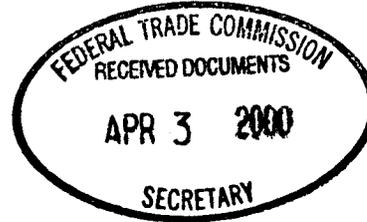


metris

COMPANIES

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March 31, 2000

BY OVERNIGHT MAIL and E-MAIL
Secretary
Federal Trade Commission, Room H-159
600 Pennsylvania Avenue N.W.
Washington, D.C. 20580

Re: Gramm-Leach-Bliley Act Privacy Rule, 16 C.F.R. Part 313 – Comment.

Metris Direct, Inc. provides servicing for its subsidiary Direct Merchants Credit Card Bank, National Association (“Direct Merchants”), a CEBA credit card bank. Its affiliate Metris Direct Services, Inc. markets fee-based services to Direct Merchants’ customers and to customers of other card issuing banks with which it has formed strategic alliances. Metris Direct Services’ products and services include DirectAlertSM, Fraud Alert ServicesSM and TripSaverSM (collectively the “Metris Services”). The Metris Services are marketed primarily through direct mail and telephone solicitation directed to cardholders. The Metris Services are also sold to the general public, including over the internet. The Metris Services are described in detail in Annex A.

Metris Direct, Inc. and Metris Direct Services, Inc. are sometimes referred to collectively in this letter as “Metris.”

Metris believes that it is not significantly engaged in financial activities described in Section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(k), and that it is therefore not a financial institution for purposes of the privacy rules proposed by the Commission (the “Proposed Rules”) pursuant to the Gramm – Leach – Bliley Act, Public Law 106 – 102, 113 Stat. 1338 (the “Act”). However, the Proposed Rules are not entirely clear as to the definition and scope of such financial activities, and a principal objective of this comment is to recommend that the Proposed Rules be clarified to eliminate the ambiguity. Metris is also interested in aspects of the Proposed Rules that will affect it regardless of its status as a financial institution, such as those affecting servicers and persons that rely upon nonpublic personal information received from others.

In this letter, Metris comments upon the Proposed Rules that Metris expects to have the greatest impact upon its businesses. However, the Commission should not infer indifference from the fact that Metris has chosen not to comment on other Proposed Rules. To the contrary, Metris wholeheartedly supports the comments submitted to the Commission by or on behalf of Visa U.S.A., Inc., MasterCard International Incorporated and The Direct Marketing Association (“Visa”, “Mastercard” and “DMA”, respectively), copies of which Metris received in advance of their filing with the Commission, and in particular, the Visa, MasterCard and DMA comments listed in Annex B.

Direct Merchants is submitting a separate comment to the Office of the Comptroller of the Currency regarding that agency's proposed privacy rule.

**Scope of "Financial Activities"
Described in Section 4(k) of the Bank Holding Company Act of 1956**

Section 509(3)(A) of the Act provides:

IN GENERAL. – The term "financial institution" means any institution the business of which is engaging in financial activity as described in Section 4(k) of the Bank Holding Company Act of 1956.

Section 4(k) of the Bank Holding Company Act of 1956 was added by Section 103 of the Act. Section 4(k) describes certain activities that are to be considered financial in nature, including specific activities named in subsection 4(k)(4) and also certain activities that the Federal Reserve Board has determined, by order or regulation in effect on the date of enactment of the Act, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto or to be usual in connection with a transaction of banking or other financial operations abroad. The Federal Reserve Board has promulgated a "laundry list" of such activities, as set forth in 12 C.F.R. 225.28 and 12 C.F.R. 211.5(d). The Commission has invited comment on whether the activities set forth in the Federal Reserve Board regulations "may be interpreted narrowly under the language of those regulations."

