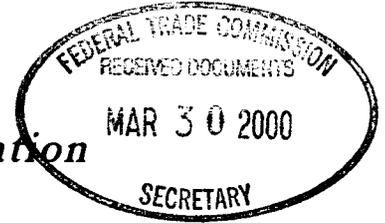




## ***The First American Financial Corporation***

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KENNETH D. DeGIORGIO  
Regulatory Counsel

### **Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313 -- Comment By The First American Financial Corporation**

March 29, 2000

#### **VIA FEDERAL EXPRESS**

Office of the Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Dear Mr. Secretary:

I write on behalf of The First American Financial Corporation (“First American”) in response to the Federal Trade Commission’s (“Commission”) Notice of Proposed Rulemaking regarding the Privacy of Consumer Information requirements of the Gramm-Leach-Bliley Act (“Act”).

#### **INTRODUCTION**

The Commission has expressly invited comment regarding the regulatory definition of the term “nonpublic personal information.” The Commission has proposed two alternative definitions of the term, one of which will be included as subsections 313.3(n), (o), and (p) of the regulations. Both alternatives define “nonpublic personal information” as:

- (i) Personally identifiable financial information; and
- (ii) Any list, description or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information.

Certain restrictions apply to data that is defined as “nonpublic personal information.” Each of the Commission’s proposed alternatives – Alternative A and Alternative B – exempt certain types of information. For example, both Alternative A and B exclude:

any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any personally identifiable financial information.

The primary difference between Alternative A and B is that Alternative B also excludes most “publicly available information” from the definition of “nonpublic personal information.” The choice between the two alternatives is of great interest to First American because, depending upon which alternative is selected, the legitimate use of public record information by First American and other information services companies may be substantially restricted.

First American and the information services industry utilize the public record to provide numerous services that are vital to the proper functioning of the U.S. economy. Most information services companies are not banks or financial institutions and are not, therefore, regulated by the Act. If Alternative A, with its more expansive definition of “nonpublic personal information,” is applied to restrict the financial companies in the information services industry, companies such as First American will not be able to offer a full range of services to compete with information services companies that are not regulated by the Act. Furthermore, companies such as First American will be placed at a competitive disadvantage to companies that are not regulated by the Act. Therefore, the definition of “nonpublic personal information” that is ultimately chosen by the Commission is of great importance to First American and all financial companies that utilize public records.

#### FIRST AMERICAN AND THE INFORMATION SERVICES INDUSTRY

First American is based in Santa Ana, California and is the nation’s leading provider of business information and related products and services. The corporation’s primary business segments include: (a) title insurance; (b) real estate information and services, which includes mortgage information services and database information and services; and (c) consumer information and services, which provides home warranties; automotive, subprime and direct-to-consumer credit reporting; property and casualty insurance; property and automotive insurance tracking services; resident screening; pre-employment screening; lender-placed flood and hazard insurance; investment advisory services; and trust and banking services. In order to facilitate and insure innumerable financial transactions, First American uses an extensive database of information compiled from public record documents such as real estate deeds, tax liens, and court judgments. Furthermore, particularly with respect to the many real estate closing services First American provides, we often add documents to the public record by preparing and filing such documents with government entities.

First American is only one of a multitude of companies that provide vital information to American consumers and businesses in order to facilitate economic activity. Information services are an overlooked but essential element of most economic transactions. As a result, a vibrant information services industry is one of the cornerstones of a competitive marketplace.

First American acknowledges the significance of consumer privacy. Indeed, in providing our products and services we endeavor to strike a reasonable balance between this important value and the legitimate needs of our customers. Though we support the efforts of the

Commission and the drafters of the Act to protect consumer privacy, because of the substantial damage that the adoption of Alternative A would have on our industry, the economy and the very consumers the proposed regulations are designed to protect, we find it necessary to encourage the adoption of Alternative B. Alternative B meets the privacy goals of the Act while avoiding the damage that Alternative A would have on essential economic activity.

### ALTERNATIVE B SHOULD BE ADOPTED

First American propounds two reasons why Alternative B should be selected in preference to Alternative A. First, adoption of Alternative A would effectively prohibit companies whose business requires them to add documents to the public record from compiling, selling or using information from such documents. Second, adoption of Alternative A would place companies such as First American at an extreme competitive disadvantage to other non-financial institutions that do not have to comply with the Act or these regulations.

#### I. Alternative A Would Effectively Prohibit Companies That File Transaction Documents for Their Customers With Government Entities From Later Making Use Of The Information.

