



Sent by email to GLBRule@ftc.gov

March 31, 2000

Secretary
Federal Trade Commission
Room H-159, 600 Pennsylvania Avenue, NW
Washington, DC 20580

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

Dear Mr. Secretary:

I am writing on behalf of NASCUS, the professional association comprised of the National Association of State Credit Union Supervisors, the 48 state and territorial credit union supervisors, and the NASCUS Credit Union Council, comprised of nearly 800 state chartered credit unions. We appreciate the opportunity to provide comments on the FTC's proposed privacy of consumer financial information regulations, 16 CFR Part 313.

We note that the proposed regulations are similar to those being proposed by the other federal agencies with certain exceptions.

The Act has given the FTC privacy enforcement jurisdiction over state-chartered non-federally insured credit unions. Currently, there are 499 such institutions in the state-chartered credit union system.

Credit unions are distinct among financial service providers. Operated as not-for-profit cooperatives, credit unions have special features such as limited fields of membership (specifications on who may be served), defined participation with credit union service organizations (CUSOs), and in the case of the credit unions in question under these rules, share insurance coverage provided by a private vendor.

Clearly, FTC must promulgate rules and regulations that are applicable to these and other unique features of credit unions.

In order to guarantee the fulfillment of FTC's statutory mandate to safeguard personal financial information in a manner consistent with the state chartered credit unions system, FTC should consult with, and to the maximum extent feasible, rely on the expertise and examinations of the state agencies bearing supervisory responsibility for privately insured

state-chartered credit unions when enforcing compliance with the proposed privacy regulations.

In addition to the above general comments, NASCUS respectfully submits the following specific comments concerning the proposed rule.

- 1) It is important that the FTC consult with the appropriate state regulator prior to making its determination with regard to control of a company.
- 2) The definition of control between a credit union and a credit union service organization (CUSO) should be amended to reflect the unique relationship found in the credit union community.
- 3) The definition of government regulator should be expanded to recognize the state credit union regulator.
- 4) Ambiguous terms are used – such as “reasonable” and “prompt” and “clear and conspicuous” and “adequate” – which may lead to misunderstanding. These should be defined or eliminated.
- 5) Clarification of electronic mailing of notices is needed (section 316.4).
- 6) Express exception for notice and opt out requirements for providers of excess share insurance should be included (section 316.11).
- 7) An example should be included when describing nonaffiliated third parties subject to exceptions (section 316.6(b)).
- 8) Corporate credit unions should be exempt from the privacy regulations.
- 9) FTC should follow the other agencies if the effective date of the regulation is extended.
- 10) Lastly, there are several places where words should either be added or deleted.

Further, we make comments about one of the important duties of the FTC under the Act, to make a determination when a state privacy law provides more consumer protection and is therefore not preempted by the Act (section 507).

State Regulator Consultation

The FTC should turn to the state regulator when deciding where the control of a company rests and should make it clear that it will consult with the appropriate state regulator prior to making its determination about the power to exercise, directly or indirectly, a controlling influence over the management or policies of the company.

Definition of Control

The definition of control should be amended to reflect the unique relationship between a credit union and a credit union service organization (CUSO). State law and regulations may affect the application of the 25% control test, and the state authority should be recognized in this definition. A CUSO that is 100% owned by credit unions should be considered an affiliate of all of the investing credit unions, regardless of whether any one credit union owns 25%.

State Regulator Recognition

It is critical for the FTC to include state regulators in the definition of government regulators.

Proposed Part 313.3(m) defines government regulators in a manner consistent with the Act. While this is appropriate, the FTC should consider the nature of the dual chartering system and include state regulators in that definition. More than merely cosmetic, this change would provide solid legal authority for state regulators in any proceedings involving a state chartered credit union and privacy.

NASCUS acknowledges the FTC's special authority in the enforcement of the privacy regulations for state chartered non federally insured credit unions. The addition of state supervisory agencies in the definition of government regulator in no way diminishes that authority, rather it lends clarification to the agencies responsible for state-chartered credit unions and provides consistency throughout the FTC's overall regulatory scheme.

Ambiguous Terms

NASCUS encourages the FTC to define or eliminate, to the extent possible, any ambiguous terms. We point out the following terms to illustrate this point – reasonably expect, reasonable, clear and conspicuous notice versus adequate notice, reasonable opportunity versus prompt. These terms should be defined or eliminated to avoid a misunderstanding of the rule.

