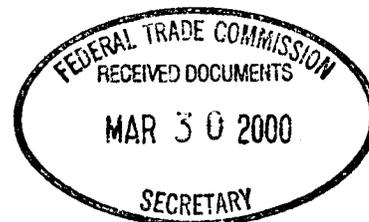


March 30, 2000

Secretary,
Federal Trade Commission
Room H-159
600 Pennsylvania Ave. N.W.,
Washington, D.C. 20580**Re: Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313 – Comment.**

Equifax is pleased to submit these comments regarding the Federal Trade Commission's proposed rule ("Proposed Rule")¹ for implementing Title V of the Gramm-Leach-Bliley Act ("Title V").² Title V was enacted last year to protect, statutorily, the confidentiality of nonpublic financial information.

Equifax, a world leader in shaping global commerce, brings buyers and sellers together through its information, transaction processing, and customer relationship management businesses. Using a broad range of knowledge-based solutions, Equifax facilitates the transaction process for its customers by providing information products, services and systems that help grant credit, authorize and process credit card and check transactions, manage receivables, authenticate, identify and manage digital certificates, predict consumer behavior, market products and manage risk. Pursuant to the Fair Credit Reporting Act ("FCRA"),³ Equifax's consumer reporting business provides information to credit grantors, insurers, employers and other businesses for consumer risk management decisions.

Equifax gives the utmost importance to protecting the privacy of personal information from inappropriate uses and disclosures. Many of our products are regulated by federal and state laws, such as the FCRA and the Fair Debt Collection Practices Act ("FDCPA").⁴ We support the privacy protective goals of Title V and the goals of the proposed rules published by the federal agencies⁵ which would implement Title V. We have three concerns, however, about the Proposed Rule: 1) the definition of "financial institution" is overly-inclusive; 2) the definition of "nonpublic financial information" does not reflect congressional intent and does not properly define "publicly available

¹ 65 Fed. Reg. 11174 (Mar. 1, 2000) to be codified at 16 CFR Part 313.

² Pub. L. 106-102, Title V, Subtitle A (15 U.S.C. § 6801 *et. seq.*)

³ 15 U.S.C. § 1681 *et. seq.*

⁴ 15 U.S.C. § 1692 *et. seq.*

⁵ A number of federal agencies have responsibilities under Title V and are working together to promulgate "substantially similar" rules. Specifically, the following federal agencies are responsible for issuing proposed rules to implement Title V: the Federal Reserve Board ("FRB"), the Federal Trade Commission ("FTC"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), the National Credit Union Administration ("NCUA"), the Secretary of the Treasury, and the Securities and Exchange Commission ("SEC").

information”; and 3) potential ambiguities in the Proposed Rule which could impact the flow of information to and from consumer reporting agencies need to be resolved so as not to interfere with the operation of the FCRA.

The Proposed Rule’s definition of “financial institution” is overly-inclusive.

Title V defines the term “financial institution” to mean, with certain exceptions, “any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956.”⁶ The Proposed Rule interprets § 4(k) in such a way as to potentially include credit bureaus and collection agencies within the definition of “financial institution.”⁷

This is so because the Proposed Rule interprets this definition to encompass an array of activities that the Federal Reserve Board has concluded are closely related to banking. These activities, which are set out at 12 C.F.R. § 225.28, include, in relevant part:

- “Collections agency services,” which is defined to include “collecting overdue accounts receivable, either retail or commercial.”⁸
- “Credit Bureau Services,” which is defined to mean “maintaining information related to the credit history of consumers and providing the information to a credit grantor who is considering a borrower’s application for credit or who has extended credit to the borrower.”⁹

Considering credit bureaus and collections agencies to be “financial institutions” under the Proposed Rule appears to serve no functional purpose. The notice and opt-out protections of sections 502(a)-(b) of Title V are afforded only to “consumers” and “customers,” the latter of which Title V defines to mean “an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes....”¹⁰ Credit bureaus and collection agencies therefore would not be subject to these limitations because both provide services to the creditor, not to the consumer.¹¹

⁶ Title V, § 506(3)(A).

⁷ 65 Fed. Reg. 11176-11177 (preamble discussion of § 313.3(j), definition of financial institution).

⁸ 12 C.F.R. § 225.28(b)(2)(iv) (1999).

⁹ 12 C.F.R. § 225.28(b)(2)(v) (1999).

¹⁰ Title V, § 509(9).

