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Via E-mail GLBRule@ftc.gov
Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580



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

Dear Mr. Secretary:

Capital One Financial Corporation ("Capital One") wishes to comment on the proposed rule concerning Privacy of Consumer Financial Information that the Commission published for comment on February 24, 2000.

Capital One, through its subsidiaries Capital One Bank and Capital One, F.S.B., is one of the ten largest credit card lenders in the United States. In addition, it takes deposits and makes installment loans, makes auto loans through its subsidiary Summit Acceptance Corporation, is a reseller of wireless telecommunications service through its subsidiary America One Communications, Inc., and is pursuing various internet-related initiatives. Outside the United States, Capital One has operations in Canada and the United Kingdom, and is establishing or investigating businesses in various other countries. Worldwide, as of year-end 1999, Capital One had 24 million customers and \$20 billion in loans outstanding.

By reason of its ownership of Capital One, F.S.B., a federally chartered thrift institution, Capital One is a unitary thrift holding company. Capital One is not a bank holding company.

Capital One commends the Commission and its staff for the progress you have made on this massive project in the short time required by the Gramm-Leach-Bliley Act. The proposed rule clearly reflects a great deal of careful thought.

Capital One is confident that the Commission will give careful consideration to our comments and those of other commenters because it will want to minimize adverse business impact and avoid choking off product availability and economic growth, while at the same time safeguarding consumers' privacy interests and faithfully interpreting the GLB Act. But there is another reason for being especially careful in crafting this rule,

and that is that the rule restricts communications of information among companies. Those communications are commercial speech and hence are constitutionally protected. In *U.S. West, Inc. v. FCC*,¹ the U.S. Court of Appeals for the Tenth Circuit vacated the FCC's rules restricting telecommunications carriers' use and communication of "customer proprietary network information" on the ground that the FCC had failed to consider less restrictive means of implementing its statutory mandates and hence had violated the First Amendment. The Commission should ask itself the same question with respect to each of the issues it wrestles with in implementing the GLB Act's privacy provisions: Is this proposal the least restrictive way to implement the Act's mandate? By subjecting each issue to that inquiry, the Commission will give itself the best odds of staying on the right side of the Constitution.

Capital One's comments are as follows:

1. "Financial Information." The Act covers, and hence the rule can cover, only "financial information" of consumers and customers. (Act § 509(4)(A).) The proposed rule, however, would cover *any* information obtained in connection with providing a financial product or service -- and because providing financial products and services is what financial institutions do, the proposed rule therefore would sweep in virtually all of the information that a financial institution gathers and manages. That information includes a great deal that is not financial in nature, including names, addresses, telephone numbers, and much more. Congress, however, limited the reach of the Act in two distinct ways: First, the Act applies only to financial institutions, and second, it applies only to financial information. In doing so, Congress legislated its view that financial information was in greater need of protection than non-financial information, such that consumers had a greater privacy interest in financial information than in non-financial information. By eliminating that second limitation in scope -- the limitation to financial information -- the proposed rule goes beyond the plain language of the Act.

That Congress meant what it said when it limited the scope of the law to *financial* information is highlighted by the following colloquy that occurred during Senate debate on the GLB Act:

Mr. ALLARD: "is it Chairman Gramm's understanding that the term 'nonpublic personal information' as that term is defined in section 509(4) of title V, subtitle A, applies to information that describes an individual's *financial condition* obtained from one of the three sources set forth in the definition [*i.e.*, (i) provided by a consumer, (ii) resulting from a transaction or service, or (iii) otherwise obtained], and by example would include experiences with the account established in the initial transaction or other private financial information."

¹ 182 F.3d 1224 (10th Cir. 1999).

Mr. GRAMM: "Mr. President, that is my understanding."²

Capital One submits that, to be consistent with the Act, the proposed rule should be limited in its scope to information that is financial in nature. For a fuller development of that concept, we invite the Commission's attention to the comments of Professor Fred H. Cate of Indiana University School of Law, submitted March 10, at pages 3-4.