Metris strongly recommends that the Commission interpret the term "financial activities as described in Section 4(k) of the Bank Holding Company Act" to include only activities specifically described in Section 4(k) itself and activities specifically included in the Federal Reserve Board's "laundry list." The "laundry list" has been developed over a period of years through a rigorous process of application and approval. The banking industry has had ample opportunity to petition the Federal Reserve Board to add activities to the list, and will be able to continue to do so as products and services evolve in the future. There is no apparent need for the Commission to broaden the scope of financial activities beyond those described in Federal Reserve Board regulations. However, that is precisely what the Commission would be doing if it indicated by rule that "financial activities" include not only the traditional financial activities named in Section 4(k) of the Act itself and those on the Federal Reserve Board's "laundry list" but also, perhaps, other activities that a court or federal or state agency might deem to be "traditional financial activities" or "closely related to banking" or "usual in connection with the transaction of banking or other financial operations abroad."

Adoption of a broad definition of "financial activities" would not serve the public interest. Entities providing products and services that did not fit within the statutory definition but that were in any way related to services provided by banks and other financial institutions would be forced to act as if they were financial institutions, or face the prospect of litigation or enforcement. So they would provide initial and annual disclosures and, where applicable, opportunity to opt out. The fact that this would be expensive is obvious. But would it be worth the expense? Certainly not in every case. For example, Metris' privacy notices would probably confuse more than they would inform; while customers are aware of the brand names of the

Metris Services, few would recognize Metris Direct Services' name and fewer still would expect to receive privacy notices from Metris. In this regard, Metris strongly supports the suggestion made by numerous other commenters that if consumers receive large numbers of privacy and opt out notices, they are likely to ignore them all.

Entities like Metris Direct Services, Inc. do not share nonpublic personal information with unaffiliated third parties, and they maintain state of the art procedures and systems to assure the confidentiality and security of their customers' nonpublic personal information. Metris' decisions with respect to nondisclosure and confidentiality are driven by its relationships with its strategic partners and the competitiveness of the marketplace. A main thrust of Metris' marketing is to establish strategic partnerships with card-issuing banks. The banks are jealous of their customers and they place stringent contractual limits upon the uses Metris may make of customer information. Moreover, the highly competitive market in which Metris Direct Services, Inc. operates dictates that information must be safeguarded: if not carefully guarded, the information might fall into competitors' hands.

Proposed Rule Section 313.3: Definition of "Nonpublic Personal Information"

The Commission has invited comment on whether "nonpublic personal information" should cover information about a consumer that contains no indicators of the consumer's identity. Metris joins with other industry commentators in opposing this unwarranted expansion. Besides being inconsistent with the common sense meaning of the term, as defined in the Act, placing limits on the disclosure of depersonalized information can serve no conceivable purpose. Moreover, Metris and other direct mail and telemarketing firms routinely and legitimately use depersonalized information in connection with market studies, for financial modeling and other modeling; thus, depriving businesses of such information would have negative consequences far outweighing any conceivable benefit to consumers.

Proposed Rule Section 313.4: When Initial Privacy Notice Must be Given

Section 313.4(a)(1) of the Proposed Rules provides that a financial institution must provide an initial privacy notice to an individual who becomes its customer, prior to the time of establishing a customer relationship, except as provided in paragraph (d)(2). Paragraph (d)(2) provides very limited exceptions for financial institutions that purchase loans from other financial institutions or orally agree to enter into the customer relationships. As written, Section 313.4(a)(1) of the Proposed Rules imposes a significant and unnecessary burden upon financial institutions that market their products and services by mail.

The problem is that direct mail marketing entities typically only send two mailings to their customers. The first is an advertisement that invites a response. The second, sometimes referred to as a "fulfillment package," contains detailed information about the purchased product or service. Materials in the "fulfillment package" include any terms and conditions and membership contracts by which the consumer may be bound as well as notices and other materials that the consumer should keep and refer to. The initial mailing is generally sent to a very large number of consumers, a small percentage of whom can be expected to respond. The second mailing is sent only to those who respond. Depending on the type of product or service, the nature of the list from which the addressees are taken, and other factors, the rate of response

may be 3%, 1% or considerably less. Thus, it is apparent that if the Commission's rule effectively requires that privacy notices be included with the first mailing, the direct mail marketing entity will be required to send a very large number of privacy notices to consumers who will not want the products or services and will simply ignore the notices and throw them away.

