

March 31, 2000

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

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

Dear Mr. Clark:

This letter is submitted to the Federal Trade Commission ("FTC") on behalf of the member organizations of the Education Finance Council ("EFC") in response to the FTC's request for comments relative to its Notice of Proposed Rulemaking issued pursuant to Section 504 (a) of the Gramm-Leach-Bliley Financial Services Modernization Act ("GLB Act").

EFC represents lenders and secondary market organizations engaged in making, purchasing and servicing student loans for college students and their families pursuant to Title IV of the Higher Education Act of 1965 as amended ("HEA" and "HEA Loans") as well as private education loans pursuant to various State and Federal consumer credit laws. EFC members' activity in connection with HEA Loans is comprehensively regulated by the United States Department of Education ("ED") as a condition of participation and receipt of HEA Loan benefits. EFC members, commercial banks, thrifts, credit unions and Sallie Mae combined provide roughly \$24 billion of funds to students and parents for education loans under Title IV of the HEA. ED also acts as an HEA lender. EFC represents originators and secondary market purchasers of student loans most of whom are nonprofit corporations under Section 150 (d) of the Internal Revenue Code or are State statutory instrumentalities or agencies. Many of EFC's members purchase loans from financial institutions, work with schools to provide loans to students and parents, have third party servicers collect on those loans and ensure compliance with the HEA. Further, many EFC members finance their lending through the issuance of debt obligations or asset-backed securities using financial advisors, trustees and other fiduciaries, investment bankers, bond counsel and other lawyers, rating agencies, credit and liquidity providers, bond insurers and warehouse lenders. All of the entities referenced in this paragraph are an integral part of providing education loan funds for students.

I. COMPLETE EXCEPTION WARRANTED

As a threshold matter, EFC believes that the proposed privacy rules should contain a specific exemption for consumer or customer relationships created around the application and disbursement of all HEA Loans.

Congress has long considered HEA Loans to be a unique form of financial product that justifies exemption from federal and certain State regulation otherwise applicable to consumer loans. Under section 433(c) of the HEA, for example, HEA Loans are exempt from the provisions of the Truth in Lending Act. The HEA also provides that HEA Loans are exempt from State usury and certain other defenses to enforceability laws. Because of the unique nature and extent of ED regulation and control over HEA Loans, EFC believes that a specific exemption from applicability of the proposed privacy regulations should be granted for HEA Loans.

Alternatively, EFC believes the proposed privacy regulations should not apply to certain HEA Loan *providers*, the primary purpose of whom is the making or holding of HEA Loans. The rationale for this would be the same as set forth in the preceding paragraph with respect to the pervasive federal regulation controlling student eligibility, application, disbursement and servicing of HEA Loans. Additional layers of regulation in this area would in some cases create duplication and in others conflicts in compliance. Moreover, with respect to EFC members who are State agencies or instrumentalities, EFC believes that FTC regulation of these entities poses potentially thorny and unnecessary jurisdictional questions. At a minimum, applicability of the proposed privacy rules to HEA Loan providers should be delayed to permit the identification and elimination of duplicative or inconsistent provisions as compared to the ED rules which govern virtually every action taken by these entities.

It should also be noted that ED makes approximately \$11 billion in HEA Loans (Federal Direct Student Loans) annually in direct competition with the Federal Family Education Loans made by EFC members and other HEA Loan lenders. ED also owns and holds defaulted HEA Loans originally made and held by EFC members and other HEA Loan lenders. Thus, it would appear that ED falls within the purview of a covered entity under the proposed Rules. EFC would expect ED to seek exemption from the privacy rules on grounds that it is a federal agency. Therefore, because ED is both a competitor *and* regulator of EFC's members, EFC believes that if an exemption is granted to ED, a parallel exemption should be granted for FFEL loan providers whose primary purpose is the making or holding of HEA Loans.