¹¹ The FTC suggests one possible exception to this, for which it has requested public comment. In discussing the definition of “customer relationship” the Preamble to the Proposed Rule states, that a “consumer has a ‘customer relationship’ with a debt collector that purchases an account from the original creditor (because he or she would have a credit account with the collector), but not with a debt collector that simply attempts to collect amounts owed the creditor.” 65 Fed. Reg. 11176-11177 (Preamble discussion of § 313.3(i), definition of customer relationship). The adoption of such a position in the final rule would create an artificial distinction likely to confuse consumers. Potentially, this interpretation could create a situation where a collection agency attempting to collect two debts from the same individual could have to observe Title V in one case, but not the other, simply based upon whether it has purchased the debt. This is an unnecessary, artificial distinction which should not be adopted by the final rule.

The Preamble to the FTC Proposed Rule, in fact, recognizes that “many entities that come within the broad definition of financial institution will likely not be subject to the disclosure requirements of the Rule because not all financial institutions have ‘consumers’ or establish ‘customer relationships.’”¹² Given this acknowledgement, the definitions in the Proposed Rule should be revised so that the definition of “financial institution” includes only those financial institutions that provide products and services to consumers. This would eliminate unnecessary confusion and would be consistent with the consumer protection goals of Title V.¹³ Such a revision would also be consistent with a recognition that the Bank Company Holding Act, unlike Title V, is designed to cover non-consumer financial activities.

The Proposed Rule’s definition of “nonpublic personal information” does not reflect congressional intent and does not properly define “publicly available information.”

Title V and the Proposed Rule regulate the disclosure of “nonpublic personal information” by financial institutions to nonaffiliated third parties. A threshold question, therefore, is what constitutes “nonpublic personal information.” Section 509(4) of Title V defines that term, in relevant part, to mean:

- (A) personally identifiable financial information
 - (i) provided by a customer to a financial institution;
 - (ii) resulting from any transaction with the customer or any service performed for the customer; or
 - (iii) otherwise obtained by such financial institution.
- (B) Such term does not include publicly available information, as such term is defined by the regulations....”

The Proposed Rule’s treatment of the definition of “nonpublic personal information” is flawed in two fundamental respects. First, the definition in the Proposed Rule functionally reads the word “financial” out of the phrase “personally identifiable financial information.” Second, the Proposed Rule’s alternative formulations of what constitutes “publicly available information,” which is part of the definition of “nonpublic personal information” unfairly and unnecessarily restricts the actions of financial institutions.

“Nonpublic Personal Information” should only include information that is intrinsically financial.

The Proposed Rule effectively reads the word “financial” out of the term “personally identifiable financial information” in Title V’s definition of “nonpublic financial information.” Such a broad definition could bring widely published identifying information, such as name and address, within the scope of the Proposed Rule. There is nothing in Title V’s language or legislative history to suggest that this is what the

¹² 65 Fed. Reg. 11176-11177 (Preamble discussion of § 313.3(j), definition of financial institution).

¹³ We also note that in the case of credit bureaus and collection agencies, consumers will continue to be able to avail themselves of the protections of the FCRA and FDCPA, respectively.

Congress intended. As the words of the definition of nonpublic financial information suggest, Congress intended that the definition apply to information that is intrinsically financial in character (hence the use of the phrase “personally identifiable financial information,” rather than the phrase “personally identifiable information.”)

That the definition of “nonpublic personal information” should apply only to financial information is evidenced in the legislative history of Title V. In an exchange between Senator Phil Gramm (R-TX), Chairman of the Banking Committee, and Senator Wayne Allard (R-CO), Chairman Gramm emphasized that “nonpublic personal information” was intended to apply to information that “describes an individual’s financial condition.”¹⁴ Similarly, Senator Charles Hagel, in his comments in support of the G-LB Act, observed that Title V’s privacy protections “protect the privacy of customers’ financial information.”¹⁵ As this legislative history, as well as the general purpose of Title V, indicate, the definition of “nonpublic personal information” should be limited to information that is intrinsically financial in nature.

The definition of “publicly available information” unfairly and unnecessarily restricts the activities of financial institutions.

The task of defining the term “publicly available information” is delegated by Title V to the regulatory agencies. The Proposed Rule offers two alternative definitions of “publicly available information” for public comment.¹⁶ The Proposed Rule’s definition of “publicly available information” is an integral part of the Proposed Rule because Title V excludes “publicly available information” from the definition of “nonpublic personal information.” Unfortunately, one, if not both, of the alternatives offered in the Proposed Rule do more to unfairly and unnecessarily restrict financial institutions than to define what it means for information to be publicly available.