The burden of the proposed rule can be significantly reduced in either of two ways. One way is to add an example to make it clear that a continuing relationship with a customer commences after the consumer receives the "fulfillment package" and becomes contractually bound. The other is to add an exception in Paragraph (d)(2) for direct mail solicitations.

Modifying the proposed rule in the manner suggested will accomplish a significant saving for direct mail marketers without any reduction of consumer protection. Consumers who receive privacy notices with their initial solicitations are unlikely to read or retain them, while notices received with "fulfillment packages" are significantly more likely to be read and retained. Moreover, consumers lose nothing of substance where the initial privacy notices are deferred since financial institutions are prohibited from sharing any of their nonpublic personal information until they have received the privacy notice and notice of their right to opt-out, and have had a reasonable opportunity to opt-out. The only theoretical advantage to consumers of receiving their privacy notices with the solicitation mailing is that they might "comparison shop" based on the disclosed privacy policies. Metris submits that this is an illusory benefit.

As written, Section 313.4(d)(2) of the Proposed Rules disfavors direct mail merchants, as compared to telemarketers. The latter are permitted to give privacy notices within a reasonable time after they enter into customer relationships, while direct mail merchants must give the notices before the relationships are formed. It is not clear why the Commission has proposed this disparity in treatment. There is no suggestion that direct mail is inherently less desirable than telemarketing, or more subject to abuse. Similar products are sold by both methods and often, as in the case of Metris, by the same sellers. Metris submits that in this case, consistency is desirable.

Metris agrees with other commenters that it is critically important that financial institutions be permitted to combine their initial privacy notices with other required disclosures. However, such permission provides no relief for Metris in selling the Metris products since the Metris products are not credit or electronic fund transfer products and therefore no other disclosures are required.

Proposed Regulations Sections 313.4 and 313.7: Privacy and Opt-Out Notices to Joint Customers

The Commission requests comment on who should receive the initial privacy notice in situations where there is more than one party to an account.

Metris believes that the final rule should clearly state that if a continuing relationship is established with two or more customers jointly, a financial institution is required only to provide one copy of the initial privacy notice to the parties. This is consistent with other federal consumer protection regulations, such as Regulations E and Z, requiring one set of disclosures be

sent to the parties. If a financial institution must provide a copy of the initial privacy notice to every party to a joint account, it will incur significant costs. In addition to the obvious costs of sending additional mailings, if such notices are to be meaningful they will need to be sent to each customer at his or her own address. While in most cases, all of the customers will be at the same address, a financial institution will be forced to establish procedures for determining all relevant addresses.

It is highly likely that financial institutions that are required to send initial privacy notices will combine those notices with the opt-out notices required by Section 313.7 of the proposed rule. As with the initial privacy notice, Metris believes that financial institutions should only be required to provide the opt-out notice to one customer who is a party to a joint account. Metris agrees with other commenters that where a financial institution provides the opt-out notice to one party to the account, the financial institution should be required to honor an opt-out notice received from any party to the account.

Proposed Rules Section 313.4: Notices From Affiliates

The Section – by – Section Analysis of the Proposed Rules notes that the Proposed Rules “do not prohibit affiliated financial institutions from using a common initial, annual or opt out notice” provided certain requirements are met. Metris strongly supports this concept, and suggests that it should be incorporated into the final rule. Moreover, the Commission should make it clear in the final rule that if one or more affiliated financial institutions deliver disclosures when a customer enters into a relationship with any one of them, the institutions should not be required to deliver additional disclosures when the customer subsequently enters into an additional relationship with any of the institutions. These suggestions are consistent with the Commission’s avowed intent to reduce the costs of compliance to the extent consistent with consumer protection. Clearly, a requirement of multiple notices would be costly, particularly for an organization that aggressively cross-markets its products and services. Just as clearly, such a requirement would provide no new or additional protection to customers, whose willingness to read privacy notices is most likely inversely proportional to the number of notices they receive.