Even if the final regulations apply to HEA Loan activity, EFC urges the FTC to accept in the context of HEA lending—and in lieu of the proposed GLB Act notice and disclosure requirements—the extensive disclosure concerning, among other things, the sharing of student/parent information already required by HEA and ED to be provided to consumers seeking HEA Loans. This far-reaching, existing HEA Loan disclosure language is included in the combined Application & Promissory Note (the “A/P Note”) which each potential borrower is required to complete and sign as a application for a

HEA Loan. EFC believes the spirit and substance of the existing HEA disclosure language is analogous to that contemplated by the proposed GLB Act regulations. The HEA Loan A/P Note also includes notice of the Privacy Act of 1974, the Right to Financial Privacy Act of 1978, and the Paperwork Reduction Act of 1995. EFC believes that these new disclosure requirements would provide little additional benefit to consumers or customers of EFC members. Additional disclosure would only lead to more paperwork, increased confusion and a less than consumer-friendly process for student borrowers, most of whom tend to be relatively unsophisticated consumers of credit. The added documentation could also lead student borrowers to pay even less attention to the multiple notices and mailings initially and throughout the life of the loan, thus possibly increasing the number of delinquencies or even defaults.

EXAMPLE I(A)

EFC seeks to have the following language included in Section 313.1(b) *Scope*: "Specifically exempted from coverage under these regulations is that portion of an entity's activities which create consumer or customer relationships solely for purposes of making or holding student loans pursuant to Title IV of the Higher Education Act of 1965, as amended."

In the alternative, EFC seeks to have the following language included in Section 313.1(b) *Scope*: "Entities whose primary purpose is to provide student loans pursuant to Title IV of the Higher Education Act of 1965, as amended, are exempted from coverage under the regulations to the extent so engaged."

II. PARITY OF LENDERS IN THE HEA TITLE IV PROGRAM

Should the FTC determine to include applicability of the final GLB Act rules to HEA Loan activity, EFC strongly believes that treatment given to EFC members with respect to applicability of the rules should also be accorded ED in its role as a provider and holder of HEA Loans. It is not clear whether the proposed regulations anticipate such a result.

III. TIMING OF INITIAL DISCLOSURE

Title V of the GLB Act establishes new privacy protections for consumers and their financial information. Title V requires financial institutions to clearly disclose to consumers, at the inception of the consumer relationship and annually thereafter for customers, the financial institution's policies for collecting and sharing nonpublic financial information. Moreover, financial institutions must give consumers, in certain situations, the right to opt out of disclosure of their financial information to nonaffiliated third parties.

The timing of the initial disclosure to consumers and customers presents certain unique problems for HEA Loan and private, non-HEA student loan ("Private Education Loan") providers. While lenders make HEA Loans and Private Education Loans to students,

the colleges and universities are a necessary initial intermediary in the process, specifically in determining under HEA and ED guidelines whether borrowers are eligible for a loan and for what amount and then in distributing the A/P Note to potential student borrowers. Often the lender does not have the opportunity to present any disclosure information to a borrower until well after the loan application has been completed, signed, guaranteed and received by the lender. In many cases, the lender receives, approves and disburses funds under the A/P Note on the same day. In fact, this same-day processing is becoming the standard practice in student loan funds delivery, a practice encouraged by ED. In almost all instances, there is no in-person or direct contact between the borrower and the lender. For HEA Loans, the entire application and disbursement process is strictly and in detail driven by the HEA and regulations promulgated thereunder by ED. For Private Education Loans, most steps in the eligibility, application and delivery process necessarily parallel those for HEA Loans. Moreover, for Private Education Loans, there is specific guidance provided under the federal Truth-in-Lending Act regarding initial disclosure timing within the context of the highly structured, unique application and delivery process described herein.

If lenders of HEA Loans and Private Education Loans are required to present an initial disclosure—either upon creation of a consumer relationship or prior to the creation of a customer relationship—EFC believes a more flexible initial disclosure rule should apply. EFC encourages the FTC to adopt a rule applicable to HEA Loans and Private Education Loans which would allow disclosure to customers *at or soon after* the time of disbursement, as opposed to the present proposal requiring initial disclosure prior to that time. As discussed above, initial disclosure prior to establishing a customer relationship is simply not practical within the context of the application and disbursement process for HEA Loans and Private Education Loans. If the FTC were to adopt the draft language as proposed, it would unnecessarily slow down the delivery of funds to student borrowers, causing delays in student enrollment. Such a result is clearly not in the best interest of students, families or institutions of higher education.