The first option, Alternative A, would deem information to be publicly available only if it was actually obtained from public sources.¹⁷ Under this approach the fact that the information is available from public sources would be immaterial if the financial institution does not actually obtain the information from such a source. Therefore, unless the financial institution has actually obtained the information from a public source, the consumer would have the ability to opt-out of a disclosure of that information unless the disclosure would be covered by a Title V exception. The adoption of Alternative A would use Title V’s grant of authority to the regulatory agencies to define the term “publicly available” to mean something else entirely: “publicly obtained.” If Congress had wanted the regulatory agencies to define what “publicly obtained” means, it presumably would have used those words in Title V.

¹⁴ See, Cong. Rec. (Nov. 4, 1999) p. S13902.

¹⁵ See, Cong. Rec. (Nov. 4, 1999) p. S13876 (emphasis added).

¹⁶ We note that the regulatory agencies appear to be split on this issue. The FTC, the OCC, the OTS, and the FDIC, have presented both of the alternatives. The FRB and the SEC present only “Alternative B.” The NCUA, on the other hand, presents only what is Alternative A. All of the agencies, however, are accepting public comments on both alternatives.

¹⁷ Proposed Rule, § 313.3 (n)-(o)-(p) (Alternative A).

The second option, Alternative B, would exclude from the definition of “nonpublic personal information” information that is available from public sources, such as public records (including birth certificates and real estate records) and telephone books, even if the financial institution did not actually obtain the information from such sources.¹⁸ This Alternative more accurately reflects the meaning of “publicly available” as that term would ordinarily be used. Whether Alternative B would significantly differ from Alternative A in practice, however, likely will depend upon something that is unclear in the Proposed Rule, namely, how a financial institution would be required to determine whether a particular piece of information is, in fact, “available” from public sources. For Alternative B to differ significantly from Alternative A, with respect to identifying information, the Proposed Rule would need to create a presumption that such information is publicly available in a variety of sources such as telephone directories, public records, and over the Internet.¹⁹

We believe that the definition of “publicly available information” should focus, as the term implies, on the public availability of the information. At a minimum, the definition of nonpublic personal information should exclude information of a type that is publicly available, such as in telephone directories, from the Internet, etc., and that a financial institution need not determine whether any specific item of information is, in fact, individually publicly available. Is personal privacy protected by prohibiting a financial institution from disclosing a name and address which is readily available in a traditional or online telephone directory? Is personal privacy protected by prohibiting a financial institution from disclosing an individual’s ZIP code, when that information is readily available on the post office website? We do not believe that it is and we do not believe that scarce privacy enforcement resources should be diverted from the protection of nonpublic personal information in order to prevent a financial institution from disclosing information that is already publicly available from other sources. Nor do we believe that Congress intended such an outcome.

Potential ambiguities in the Proposed Rule which could impact the flow of information to and from consumer reporting agencies need to be resolved so as not to interfere with the operation of the FCRA.

We are concerned that ambiguities in the Proposed Rule arising from the implementation of § 502(c) and § 502(e)(6) of Title V could result in interpretations that could interfere with the flow of information to and from consumer reporting agencies.

Both of the ambiguities, which are discussed below, could be appropriately resolved pursuant to Section 506(c) of Title V, which provides that, with the exception of certain explicit amendments concerning administrative enforcement of the FCRA, “nothing in this title shall be construed to modify, limit, or supersede the operation of the [FCRA], and no inference shall be drawn on the basis of the provisions of this title

¹⁸ Proposed Rule, § 313.3 (n)-(o)-(p) (Alternative B).

¹⁹ If, on the other hand, the financial institution had to document the actual availability of personal information from a public source in each instance, there would be little difference between this approach and Alternative A.

regarding whether information is transaction or experience information under section 603 of [the FCRA].” The Proposed Rule incorporates this provision, but does so without any further elaboration. We request that the Proposed Rule be modified to include a discussion of the meaning of this section and clarify some ambiguities that may arise from other provisions of the Proposed Rule regarding the flow of information to and from consumer reporting agencies.

The first potential ambiguity which concerns us arises from § 502(c) of Title V,²⁰ which prohibits nonaffiliated third parties which receive nonpublic personal information from financial institutions from disclosing (in effect redisclosing) that information to other nonaffiliated third parties, unless such a disclosure would be lawful if made directly by the financial institution. If this provision were interpreted to apply to consumer reporting agencies, a consumer reporting agency would be prohibited from redisclosing the nonpublic financial information it receives from financial institutions.²¹

Such an interpretation, which would functionally bar the disclosure of consumer reports and credit header reports, is surely not something Congress intended.²² Moreover, this interpretation would clearly place § 502(c) into direct conflict with § 506(c). We request, therefore, that the Proposed Rule be modified simply to make it clear that § 502(c) does not apply to consumer reporting agencies to the extent that it might prevent consumer reporting agencies from redisclosing nonpublic financial information in consumer reports and credit header reports to nonaffiliated third parties.

