, section 313.12 of the proposed rule permits a financial institution or nonaffiliated third party that receives nonpublic personal information in accordance with an exception under §§ 313.9, 313.10, or 313.11 to use that information only for the purpose of that exception. Does "use" of that information include any disclosure to another nonaffiliated third party pursuant to an exception under §§ 313.9, 313.10, or 313.11?³⁷

The FTC solicited comments on the meaning of the word "lawful" as that term is used in section 502(c) of the Act. NAMIC believes that it would be lawful for a nonaffiliated third party to disclose information pursuant to any exception, including that provided in proposed §313.9 of the rule. A nonaffiliated third party that directly or indirectly receives nonpublic personal information from a financial institution should be able to use that information for any purpose permitted by the GLB Act so long as that third party complies with any applicable notice and opt out requirements imposed by Title V (and such use complies with any contractual agreement between the financial institution and the nonaffiliated third party), even if the financial institution is not a party to the subsequent disclosure.

³⁶ 65 Fed. Reg. 11185 (March 1, 2000)

³⁷ Many of the questions and comments submitted by NAMIC in this letter with respect to sections 313.9, 313.10, and 313.11 of the proposed rules also are applicable to section 313.12.

Finally, the FTC solicited comments 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 complies with the limits on redisclosure of that information. NAMIC does not believe such requirements are necessary or feasible. Financial institutions cannot monitor the third party's use of the information or compliance with contracts governing the use of the information. Of course, if a financial institution becomes aware of conduct by a third party that violates the GLB Act or the final rule with respect to nonpublic personal information disclosed by the financial institution, the financial institution must take steps to investigate the alleged violations and pursue appropriate contractual and other remedies.

Section 313.13 Limits on sharing of account number information for marketing purposes.

The FTC should amend the proposed rule to permit the disclosure of customer account numbers with the customer's consent, in an encrypted, scrambled or similarly coded form, or where disclosure is necessary to service or process a transaction expressly requested or authorized by the customer. The flat prohibition on disclosure of account numbers may preclude companies from carrying out routine practices involved in servicing or monitoring customer accounts.

Section 313.16 Effective date; transition rule.

Congress established aggressive time periods for implementation of Title V. While theoretically possible, a November 12, 2000 effective date is not practical given the scope of the Title V and the actions financial institutions will have to take to comply with it. Congress recognized that the 12-month effective date might not be feasible and granted each agency charged with issuing rules the authority to extend the date. NAMIC encourages the FTC, and will encourage State insurance regulators, to exercise the authority granted to them in section 510(1) of the GLB Act to delay the effective date of Title V.