EXAMPLE III(A)

If initial disclosure is required for HEA Loans and Private Education Loans, EFC seeks to have the following exception added to Section 313.4(d)(2) *Exceptions to allow subsequent delivery of notice*: “(iii) You are making a private student loan or a student loan under Title IV of the Higher Education Act of 1965, as amended, provided, however, that a reasonable time shall be deemed to be within 90 days of the disbursement of a student loan, and provided further that no nonpublic personal information not excepted under Sections 313.9, 313.10 or 313.11 may be disclosed prior to providing the required notice.”

In the alternative, EFC proposes an approach to the timing of initial disclosure to student loan customers based on the *intended use* by the lender of customer financial information. EFC believes that the proposed rules are less concerned with a financial institution providing disclosure in advance when lenders only intend to disclose the

customer's financial information to third parties excepted under Sections 313.9, 313.10 and 313.11. Thus, requiring financial institutions to provide notice in advance of loan disbursement would be unnecessary when lenders only intend to disclose the information to nonaffiliated third parties under the exceptions provided in Sections 313.9, 313.10 and 313.11. It is more important to provide timely opt-out opportunities to students whose nonpublic personal information may be shared circumstances *not* excepted under Sections 313.9, 313.10 and 313.11. Otherwise, a rather substantial administrative burden would be created for financial institutions without an offsetting consumer or customer benefit.

EXAMPLE III(B)

As an alternative to the immediately preceding Example related to initial disclosure, EFC proposes the following exception be added to Section 313.4(d)(2) *Exceptions to allow subsequent delivery of notice*: "(iii) You are making a private student loan or a student loan under Title IV of the Higher Education Act of 1965, as amended, provided, however, that a reasonable time shall be deemed to be within (A) 90 days of loan disbursement for lenders who disclose nonpublic personal information only to nonaffiliated third parties excepted under Sections 313.9, 313.10 and 313.11 hereunder, or (B) 30 days of loan disbursement for lenders who disclose nonpublic personal information to nonaffiliated third parties not excepted under Sections 313.9, 313.10 and 313.11. In no event may nonpublic personal information not excepted under Sections 313.9, 313.10 or 313.11 be disclosed to nonaffiliated third parties prior to providing the required notice."

IV. WHEN INITIAL DISCLOSURE TO CONSUMERS IS NOT REQUIRED

EFC seeks additional clarification and guidance on necessary disclosure to consumers under 313.4(b). The opt-out notice and associated record retention requirements should only be necessary for student loan consumers if the financial institution discloses nonpublic personal information of such consumers to nonaffiliated third parties not covered under 313.09, 313.10 or 313.11. Otherwise, the FTC would require hundreds of thousands of businesses to generate and retain information and records at great expense regarding nonpublic personal information of consumers that such businesses will simply not use. EFC understands the proposed regulations to say that a lender is not required to provide initial notice to a consumer and must only provide the opt-out notice if nonpublic personal information of consumers will be disclosed to nonaffiliated third parties for purposes not covered under 313.10 or 313.11. EFC supports the provisions of Section 313.4(b)(1) and strongly encourages the FTC to extend this language to include a reference to Section 313.09.

In the event the proposed Section 313.4(b)(1) exception is modified or eliminated, EFC urges that the initial notice and opt-out notification requirements to consumers be deemed compliant with the rules if it is delivered within 90 days of withdrawal of the loan application or loan denial.

V. CLARIFICATION OF SECTION 313.09

EFC supports the exception to opt out requirements for service providers and joint marketing agents but wishes to clarify that the exception for service providers and joint marketing agreements applies to information received by a financial institution from such a provider or agent as well as information supplied by a financial institution to such a provider or agent.