Compliance Issues

When reading proposed Part 313, it is unclear as to whether the FTC or the State will bear primary responsibility for examining for compliance and whether compliance will be incorporated into the state credit union supervisor's regular examination process.

NASCUS urges the FTC to clarify that examination for compliance with Proposed Part 313 is expected to occur in the course of regularly scheduled safety and soundness examinations conducted by state credit union regulators. Clearly, in the case of state-chartered credit unions, any form of special privacy exam would create an undue burden both upon the state-chartered credit union as well as upon the State Supervisory Agency that is the authoritative regulator of that institution.

Electronic Notice

Proposed Parts 313.4 and 313.5 address delivery of privacy notices to customers. The Parts however do not clearly address notice by electronic delivery. While Part 313.4 clearly addresses reasonable notice in terms of interaction on a credit union web site, it does not address stand-alone electronic communication.

There are situations where credit union members are willing to communicate via electronic methods even when not utilizing electronic banking options. The only place where this is addressed in the Proposed rule is in the "negative."

Proposed Part 313.4(d)(5)(ii) establishes in the negative that notice is insufficient when a customer has not indicated a willingness to receive electronic notification. From this negative is drawn the positive premise that notice is sufficient electronically, without acknowledgment of receipt, when a customer has expressly consented to receipt of electronic notification.

With the advent of electronic communication, this important point should be stated in the affirmative. Furthermore, clarification as to whether consent, once given extends until revoked or must be reaffirmed annually.

Nonaffiliated Third Parties Exception Example

In response to the FTC's request, we believe an example would be helpful in section 313.6(b), Description of nonaffiliated third parties subject to exceptions. The FTC should include an example in the final rule.

In addition, NASCUS suggests the example provided in section 313.7(3)(i) is overly specific with regard to examples of reasonable opportunity to opt out by mail.

Corporate Credit Unions

We encourage the FTC to exempt corporate credit unions from the privacy rules because the membership of corporate credit unions is credit unions, not natural person consumers. They are operated to serve other credit unions. We do not believe that Congress expected to extend consumer protections to "commercial" activities. Further, we believe that both compliance and supervision would be burdensome while not resulting in the extension of protections envisioned by Congress.

Effective Date

As previously stated, the FTC's rule mirrors the other agencies' proposed rules and the agencies have coordinated their comment periods. If the other agencies extend the effective date of the rule beyond November 13, NASCUS encourages the FTC to follow suit to avoid placing undue burdens on credit unions or state regulators who may also regulate other institutions subject to privacy rules of other agencies.

Lastly, NASCUS offers the following additions or deletions to the final rule.

- 313.8(e) Duration of consumer's opt out direction. Add the word "expressly" before "revoked by the consumer in writing...."
- 313.11(b)(1) Examples of consent and revocation of consent. Delete "of the fact" from the sentence.
- 313.3(g)(1) Control of a company. Add "of" after the words ownership and control.

More Restrictive State Laws

Section 507 of the Act empowers the FTC to determine when a state specific privacy law provides greater protection than does the national Credit Union Administration (NCUA) rules for federally insured credit unions and therefore survive preemption. FTC should promulgate guidelines to clarify the many issues raised by this provision of the Act.

Currently, as many as 21 states are considering privacy regulations. In light of that, FTC should clarify what standards will be used to determine greater protection. To what degree may a state specific privacy law vary from the NCUA guidelines before it reaches the level of “inconsistent” and is therefore preempted? What are the procedural standards for a FTC determination: 30 days, 45 days etc.? Are all state laws preempted until there is a determination, or do they take affect when passed until the FTC determines they are preempted?

In light of the complicated nature of the privacy regulations and the substantial number of state legislatures currently considering their own privacy regulations, the FTC should take this opportunity to provide guidance to this significant provision of the Act. Not only does this uncertainty affect the state legislatures, it also significantly affects the 49 state, territorial and federal credit union regulatory agencies as well as the 10,000 federally insured credit unions.

We encourage the FTC to revise the final rule as suggested above.

NASCUS appreciates the chance to offer comments on the proposed rule, and we look forward to continue to work with the FTC in the coming months. If you have any questions, please contact me at 703-528-8354.

Sincerely,

A handwritten signature in black ink, appearing to read "Douglas F. Duerr". The signature is fluid and cursive, with a long horizontal stroke at the end.

Douglas F. Duerr
President and CEO