The second ambiguity which we hope the final rule will clarify arises from the relationship between § 506(c), the § 502(e)(6) exception for consumer reporting agencies, and the Proposed Rule’s use limitation on information obtained pursuant to that exception.²³ Section 502(e)(6) provides an exception to the general rule established in §§ 502(a)-(b) for disclosures that are: “(A) to a consumer reporting agency in accordance with the Fair Credit Reporting Act, or (B) from a consumer report reported by a consumer reporting agency.” In addition, § 313.12(b)(2) of the Proposed Rule provides that a nonaffiliated third party “may use nonpublic personal information about a consumer that [it] receive[s] from a nonaffiliated financial institution in accordance with an exception under §§ 313.9, 313.10 or 313.11 only for the purpose of that exception.” Section 313.11 of the Proposed Rule includes the consumer reporting agency exception.

When read together, §502(e)(6) and the Proposed Rule’s use limitations might be interpreted to restrict the ability of consumer reporting agencies to disclose credit header information to nonaffiliated third parties because of the Proposed Rule’s flawed

²⁰ Proposed Rule § 313.12(b)(1).

²¹ This would be the case if credit header information were not excluded from the definition of “nonpublic financial information.”

²² Section 502(e)(6) of Title V provides an exception to the general rule established in §§ 502(a)-(b) for disclosures that are: “(A) to a consumer reporting agency in accordance with the Fair Credit Reporting Act, or (B) from a consumer report reported by a consumer reporting agency.” This provision is restated in § 313.11(a)(5) of the Proposed Rule. Therefore both Title V and the Proposed Rule clearly envision the use of nonpublic personal information in consumer reports.

²³ This provision is restated in § 313.11(a)(5) of the Proposed Rule.

definitions of nonpublic personal information and publicly available information, discussed previously. We believe that such an outcome would conflict with § 506(c) because the disclosure of credit header information independently of a consumer report has been recognized by the FTC and the courts as being permitted by the FCRA.²⁴ We also note that the disclosure of credit header information has been a matter of industry custom and usage for many years. Congress is well aware of the status of credit header information and if Congress had intended to alter the settled law and practice regarding the disclosure of credit header information, it certainly would have done so explicitly.²⁵ It has not done so.²⁶ As a result, we suggest that the Proposed Rule be revised to make it clear that consumer reporting agencies may continue to disclose credit header information and the clients of consumer reporting agencies may continue to use such information.

Equifax appreciates the opportunity to submit comments on the Proposed Rule. Please contact me if you have any questions about our submission.

Sincerely,



John A. Ford
Vice President, Privacy and External Affairs
Equifax Inc.

²⁴ See, “TRW Agrees To Settlement Prohibiting Similar Practices”, FTC Press Release (Jan 12, 1993). The DC Circuit Court of Appeals has taken judicial notice of this consent decree. See, Trans Union Corporation v. FTC, 81 F.3d 228, 232, n.1 (DC Cir. 1996). See, also, Ali v. Vikar Management Limited, 994 F. Supp. 492 (S.D.N.Y. 1998); Dotzler v. Perot, 914 F. Supp. 328 (E.D. Mo. 1996); Gomon v. TRW, 28 Cal. App. 4th 1161 (Cal. Ct. App. 1994).

²⁵ The potential conflict between § 506(c) of Title V and § 502(e) of Title V arises not from congressional action, but from the excessively broad definition of “nonpublic financial information” included in the Proposed Rule. As discussed above, the legislative history indicates that congressional intent was to limit this definition to information that was intrinsically financial, if the Proposed Rule did so, the potential conflict between § 506(c) and § 502(e) would not exist.

²⁶ Several bills have been introduced in the 105th and 106th Congresses to alter the status of credit header information, but have not been enacted. During the 105th Congress, Senators Dianne Feinstein (D-CA) and Charles Grassley (R-IA) introduced legislation, S. 600, that would have amended the FCRA’s definition of a consumer report to cover credit header information (Section 2 of the bill was entitled “Confidential Treatment of Credit Header Information”). A companion bill containing the same credit header information language, HR 1813, was introduced in the House of Representatives by Representative Jerry Kleczka (D-WI) and 74 cosponsors. Representative Kleczka included this credit header language in another measure, HR 1450, he introduced in the current Congress.