

VIA FEDERAL EXPRESS

experian

Experian
505 City Parkway West
Orange, CA 92868

714 385 8296 Telephone
714 938 2513 Facsimile
@experian.com

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



Subject: Comments on Proposed Gramm-Leach-Bliley Act Regulations,
16 CFR part 313

Dear Mr. Clark:

Experian Information Solutions, Inc. ("Experian") submits the following comments to the notice of proposed rulemaking and related proposed rules promulgated by the Federal Trade Commission ("FTC") pursuant to Section 504 of the Gramm-Leach-Bliley Act (the "GLB Act" or "Act"). Substantially similar rules have been promulgated by the Department of the Treasury, Office of the Comptroller of the Currency ("OCC"), Board of Governors of the Federal Reserve System ("FRB"), Federal Deposit Insurance Corporation ("FDIC") and Department of the Treasury, Office of Thrift Supervision ("OTS"). Experian offers these comments to the FTC on behalf of itself and its affiliates. In order to facilitate uniformity, a courtesy copy of these comments will also be provided to the OCC, FRB, FDIC and OTS (sometimes collectively with the FTC, the "Agencies").

Experian, as operator of a credit reporting system regulated under the Fair Credit Reporting Act (15 USC § 1681 et seq., the "FCRA"), is a member of the Associated Credit Bureaus, Inc. ("ACB"), as well as the Individual Reference Services Group ("IRSG"). Affiliates of Experian involved in direct marketing are likewise members of the Direct Marketing Association ("DMA"). The ACB, IRSG and DMA have separately commented or will soon comment on the proposed rules, noting in detail the profound

negative affect the proposed rules would have in matters such as fraud prevention, consumer identification and verification, and direct marketing. While Experian will not reiterate the evidence presented by these groups, it fully supports and agrees with their comments. The detrimental impact of the rules as proposed on traditional and electronic commerce cannot be overstated.

I. THE SCOPE OF THE PROPOSED RULES IS OVERLY BROAD

A. The Proposed Rules Ignore the Clear Congressional Intent to Regulate Only "Financial" Information.

The central purpose of Subtitle A of Title V of the GLB Act is the protection of "nonpublic personal information." Congress comprehended that the definition of this term would necessarily dictate the scope of the Act, and carefully defined nonpublic personal information as "personally identifiable *financial* information - (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution."¹ GLB Act § 509(4)(A)(emphasis added). The FTC must give credence to this definition in promulgating rules, and has fundamentally failed to do so.

Excluded from the definition of *financial* information is "publicly available information, as such term is defined by the regulations prescribed under Section 504." GLB Act § 509(4)(B). No fair reading of the Act can lead to the conclusion that the only data not covered by the Act is "publicly available information," yet this is the approach adopted in the proposed rules. The starting point of the Act itself is data that is *financial*.² In the

¹ We note in passing the FTC's example under this subpoint of data contained in a credit report. We are unaware of how this information can lawfully be redisclosed by a financial institution separate and apart from the operation of the GLB Act, with the sole exception of affiliate sharing pursuant to the FCRA.

² This is confirmed in the colloquy between Senators Gramm and Allard set forth at Cong. Rec., Nov. 4, 1999, p. S13902, in which Senator Gramm confirmed that "nonpublic personal information" was intended to apply only to information that "describes an individual's *financial* condition." (emphasis added) The "publicly available" exception was clearly meant to allow use of financial data contained in public real estate filings, court records and the like.

FTC's rearrangement of the statutory passage, the proposed definition of "personally identifiable financial information" removes the term "*financial*" entirely as a qualifier of the term "*information*." The effect is to ignore the phrase "financial" altogether, such that any and all data given to a financial institution is covered by the Act, the sole exception now being "other than publicly available information." This excessively broad interpretation of the definition causes all personally identifiable data, no matter how mundane, no matter how far removed from the consumer's "financial" condition, to fall within the restrictions of the Act, unless it is actually obtained (under Alternative A) or could be obtained (under Alternative B) from publicly available sources. Under the Agencies' proposed rules, if a bank gives away toasters to attract depositors and in the account application affords a choice of toaster colors, the bank's knowledge of the color preference of its customers is regulated "financial" data. Congress simply could not have intended such an absurd result.

If Congress had desired to regulate all data except publicly available data, it would have simply so stated in the Act. Congress took pains not to do so, providing a clear definition. Indeed, as pointed out in the notice of proposed rulemaking, Congress knows how to regulate non-financial data such as medical data. In the GLB Act, Congress chose to regulate only *financial* data. The FTC cannot ignore the clear intent of Congress and treat the phrase "financial" as mere surplusage. With respect to the FTC's invitation to comment on the definition of "personally identifiable financial information," we respectfully suggest that the term is not in need of definition; reliance instead on the intrinsic meaning of "financial" without more is adequate, appropriate, fair and logical. With suitable examples, the FTC's job would be done and the intent of Congress fulfilled. No matter how well intentioned, it is not the role of the FTC to turn a financial privacy bill into an omnibus privacy bill.

B. Accepting the Flawed Definitional Scheme as Proposed, the FTC Should Adopt the Alternative B Definition of "Publicly Available Information."

Neither of the alternative definitional schemes comports with Congressional intent, and neither is appropriate, as discussed above. Of the two flawed choices, Alternative B adheres more closely to the legislative

intent. Yet effort must still be made within the proposed rules to make meaningful the exception for "publicly available information." The FTC invites comment, for instance, as to whether a financial institution would have to undertake reasonable procedures to establish whether the data was actually available from public sources. The definition and related examples should instead make plain that data "of the type" specified should be considered publicly available, without more. Name, address and other identifying data is ubiquitous, and should be recognized as always being publicly available. Even the fact of a customer relationship with a bank is, in the most common sense, "publicly available." Every time one uses a credit card, writes a check or uses an automated teller, the relationship is apparent to all involved.