Proposed Rules Section 313.5: Termination of Customer Relationship

Section 313.5(c)(2)(iii) of the Proposed Rules provides that a financial institution no longer has a continuing relationship with a customer when it has not communicated with the customer about the relationship for a period of twelve consecutive months other than to provide annual notices of privacy policies and practices. Metris strongly supports this provision. Many products and services, including some of the Metris Services, are paid for in advance and made available for extended periods of time thereafter. Often, there is no contact with the customer from the time the “fulfillment package” is delivered and the time – if ever - when the customer contacts the seller with a request for specific assistance. An example is Metris’ card registry product, Fraud Alert ServicesSM, which provides coverage for life for a single front-end fee. It would be extremely burdensome for Metris to provide an annual privacy notice to its Fraud Alert ServicesSM customers, both because mailing is expensive and because it would be necessary to maintain records of customers’ addresses long after they ceased to be active in any generally understood sense of the word.

In addition, a clarification is in order. A standard practice of credit card issuers and other financial institutions that provide products and services to customers is to contact inactive customers periodically to attempt to induce them to become active. For example, Direct Merchants sometimes contacts inactive cardholders and attempts to provide incentives for them to use their cards. These communications are in the nature of solicitations, rather than communications about existing relationships. Metris suggests that the Proposed Rule be clarified to make it clear that advertisements and solicitations directed to inactive or dormant customers are not communications “about the relationship” and do not necessitate annual privacy notices.

Proposed Rule Sections 313.7 and 313.8: Opt-Out by Telephone

The final rules should be revised to make it clear that a financial institution may provide a toll-free telephone number as a means to opt out, in lieu of or in addition to the media permitted in the Proposed Rules. This would be consistent with the Federal Trade Commission’s proposed privacy rules and would benefit both financial institutions and consumers because toll-free telephone numbers are both convenient (thus more likely to be used by consumers) and inexpensive (because most financial institutions already maintain toll-free consumer inquiry lines). This is in contrast with a requirement to include self-addressed, stamped envelopes or tear-off forms, which would impose huge costs.

Proposed Rules Section 313.13: Encrypted Account Numbers

Section 313.13 of the Proposed Rules, like the Act, forbids the disclosure of account numbers, access numbers or similar forms of access numbers for transaction accounts to nonaffiliated third parties for telemarketing, direct mail marketing or marketing through electronic mail to the consumer. The final rule should make it clear that the disclosure of an encrypted number to a nonaffiliated third party that does not have the information necessary to decode or unscramble the encrypted number is not forbidden. Also, the final rule should make it clear that the term “account number or similar form of access number or access code” does not include a reference number used by a financial institution, provided the reference number cannot be used by the third party to which it is disclosed to post a charge or debit against a particular account. The sole purpose of the rule set forth in Section 313.13 of the Proposed Rules is to prevent third parties from posting charges or debits directly to customers’ accounts by using their account numbers, a risk that is not present where encrypted numbers or reference numbers are disclosed.

Proposed Rules Section 313.16: Effective Date

The Commission seeks comment on whether six months following the adoption of the final Rule is sufficient time to enable financial institutions to comply.

The final Rule should provide that while the obligations of Sections 502 and 503 of the Act and the implementing regulations become effective November 13, 2000, compliance with such obligations is voluntary until November 13, 2001. Section 502 and 503 of the Act place numerous new obligations on financial institutions. Indeed, financial institutions will not know the true extent of the obligations imposed under Sections 502 and 503 until the final Rule is released; thereafter, financial institutions need adequate time to implement operational changes

and audit procedures, which are necessary to comply with these obligations. In addition to developing Sections 502 and 503 notices, financial institutions must establish and implement new procedures for delivering such notices to consumers. Moreover, financial institutions must establish and implement new procedures for providing opt-out methods to consumers and for receiving and handling opt outs received from consumers. Financial institutions also must design and implement effective employee training programs for satisfying all of these new procedural requirements, and must establish compliance systems to monitor their performance in complying with these requirements. Furthermore, financial institutions must evaluate all of their existing contracts with nonaffiliated third parties, to determine if they comply with the obligations imposed under Sections 502 and 503.