2. "Publicly Available" Information. The Act states that "non-public personal information," which is the category of information to which the Act applies, "does not include publicly available information, as such term is defined by the regulations described under Section 504" (Act § 509(4)(B)). To implement that element of the statute, the Commission offers Alternatives A and B. Alternative A treats information as subject to the "publicly available" exclusion only if a financial institution in fact obtained the information from a public source; Alternative B treats information as subject to the "publicly available" exclusion if the information is available from a public source, regardless of whether the financial institution in fact obtained it there.

We submit that Alternative B is clearly correct and is the only alternative of those two that is consistent with the plain language of the statute. The statutory concept is "publicly available" and not "obtained from a public source." Alternative B is also the only alternative that is consistent with the logical purpose of the Act, which is to protect consumers' interests in information that they would like to keep private. Publicly available information cannot be kept private because it already is not private. Alternative B also eliminates the artificial necessity imposed by Alternative A of a financial institution's tracking the origin of every bit of information that it possesses.

The interpretive authority granted to the Commission by the Act with respect to the term "publicly available information" empowers the Commission to define how widely available information must be in order to be considered "publicly available" -- and the Commission has done that (Proposed Rule § .3(p)) -- but it does not empower the Commission to substitute, for the concept that Congress enacted, a different concept that is far more restrictive.

3. Status of Customer Lists. The Act states that customer lists -- or more broadly, consumer lists, which can include anyone who has had financial dealings with an institution -- are covered by the concept of "non-public personal information" if they are derived from non-public personal information but not if they are not derived from non-public personal information. (Act § 509(c).) The proposed rule eliminates that distinction by providing that consumer lists are automatically covered as "non-public personal information" (see Supplementary Information, pages 9-10). That approach is predicated on the assumption that the fact of a consumer relationship is covered information (Proposed Rule § 313.3(o)(2)(c)). That approach in turn may be based on the

² Congressional Record, November 4, 1999, page 13902 (daily ed.) (emphasis added).

Commission's overly broad concept of "financial" information, discussed above. That a person has had dealings with a financial institution conveys nothing about the nature of those dealings (for example, the balances in their deposit accounts or the amounts of their loans) which we submit is what Congress intended to cover by the language that it chose.

The Commission attempts to give meaning to the distinction that Congress enacted by suggesting that a consumer list could be derived using "government real estate records or bankruptcy records" (*id.*), but development of such sublists of an institution's consumer lists is not a realistic or meaningful list-compiling activity for a financial institution, and hence is not a reasonable interpretation of the statute.

A useful analogy is the Federal Communications Commission's rules on the subject of "customer proprietary network information," a species of information that is protected by the Communications Act. In those rules, the FCC came to the same conclusion that we advocate here: Account information is covered by the statute's restrictions, but a customer list is not.³

For a fuller discussion of the proposed rule's treatment of consumer lists, we invite the Commission's attention to the letter of Professor Cate referred to in our comment 1 above, at pages 5-7.

4. Applicants Who Do Not Become Consumers. The proposed rule includes within the concept of "consumers" people who apply for credit (or other financial services) but who are turned down. The proposed rule's definition is difficult to reconcile with that of the statute, which defines a "consumer" as "an individual who obtains [not "seeks to obtain"], from a financial institution, financial products or services" (Act § 509(9)). The Commission achieves this result only by defining "financial service" to include the application-processing activity. (Proposed Rule § .3(k)(2).) That definition is a strained reading of the statute that greatly expands its scope and requires one to accept that a person has received a financial service even if that person's application for a financial service has been declined. That concept of "service" stands ordinary language on its head.

