



March 31, 2000

Mr. Donald S. Clark, Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313
issued by the Federal Trade Commission on March 1, 2000. 65 Fed. Reg. 11174-11195.

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

Re: Docket No. 5-1058, Gramm-Leach-Bliley Act Privacy Regulations

Dear Mr. Clark and Ms. Johnson:

As national trade associations representing the electronic commerce, software, computer, communications, Internet and high technology industries, we are submitting these comments in response to the Federal Trade Commission's (FTC) Federal Register notice of March 1, 2000; the Joint proposed rulemaking by the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision, published on February 22, 2000; the National Credit Union Administration, on March 1, 2000; and the Securities and Exchange Commission on March 8, 2000.. While we believe the proposed rule may impact a great many sectors and industries, our specific concerns relate to the potential coverage of the proposed rule on the software, Internet commerce and high technology industries.

The Gramm-Leach-Bliley Act (G-L-B) addressed the structural modernization of the financial services industry, and reforms and changes in law attendant to the various elements that compromise that industry. The proposed rule would implement Subtitle A of Title V of Pub. L. 106-102, as it pertains to the statutory responsibilities of the Government.

Privacy is vitally important to every citizen; indeed, national surveys show that this issue is one of the most important concerns of all Americans. That vital concern is shared by consumers and business alike, and industry has implemented vigorous voluntary standards through independent entities such as TrustE and BBBOnLine. The Private Sector commitment to effective Privacy self-governance is driven in no small part by our commitment to serve our customers, and our desire to continue to earn their trust and confidence.

DEFINITIONS: - "SIGNIFICANTLY ENGAGED IN FINANCIAL ACTIVITIES"

We are concerned that in its proposed implementation of the G-L-B, the Government may have included within the scope of the rule whole categories of industry, indeed entire industries, which are not even aware of the potential applicability of the rule to their conduct of business, or the extent of its applicability. The application of the rule to those "significantly engaged in financial activities", while perhaps intended to focus the applicability of the rule, actually introduces uncertainty and confusion over the meaning of 'significantly engaged' and of 'financial activities'. Simply put, in broadly applying the rule not only to "financial institutions" but also to "other persons" that receive non-public personal information from financial institutions, the regulations appear to potentially cover every industry, and would thus

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overreach Congressional intent. The breadth of the rule as drafted would portend consequences and impact well beyond American industry's reasonable expectations, and perhaps beyond those of the Government as well.

DEFINITIONS: - "*INCIDENTAL TO...COMPLEMENTARY TO...*"

The potential impact of the rule is troubling in its effect on those businesses that could nominally fall within the broad rubric of "any institution the business of which is engaging in activities that are financial in nature." The inclusion in the definition of those businesses that are "**incidental** to such financial activity" or whose business is "**complementary** to a financial activity" (emphasis added), is sweeping in its effect, and may include much of the business comprising the U.S. economy. Most specifically, the evolution of technology, software and the Internet as the enabling tools of American consumers and business in the conduct of their financial activities, could bring virtually all of these industries within the scope of the proposed regulations as currently broadly written. The resulting economic and compliance impact on all aspects of the high technology industry, and on small business, would be enormous.

Categories of industry such as software companies, computing technology manufacturers, Internet portals and gateways, Internet service providers, Internet search engines, or data processing, communications and data transmission companies, were never the intended targets of the Congress in enacting the G-L-B, nor of the President in signing it. In the absence of a legislative history and Congressional record validating such a broad interpretation, the rules implementing the G-L-B need to be written in a manner that clearly focuses on financial institutions, and therefore clearly excludes other industries.

DEFINITIONS: - "*FINANCIAL IN NATURE*"
- "*FINANCIAL PRODUCT OR SERVICE*"

To bring clarity to the regulations, and enable businesses to understand whether they are or are not within the scope of the rule, the Government must also define with specificity those activities that are "financial in nature". Likewise, the rule's lack of specificity regarding the meaning of the term "financial product or service", unnecessarily complicates the task of compliance. It is, therefore, critically important that the regulations specify those actual products or services which are within its' intended scope.

DEFINITIONS: - "*CONSUMER*"
- "*CUSTOMER*"
- "*CONTINUING RELATIONSHIP*"

The distinctions between a "consumer" and a "customer" require clarification as well, as well as the concept of a "continuing relationship". In Internet commerce, repeat visits by an individual to a Web site, and the viewing of the informational content there, **without the purchase of any product or service**, could **still** constitute either a "customer" or "consumer" or "continuing" relationship, depending on **the chosen definitions**. **However, what might be considered a relationship under one or more of those terms, if it were to be so defined** in the Internet world, might not be considered to be such in a traditional 'bricks and mortar' business **at all**. How then those terms actually are to be defined and applied in the context of the G-L-B implementing regulations becomes a key issue to be resolved. Under the present construction of the proposed rule, the regulatory intent is at best unclear, and at worst a matter of serious concern to the high technology community. In an on-line context:

- When does a site visitor or site service user become a consumer?
- When does a consumer become a customer?
- Under what circumstances is a repeat site visitor considered to be in a continuing relationship?
- Do exclusions regarding one-time transactions apply

in an on-line context?