Existing customers of financial institutions present special problems. For example, if the proposed effective dates are adopted without change, Metris will not even have six months to comply with the obligations of Sections 502 and 503 with respect to existing consumers. The Commission indicates that if a financial institution intends to disclose nonpublic information after the effective date of the final Rule about someone who was a consumer before the effective date, the institution must provide the Section 502 opt-out notice (and the Section 503 privacy notice) to the consumer far enough in advance of the effective date to provide the consumer a reasonable opportunity to opt out (30 days?) before the effective date. And even if Metris were to decide to place a moratorium upon disclosures regarding existing customers, the Proposed Rule would require it to provide the Section 503 privacy notices within 30 days of the effective date of regulations. Thus, given a November 13 effective date, Metris would be required to provide these Section 503 privacy notices during the holiday season – one of the busiest times for mail during the year. Metris is already overburdened this time of year preparing to send other special year-end disclosures to consumers. In addition, the privacy notices undoubtedly will generate a great number of calls regarding the privacy rights and the meaning of the elements of a very complex privacy notice. These calls are likely to overwhelm Metris' customer call center since the holiday season already is one of the peak times for customer service calls.

The short 30-day transition period also would place tremendous pressure on Metris in finding third-party service organizations to prepare and print its privacy notices and to provide these notices to consumers. Metris uses third-party mail houses to process and send notices to consumers. If Metris and all other financial institutions are required to send Section 503 privacy notices to all of their existing customers within the same 30 days, these mail houses – which are limited in number – will be completely overwhelmed. Moreover, the 30-day transition period will not allow Metris to coordinate the mailing of Section 503 privacy notices with other required disclosures that are mailed out because the 30-day period will not necessarily overlap with the time period in which the other required disclosures must be mailed out.

For all of these reasons, it is imperative that the final Rule provides financial institutions sufficient time within which to send out the Section 503 privacy notices to existing customers. A voluntary compliance rule of 12 months would provide financial institutions with the flexibility they need in providing the Sections 502 and 503 notices to all of their existing customers.

Metris appreciates the opportunity to comment on the Proposed Rule. If you have any questions or comments concerning this comment letter, please contact me at (612 525-5090) or Lorraine E. Waller at (612) 593-4794.

Sincerely,



Z. J. Barclift
Executive Vice President, General Counsel
Metris Direct, Inc.
Metris Direct Services, Inc.

ANNEX A
to Metris' Privacy Comments

DirectAlert

DirectAlert is a membership club program that provides members with a translated, easy to read copy of their credit bureau report as well as automatic updates every quarter. DirectAlert helps customers understand their credit report and credit standing by providing a "members only" credit expert hotline staffed with highly trained and accredited representatives. DirectAlert gives members piece of mind by giving them access to information that matters.

Fraud Alert Services

Fraud Alert Services is a credit card registration membership club that protects all the credit cards members have should they ever be lost or stolen by providing a 24 notification service. Along with a free credit bureau report, members are given access to car rental discounts and emergency cash and airline tickets while they travel. In addition, members receive a change of address service, a date notification service, property and document registration, and a personal message service.

TripSaver

TripSaver is a travel membership program designed for people seeking a superior value for their travel and vacation dollar. Offering a 5% rebate on all travel reservations, and backed by a 110% low price guarantee, TripSaver delivers a dynamic combination of special offers and cash back rebates on hotel, air, cruise and car rental reservations.

ANNEX B
to Metris' Privacy Comments

Metris wishes to confirm its wholehearted support for positions taken by Visa U.S.A., Inc., MasterCard International, Incorporated and The Direct Marketing Association, Inc. in comments to the Commission regarding the Proposed Rules:

- **Section 313.3 – “Customer”.** The final rules should make clear that an individual is not a “customer” of a financial institution merely because the individual repeatedly engages in isolated transactions with the institution. (*See Visa comment.*)
- **Section 313.3 – “Customer”.** The final rule should be modified to make it clear that a customer relationship will be deemed to exist only where the financial institution agrees to obligate itself to a consumer. (*See MasterCard comment.*)
- **Section 313.3 – “Financial Institution”.** The final rule should make clear that data processors and others that perform services for financial institutions, but do not themselves provide financial products or services to individuals, will not be required to make the disclosures mandated by the Act because they do not have “consumers” or “customers” as defined. (*See Visa comment.*)
- **Section 313.4 – Initial Notices in Connection with Oral Contracts.** The notion that a customer who has orally agreed to enter into a customer relationship with a financial institution must agree to receive the privacy notice at a later time is confusing and unnecessary and should be deleted from the final rules. (*See MasterCard and Visa comments.*)
- **Section 313.4 – Initial Notice Via Electronic Medium.** The final rule should specify that a financial institution may satisfy its obligation to provide notices to consumers who have agreed to receive information electronically by posting the institution’s privacy notice on its website. Financial institutions should not be required to send the initial or annual notices to consumers via e-mail. (*See MasterCard and Visa comments; Metris generally supports comments by both MasterCard and Visa relating to electronic disclosures, but wishes to add that it is important that the electronic disclosure requirements of the final rules be consistent with those of other consumer protection statutes, such as Regulation Z and Regulation E, currently under consideration by the Federal Reserve Board.*)
- **Section 313.6 – Information to be Included in Privacy Notices.** By requiring overly detailed privacy notices, the proposed rule would impose substantial additional burdens on financial institutions, with absolutely no corresponding benefit to consumers. Thus, for example, the examples in Section 313.6 should be revised to refer to examples of the “type of source”

rather than the “source,” to make it clear that a financial institution is required to provide only examples of the categories of nonpublic personal information that the institution discloses, to eliminate the requirement that affiliate sharing practices be described, and to specify that a financial institution may categorize nonaffiliated third parties to which information is disclosed by type of business in which such entities engage, by type of products offered by such entities, or by a combination of both. (*See* MasterCard and Visa comments.)

- **Section 313.6 – Integrity of Nonpublic Personal Information.** The example regarding “integrity” of nonpublic personal information should be deleted from the final rule. (*See* Visa comment.)
- **Section 313.7 – Opportunity to Opt Out.** Any requirement that a financial institution provide any type of reply form, even if a self-addressed, stamped envelope is not required, to every consumer to whom the institution mails an opt-out notice would be extremely costly to financial institutions, especially smaller institutions, and should be deleted from the final rules. (*See* MasterCard and Visa comments.)
- **Section 313.8 – Accepting Opt-Out Notices.** The final rules should make it clear that a financial institution is not required to accept opt-outs through each and every means the institution has already established to communicate with consumers, but instead can designate specific contact points for this purpose. (*See* MasterCard and Visa comments.)
- **Section 313.8 – Implementing Opt-Out Instructions.** The final rules should make clear that a financial institution must comply with a consumer’s opt-out instruction as soon as reasonably practicable after receiving the instruction, but should not specify a specific time period for doing so. (*See* MasterCard and Visa comments.)
- **Section 313.9 – Servicing Exception.** It is inappropriate to apply the disclosure and confidentiality requirements of Act § 502(b)(2) to traditional financial institution outsourcing arrangements, unless those arrangements also qualify under Act § 502(e). (*See* MasterCard and Visa comments.)
- **Section 313.9 – Disclosure of Outsourcing Arrangements.** If the Commission decides that some disclosure of outsourcing is necessary, the disclosure should be brief and generic: “We may use third party processors and servicers to assist us, and share information with them to allow them to do so.” (*See* Visa comment.)
- **Section 313.11 – Consumer Consent to Release of Information.** The final rules should not require that a consumer’s consent to release information be in writing or in any other particular form. (*See* MasterCard comment.)

- **Section 313.12 – Monitoring of Third Parties.** The final rules should not require financial institutions to develop policies or procedures to ensure that third parties are complying with rules limiting redisclosure of information. (*See MasterCard and Visa comments.*)
- **Section 313.13 – Account Numbers Furnished to Agents.** The final rules should make it clear that financial institutions may furnish account numbers and access numbers to those agents that are acting on the financial institutions' behalf to market the financial institutions' own products and services. (*See MasterCard comment.*)

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