5. "Financial Institution". The Agencies' proposed definition of "financial institution" -- "any institution the business of which is engaging in activities that are financial in nature or incidental to such financial activities as described in Section 4(k) of the Bank Holding Company Act" (the "BHCA") (Rule § .3(j)(1)) -- is extremely broad. Following the approach of the Act, status as a "financial institution" is not determined by a company's actual affiliation with a bank-holding-company group. Hence, the rule will include many businesses that never dreamed of being "financial institutions" and have no

³ "Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information," Order, CC Docket No. 96-115, May 21, 1998, pp. 6-7. Effectiveness of the FCC's "CPNI" rules is in abeyance as a result of the Tenth Circuit's decision in *U.S. West, Inc. v. FCC*, No. 98-9518 (10th Cir. Aug. 18, 1999), which vacated the rules as being too restrictive.

familiarity with the arcane world of bank-holding-company regulation on which the proposed approach is based. Consequently, we urge the Commission to adopt a bright line standard that will be accessible to all businesses, including those that have no reason to be sophisticated in the world of banking regulation. The bright line that we suggest is to define the scope of the rules as applying only to those lines of business that are specifically enumerated in BHCA § 4(k)(4). If the Commission deems it essential that the rule also cover lines of business that have been identified by the Federal Reserve Board and hence are encompassed in BHCA § 4(k)(4)(G), even if not specifically enumerated in the statute, then we urge that those activities be specifically enumerated in the rule, rather than requiring that businesses never before subject to the byzantine labyrinth of financial regulation figure out on their own whether they are covered.

6. Delivery of Privacy Notices to Existing Customers. The proposed rule would require financial institutions to deliver privacy notices to all of their existing customers within 30 days after the effective date of the rules, November 13, 2000. (Proposed Rule § 313.16(b).) That provision, in conjunction with the identical provision in the banking agencies' proposed rule, will require delivery of hundreds of millions of privacy notices during that 30-day period, a substantial portion of which will be delivered to customers who would not otherwise receive a statement that month. This massive effort will choke the mails, and the processing facilities of financial institutions. That requirement will also likely choke institutions' facilities for processing responses to those notices, because institutions' facilities are not built to handle peak volumes of that magnitude. (For that reason, Capital One, which is independently sending out revised notices of its long-standing solicitation-opt-out policy, is staggering the mailing over several months in order to avoid overwhelming its remittance-processing facilities and call centers.) Forcing financial institutions to clog their facilities with volumes beyond what they were built for will probably result in inadvertent non-compliance on a massive scale. Nothing in the statute requires that result. We strongly urge that the requirement to send notices to existing customers be spread over a reasonable period, such as a year.

7. Consent to Electronic Communications. The proposed rule contains some ambiguity about what constitutes consumer consent to electronic communications, and when consent is required. We propose as a conceptual touchstone the principle of the Uniform Electronic Transactions Act, §5(b), that "whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." We propose that different categories of consumers be treated as follows:

- (a) For customers who conduct business with an institution electronically on a continuing basis, posting the institution's privacy notice on its web site should be sufficient to meet the requirement for initial and annual delivery of the privacy notice.

- (b) If a consumer applies for a financial product or service electronically, the institution should be able to provide its privacy and opt-out notice by the same means. (This seems to be recognized in the Supplementary Information, page 13, which states that "acceptable ways the notice may be delivered include . . . sending it via electronic mail to a consumer who obtains a financial product or service from the institution electronically.")
- (c) In other cases the privacy and opt-out notice may be provided electronically if the consumer has already obtained a financial product or service electronically from the institution and agreed at that time to receive the notice electronically, or the consumer indicates on the application form that the notice may be delivered electronically.

8. Compulsory Web-Site Navigation. The Commission states that "it would not be sufficient to provide the initial notice only on a Web page, unless the consumer is required to access that page to obtain the product or service in question." (Supplementary Information, page 13.) We suggest that the requirement to provide notice is reasonably met if a link to the privacy notice is prominently indicated, and the notice is accessible with only one click from that location. Forcing customers to click through the page containing the privacy notice before obtaining the product or service is unnecessarily cumbersome. Electronic commerce already suffers from slow and cumbersome on-line processes, which is one reason that acceptance of electronic banking has been slow. An example of the crucial importance of streamlined web-site navigation is Amazon.com's patenting of the "one click" on-line buying process, thereby forcing competitors to introduce extraneous clicks and place themselves at a competitive disadvantage solely to avoid accusations of infringement. Conspicuous disclosure of the link to the privacy page will be sufficient to enable people who care greatly about privacy to study the policy, without hindering service for all consumers and impairing for the future what otherwise promises to be an efficient delivery system.