EXAMPLE V(A)

Accordingly, EFC proposes the following language (shown below in italics) be added to the proposed Section 313.9(a) General rule: “The opt out requirements in Sections 313.7 and 313.8 do not apply when you provide *or receive* nonpublic personal information about a consumer to *or from* a nonaffiliated third party to perform services for you or functions on your behalf . . . “

VI. PARTIES COVERED BY EXCEPTIONS IN SECTION 313.10

EFC fully supports the FTC’s position that the opt out notice and consent of the customer or consumer is not needed before sharing nonpublic personal information of the customer with nonaffiliated third parties who are integral to the processing, financing, servicing, and sale of financial products and services provided by financial institutions to customers. As mentioned above, EFC members work with a number of such third parties in providing and servicing HEA Loans and Private Education Loans. The following third parties are included in the process of making, financing, servicing and selling student loans: colleges, universities and other education providers eligible to receive Title IV aid under the HEA, lenders, loan servicers, investment bankers, warehouse lenders, credit and liquidity providers, guaranty agencies, ED, financial advisors, rating agencies, collection agencies, State and federal agencies, auditors, loan purchasers, loan sellers, lawyers including bond counsel, auditors, trustees and other fiduciaries. EFC believes that the sharing of nonpublic personal information with all of these entities is covered under either Section 313.10 or 313.11, but would prefer specific examples of such coverage.

EXAMPLE VI(A)

EFC seeks to have the following example included for Section 313.10(a)(1): "For purposes of originating, disbursing, servicing, collecting, financing and otherwise processing student loans under Title IV of the Higher Education Act of 1965, as amended, the sharing of nonpublic personal information of student loan customers by and among the following entities is recognized as necessary to effect, administer or enforce a transaction requested or authorized by the customer: colleges, universities and other education providers eligible to receive Title IV aid under the HEA, lenders, loan servicers, investment bankers, warehouse lenders, credit and liquidity providers, guaranty agencies, ED, financial advisors, rating agencies, collection agencies, State

and federal agencies, auditors, loan purchasers, loan sellers, lawyers including bond counsel, auditors, trustees and other fiduciaries."

EXAMPLE VI(B)

Additionally, EFC seeks to have the following example included in Section 313.10(a)(4): "For purposes of originating, disbursing, servicing, collecting, financing and otherwise processing student loans under Title IV of the Higher Education Act of 1965, as amended, the sharing of nonpublic personal information of student loan customers by and among the following entities is recognized as necessary in connection with a proposed or actual debt financing, securitization, secondary market sale or purchase (including sales of servicing rights) or similar transaction related to a transaction of the consumer: colleges, universities and other education providers eligible to receive Title IV aid under the HEA, lenders, loan servicers, investment bankers, warehouse lenders, credit and liquidity providers, guaranty agencies, ED, financial advisors, rating agencies, collection agencies, State and federal agencies, auditors, loan purchasers, loan sellers, lawyers including bond counsel, auditors, trustees and other fiduciaries."

Further, EFC believes that a slight change in the language in Section 313.10(a)(4) is warranted. Under the proposed language, personal nonpublic information of customers can be shared without the opt out notice and consent of the customer in order to effect a secondary market sale or securitization. The regulation should be clear that Section 313.10(a)(4) applies in the same fashion to the sharing of such information by *purchasing* entities as well and that the section applies to debt financing as well as securitization. Finally, the language should clarify that the exception applies to transactions among the listed parties, whether or not initiated or requested by the consumer.

EXAMPLE VI(C)

EFC therefore proposes that Section 313.10(a)(4) be modified to read as read as follows (with proposed new language shown in italics): "In connection with a proposed or actual securitization, *debt financing*, secondary market sale *or purchase* (including sale of servicing rights) or similar transaction related to a transaction of the consumer *whether or not requested by the consumer*." Additionally, the final regulation should note that loan servicing agreements for the life of the loan are not sales of servicing rights.

VII. PARTIES COVERED BY EXCEPTIONS IN SECTION 313.11

EFC supports the exceptions mentioned in Section 313.11. Specifically important is the exception mentioned in 313.11(a)(7)(i). EFC believes that this exception is vital.