These types of issues must be answered, and definitions clarified, if the rule is to be understood and implemented on a practical basis in an E-Commerce environment.

~~—[add anything on fluidity of business customer/ consumer? Or on customer of whom on a cobranded site?]~~

DEFINITION: - *"NON-PUBLIC PERSONAL INFORMATION"*

With regard to individual data, the intent of the Act is clearly to protect disclosure of personally identifiable financial information. However, anonymous and aggregated information without any personal identifiers is an entirely different category of data, excluded by its very nature from information that is "personally identifiable". Once again, ~~however~~, clarification of when information is "personally identifiable" is necessary to avoid uncertainty and confusion about the scope and applicability of the proposed rule given the use of the term "non-public personal information".

Likewise, a 'safe harbor' principle would greatly facilitate understanding, for both Internet businesses and users, of the intended policy under the regulations in terms of when information is considered to be public in nature. Proposed regulations by the Securities and Exchange Commission (SEC) clarify that the term applies to "any information that you reasonably believe is lawfully made available to the general public[.]" [Proposed 17 C.F.R. § 248.3(w)(1), SEC Release No. 34-42484.] In contrast, the proposed G-L-B rule, with its proposed definitions of non-public information, unfortunately creates multiple risks for complexity, confusion and implementation burden. The definition proposed by the SEC is far more practical and readily implemented, and should be adopted.

REGULATORY PRECEDENCE

It is similarly important that the rule be specific as to its relationship to other, established federal regulations regarding the privacy of financial information, such as Internal Revenue Service regulations regarding tax information. It is important that the rule be clear whether it is the agency's intent that its proposed rule will, or will not, take precedence over all other such regulations.

REGULATORY CONSISTENCY AND COMPARABILITY

There are significant differences between the proposed rules by the Federal Trade Commission and the Federal Reserve/Office of the Comptroller of the Currency, particularly, for example, in the area of definitions. However, the intent of Congress is clear that the rules be consistent and comparable. It is imperative for effective implementation that the respective rules be rationalized and harmonized. If that does not occur, industry, the consuming public, and the economy overall, will inevitably bear the burden of the costs imposed by regulatory inconsistency and non-comparability. Such an outcome would not serve the public interest.

ELECTRONIC NOTICE ~~AND OPT-OUT~~

While industry strongly supports the desirability of electronic notice to consumers and customers, additional guidance is needed to facilitate effective implementation in an on-line environment. Internet commerce is a unique world in terms of the user experience. From the point of view of the consumer, guidelines are needed to avoid undue disruption by unwanted, repetitive or duplicative notices as the consumer browses one or more sites, visits a co-branded site, uses a link to a third party site, accesses a product or service that is seamlessly provided by a site (but from a different URL) – each of which could be

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construed as a mandatory notice event under the proposed rule. Such an awkward and burdensome rule-created environment would not well serve either the user or the purposes of the law.

~~A 'safe harbor' principle would greatly facilitate both opt-in and opt-out for the user.~~

~~For example, electronic financial service sites could use a prominently visible pop-up screen for noticing the user at the time the individual begins to actively engage in an applicable financial service transaction, requiring an affirmative opt-in response before the individual discloses personally identifiable information.~~

~~The user's response could then be tracked by the provider avoiding annoying duplicative notices to the user. The responsibility for such notice should reside with the party providing the financial product or service. Similar guidelines could be applied to the disclosure of personal financial information to third parties, with an opt-out screen. However, tracking a time period for such on-line disclosures and user responses would be impractical, and inconsistent with the dynamics, and value to the user, of the medium.~~

EFFECTIVE DATE

The rule must be clarified to specify that the applicability of the rule is prospective and forward-looking, and not somehow intended to capture historical transactions or previous customer relationships. To do otherwise, or to leave the applicability of the rule uncertain, would disserve all parties, result in unnecessary and wasteful costs, and inconsistent interpretation and compliance. Simple clarity, consistent with the intent of Congress, is both necessary and appropriate.

~~Finally, we strongly urge a realistic transition period for effective compliance with the new rules Act. Many industries are still unaware of their obligations under the proposed rules Act. For the some businesses other industries, such as software and related industries, intending to comply in good faith is not sufficient when confronted with the practicalities of; market cycles, such as for software development which will normally requires a year to incorporate significant changes. Compliance requirements have to take into account the realities of the marketplace. for compliance.~~

SUMMARY

The breadth of the high technology industries represented by the undersigned trade associations is indicative of the growing concerns in the business community over the meaning, intent and applicability of the proposed Privacy rules implementing the Gramm-Leach-Bliley Act. While the business commitment to individual privacy is deep, and the aggressive voluntary initiatives being undertaken by the Private Sector are significant, we must observe that an imprecise and sweeping rule would serve neither the public nor the intent of the law being implemented. We are certain that such is not the conscious purpose of the rulemakers, and so we strongly urge that the rule be substantially modified, along the lines of the comments and recommendations offered here.

We appreciate the opportunity to submit these comments, and offer to be of any assistance that might be useful to the process of refining and clarifying the subject regulations.

Sincerely,



Edward J. Black
President and CEO
Computer & Communications
Industry Association (CCIA)



William T. Archey
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American Electronics
Association (AEA)