One consequence of Alternative A is that a financial company whose business requires it to publicly file documents generated in its customer's transaction effectively would be prohibited from subsequently using the information contained in such documents. An illustration may be the most effective way to show the negative effects of this proposed language:

Among our many products and services, First American offers title insurance. Businesses and individuals purchase title insurance to insure against claims – such as an easement, tax lien, or judgment lien – against the title of real property. As part of the process of issuing a title insurance policy, First American obtains a number of items of personal information from the title insurance applicant, i.e. the customer. In order to assess and, ultimately, limit the risk associated with issuing a title insurance policy, First American uses this personal information to assemble information related to the transaction from a number of public sources, including the land transfer records of county recorders and equivalent entities across the United States. First American may also review other public records, such as property tax rolls or civil judgments. If First American issues a title insurance policy, we often prepare and file for our customer the documents necessary to evidence the property transfer on the public record.

First American, of course, does not send its personnel to the county recorder and the numerous other government agencies to search the public records required to issue a title insurance policy. First American, rather, compiles and maintains databases containing abstracted information from the public record and, often, images of the public documents themselves.

In some regions of the country, such as Washington, D.C., this database is compiled on paper or microfiche. In others, such as Orange County, California, it is compiled on electronic media. First American does not have one of these databases in every region of the country. If we do not possess a database for a certain region, we purchase access to the databases

maintained by others, including our direct competitors. Similarly, our competitors may purchase access to our databases in regions in which they do not maintain their own databases.

It is important to note that because the documents we prepare and file for our customers as part of the real estate transfer closing process become part of the public record, those documents, or abstracts of them, will eventually become part of our public records database. Similarly, the documents prepared and filed by our competitors will become part of their own databases.

Alternative A would have the perverse effect of requiring First American to provide those title insurance customers for whom it filed documents on the public record with an opportunity to opt-out of First American's public records database. This is because Alternative A, unlike Alternative B, does not exclude public records from the definition of "Nonpublic personal information." And because the information we put on the public record for our title insurance customers was provided to us by a consumer or resulted from a transaction involving a financial service (see proposed Section 313.3(o)(1)(i)-(ii) (Alternative A)), our ability to subsequently use that information – information that is now public – would be significantly curtailed. Unless we first provided our title insurance customer the opportunity to opt-out of our public records database, we could not make our entire database available to other title insurance companies – a "nonaffiliated third party" under proposed Section 313.4(a)(2).

Similarly, if a First American title insurance policy issued to a second customer requires disclosure of public documents we previously filed for a first customer (for example, when a policy is issued to different owners of the same property), we would have to notify the first customer that we will disclose information from documents publicly filed in the first customer's transaction in the policy issued to the second customer. The expense and delay associated with disclosing information from documents that anyone could easily obtain would render it virtually impossible to issue a title insurance policy.

The perverse effect of Alternative A is further demonstrated by the ramifications of a customer's decision to opt-out of a title company's public records database. Should a customer so decide, title companies could no longer be assured of the accuracy of one another's public records databases, thereby undermining confidence in title insurance products. Claims would surely rise as a consequence of title companies being unable to detect impairments on the title of the property of consumers who have opted-out of the databases they utilize.

This outcome certainly was not intended by Congress and should not be imposed through the Commission's regulations. The adoption of Alternative A would sacrifice the significant benefits of an accurate and complete database of real estate property transfers in order to give individuals an opt-out option which is of little real utility because it applies only to those few financial service companies who are also in the information services industry. By definition, consumers have no reasonable expectation of privacy regarding the information in these databases of the *public* record. In most cases, any person or business can obtain the documents directly from the source.

Because it provides a valuable exemption for public records, which contain information about which consumers have no expectation of privacy, the Commission should adopt Alternative B.

II. Many Non-Financial Companies That Are Not Regulated By The Act Would Gain An Unfair Competitive Advantage If Alternative A Is Adopted.

The adoption of Alternative A would put financial institutions which also have an information services business at an unfair competitive disadvantage. As described above, certain financial institutions, such as title insurance companies, place documents on the public record during the course of transactions with their customers. Under the current regime, public records database owners ultimately add these documents to their databases. Under Alternative A, a financial institution which operates an information services business with a public records database must first provide the customer with respect to whom it placed a document on the public record with a notice and an opt-out opportunity before subsequently disseminating that information from its public records database. Information services businesses that are not considered financial institutions under the Act, of course, would not be obligated to absorb the cost and endure the delay associated with the notice and opt-out requirements.

More importantly, the customers of such non-financial institutions would enjoy greater confidence in their public records databases. Users of the financial institution's public records database could never be certain that a customer of that financial institution has not opted-out of the database. Because users of public records databases – such as title companies, real estate appraisers, real estate brokers and agents, property and casualty insurers, and real property asset managers – require accuracy in the information they use, such potential deficiencies in a financial institution's public records database would effectively reduce competition in the industry. It would enable those select companies unregulated by the Act to charge a premium for the relative completeness of their databases – an advantage that would result solely from the application of Alternative A.

Alternative B, with its exemption for public records, would avoid these anti-competitive effects and, therefore, should be adopted by the Commission.

I am available to discuss First American's position at your convenience.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kenneth D. DeGiorgio", written over a horizontal line.

Kenneth D. DeGiorgio