VIII. INITIAL DISCLOSURE TO EXISTING CUSTOMERS

Proposed Section 313.16 requires that financial institutions provide the initial notice required under Section 313.4 within 30 days of the proposed effective date of November 13, 2000 to all

customers who were customers as of the effective date. EFC seeks an extension of the notice period for existing customers. At present, there are approximately 15 million HEA Loan borrowers. Given the highly regulated, highly structured loan servicing systems mandated by and unique to the HEA Loan arena, providing the initial notice for all 15 million borrowers within the next nine months is simply not feasible. The proposed regulations subject financial institutions to the most extensive regime of privacy rules ever proposed in the United States. In order to effectively implement the new rules, financial institutions will need to understand how those requirements will work operationally. Further, many EFC members will have to modify their servicing systems or servicing contracts with third parties in order to accommodate the notice and opt-out provisions in the proposed regulations. Such systems modification will take 12 months or longer to accomplish. Moreover, the targeted November-December compliance period as proposed will occur precisely at a peak processing time for disbursing student loans (i.e., second installments of student loans are typically issued beginning in December). Loan disbursements to student borrowers should not be jeopardized by the proposed 30-day transition period for issuing Section 313.4 notices to existing customers. Accordingly, EFC requests a delay in the implementation of the notice requirements under Section 3.16(b) until 18 months after the effective date of the regulations.

IX. INITIAL DISCLOSURE TO REPEAT MPN BORROWERS

HEA Loans are required by law to be made pursuant to one, initial master A/P Note (an “MPN”) for all loans received by a student borrower throughout his or her college career, subject to certain narrow exceptions. Under such a regime, only one actual loan application/ promissory note document will exist for multiple loans. This disbursement system is analogous to a credit card account process where a consumer opens an account and is then allowed multiple transactions—each a discreet “borrowing”—without having to execute another cardholder agreement.

Using the credit card analogy, EFC would not expect the final GLB Act rules to require a Section 313.4 notice be sent each time a credit card transaction occurs. Similarly, EFC urges the FTC to clarify that once a Section 313.4 initial notice has been sent in connection with the first loan applied for and made under a HEA MPN, no subsequent Section 313.4 notices are required for each subsequent disbursement made under such MPN. In other words, EFC believes that *one* initial Section 313.4 notice meets the regulatory requirement for all HEA Loans made under an MPN. If an institution’s privacy policies or practices change subsequent to the first Section 313.4 notice, a change-in-terms notice could suffice to update the customer as to such changes.

X. SHARING OF ACCOUNT NUMBER INFORMATION

Proposed Section 313.13 states that a financial institution may not disclose, other than to a consumer reporting agency, the account number of a consumer to any nonaffiliated third party for use in marketing efforts. For HEA Loans, borrower Social Security Numbers are a required data field and are used by ED and all other participants as a necessary account identifier. EFC seeks clarity in the final rule that the flat prohibition against use of account numbers would *not* apply to the sharing of consumer or

customer Social Security Numbers otherwise allowed under Sections 313.10 and 313.11 of the proposed rules. Such clarification is necessary for the same fundamental reasons set forth in our discussion herein under section VI: a variety of nonaffiliated third parties contribute to the application, disbursement, processing, servicing, financing and sale of HEA Loans and Private Education Loans. With respect to all parties and all such services or tasks performed, the account number of the HEA Loan is a critical data element to accomplishing the service or task. Absolute clarity on this point is essential.

CLOSING REMARKS

Thank you for giving EFC the opportunity to comment on the proposed regulations. EFC members applaud the efforts of the FTC to attempt the difficult task of implementing the GLB Act in such a short period of time. EFC hopes the FTC will consider the comments above and provide as many specific examples as possible. EFC continues to believe that notice and opt-out should not be required for any individual whose information is only shared with excepted third parties in sections 313.09, 313.10 and 313.11. Thank you again.

Very truly yours,

D. Grant Carwile, Esq.
Chair, Legal and Structural Subcommittee

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