9. Toll-Free Telephone Number. Providing a toll-free telephone number is an efficient and convenient means of enabling consumers to exercise their opt-out right, and institutions should be specifically authorized by example to use it. That example should be one of those enumerated in Proposed Rule § 313.8(a)(2)(ii).

10. Revocation of Opt-out. Consistently with enabling consumers to exercise their opt-out right by calling a toll-free telephone number (our comment 11), consumers should be able to revoke their opt-out election by the same means. Proposed Rule § 313.8(e) should be modified to permit that.

11. Statement Suffers a Violation of § 502(d)? The Commission asks whether the prohibition in § 502(d) of the Act on disclosing account numbers and other access codes to unaffiliated third parties for marketing purposes "might unintentionally disrupt certain routine practices, such as the disclosure of account numbers to a service provider who handles the preparation and distribution of monthly checking account statements for a financial institution coupled with the request by the institution that the service provider include literature with the statement about a product." (Supplementary Information, page 24.) We applaud the Commission for wishing to avoid disruption of innocent practices of that sort, but we believe that no such disruption is required by the plain language of the Act. Section 502(d) limits the disclosure of account numbers for marketing purposes. In the example given by the Commission, the disclosure of account numbers is not for marketing purposes but for statement rendition. Inclusion of the marketing information is not the purpose for which the account numbers were shared, but is an incidental use of an already-existing efficient communication channel. If the Commission adopts this plain-language interpretation of the Act, there will be no need to create an exception.

12. Encrypted Numbers. "The Commission also seeks comment on whether section 502(d) prohibits the disclosure by a financial institution to a marketing firm of encrypted account numbers if the financial institution does not provide the marketer the key to decrypt the number." (Supplementary Information, page 24.) The practice of providing encrypted numbers without the decrypting keys should not be affected by the prohibition in § 502(d), because the encrypted numbers are not account numbers: They are not usable for access to the account by anyone who receives them in absence of the key. Encrypted numbers are instead a tracking code for use between the financial institution and the marketing vendor, use of which the statute does not affect.

The Managers' Statement quoted by the Commission (Supplementary Information, pages 23-24) should not affect that interpretation. If there are situations in which it would be reasonable to provide encoded numbers along with the decrypting keys, the Commission could plausibly provide an exception based on the customer's consent. Such use of account numbers would provide access to the accounts and hence might require an exception as encouraged by the Managers' Statement. Such a process could address security-in-transit concerns that customers might have, and for which encryption is the standard solution.

13. Consent to Sharing of Account Numbers. The Commission asks whether consumers ought to be able to consent to sharing of their account numbers in circumstances otherwise proscribed by § 502(d). (Supplementary Information, page 24.) The Commission clearly does have authority under § 504(b) of the Act to create such an exception. That exception would be appropriate in cases in which the institution clearly discloses to the consumer what is intended to be done with the account numbers and why, so that the consumer is able to give an informed consent.

14. Consumers Not Resident in the United States. Financial institutions subject to the proposed rule may have foreign establishments, or otherwise carry on business with foreign consumers. Such foreign consumers will be subject to different privacy regimes in their own countries. To avoid imposing conflicting and confusing requirements on those financial institutions, and to avoid raising objections based on extraterritoriality of jurisdiction, the proposed rule should specifically state that its scope extends only to consumers who are U.S. residents.

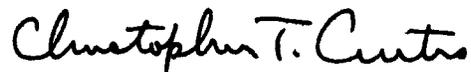
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Capital One appreciates the opportunity to comment on the Commission's proposed rule, and again commends the Commission and its staff for your careful attention to this large and complicated subject.

Very truly yours,



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