In addition, in the notice of proposed rulemaking the FTC delineates the types of "publicly available information" (public records and filings, widely distributed media and the like) which may be used to remove information from the purview of the Act. We note that the qualifiers on internet data in particular make little sense. If available to the general public over the internet, such data must be by definition "publicly available," no matter whether a password or similar restriction is in place. The analogous requirement in the bricks and mortar world would be to suggest that data available in the local library is not "publicly available" if one must first obtain a library card to obtain access to it. So long as anyone who wants to register, etc. can access the data on an internet site, it should be considered publicly available.

C. The Definition of "Publicly Available Information" Should Be Expanded.

Indeed, as noted below with respect to sanctioned credit reporting industry operations, there is ample precedent for a wider set of data to be considered "non-financial." The FCRA deals with collection and dissemination of data similar to that covered by the GLB Act. The FTC and the courts, in interpreting the FCRA, have long recognized that identifying data, such as name, address, telephone number, age, social security number and similar identifiers can be used and disclosed as such by a consumer reporting agency without restriction under the FCRA. A similar blanket exemption for all "identifying data" would also be appropriate under the GLB Act and the

proposed rules. Under § 509(4)(C) of the GLB Act, of course, a simple list of such identifying information could not be disclosed without notice and opt out if the list was derived from *financial* information. The intent of Congress to parallel the operation of the FCRA, where a list of all consumers with mortgage loans with a given financial institution, or deposits valued over \$10,000, may constitute a series of credit reports (one on each consumer on the list), is clear. But the over-expansive definition of "nonpublic personal information" adopted by the FTC, coupled with the failure to have a meaningful definition of "publicly available," improperly makes the § 509(4)(C) provisions of the Act meaningless.

Longstanding consumer reporting industry practice, supported by the FTC and the courts, views the data contained in a consumer reporting database on a given consumer in two basic categories: "above the line" data, or identification data, and "below the line" data, consisting of payment history and other sensitive financial information. Experian, like the other national consumer reporting databases, makes two uses of identifying data on consumers contained in its consumer reporting database. First, it uses such data to enhance the accuracy of marketing lists.³ Second, it uses and licenses the use of such data to create individual reference products, in turn utilized to prevent fraud, locate, verify and identify consumers and similar uses. The benefits of these uses are detailed fully in the comments offered by the trade associations and self-regulatory groups noted above, but briefly stated include detecting and preventing identity theft and fraudulent insurance and benefit claims, locating criminals and witnesses, locating "deadbeat" parents, verifying the identity of campaign donors, locating medical research participants and organ donors, and dozens of other important uses. Identification tools are increasingly important in electronic commerce to prevent fraud and realize the full potential of the internet.

The Act provides that "a nonaffiliated third party that receives from a financial institution nonpublic personal information under this section shall not . . . disclose such information to any other person that is a nonaffiliated

³ As noted in the FTC's opinion in In the Matter of Trans Union Corporation, Inc., Docket No. 9255, <http://www.ftc.gov>, at 12, Experian does not create marketing lists based on any underlying financial data, but merely uses header data as a source of best address and identifying data.

third party of both the financial institution and such receiving party, unless such disclosure would be lawful if made directly to such other person by the financial institution." GLB Act § 502(c). Under the FTC's extremely narrow definition of publicly available information, a credit reporting agency might be restricted from providing some (under Alternative B) or all (under Alternative A) identification products (not credit reports) from its database. For all of the reasons cited by the IRSG, DMA and other commentators, the FTC ought to adopt a definition of personally identifiable financial information that comports with Congressional intent, and thereby eliminate this issue. Barring this, pursuant to GLB Act § 504(b), the FTC has the ability to include additional exceptions to subsections (a) through (d) of GLB Act in its regulations. In order to protect the valid and beneficial uses of all types of data reported to consumer reporting agencies, the FTC should grant specific exception to the provisions of GLB Act § 502(c) with respect to all data in a credit reporting database.⁴ Indeed, barring adequate revisions to the definition of nonpublic personal information, such an exception is required under the Act, as discussed below.

D. The Definition of "Financial Institution" Should be Refined

The definition of "financial institution" in the Act is extremely broad. The Act defines "financial institution" as "any institution the business of which is engaging in financial activities described in section 4(k) of the Bank Holding Company Act of 1956." GLB Act, § 509(3)(A). Under this section, the Federal Reserve Board has determined that financial activities include credit bureau services. The definition of the Act is simply repeated in the proposed rules. As a result, some consumer reporting agencies may be financial institutions.

The purpose of including consumer reporting agencies as "financial institutions" is unclear. At best, such inclusion would impermissibly modify

⁴ It bears repeating that in no case is header data released by Experian with any acknowledgment that the individual to whom the report pertains is (or is not) a customer of a financial institution, other than tradeline data in a regulated consumer report. Experian receives data from many sources, including public record and data from non-financial institutions, and the fact that a name exists on our file and is accessed for reference purposes or carried over to our direct marketing database carries no connotation that the individual has a relationship of any kind with a regulated financial institution.

the operation of the FCRA by somehow imposing obligations under the Act not already imposed by the FCRA. But if a financial institution does not provide financial products or services to consumers, the substantive provisions of the Act cannot apply. These types of entities generally would still be restricted with respect to the disclosure of information received from a financial institution, as a "nonaffiliated third party." For these reasons, it would be entirely consistent with the Act if the definition of financial institution were limited to those institutions that provide financial products or services to consumers. Thus, the definition of financial institution could be:

"Any institution the business of which is providing financial products or services to consumers by engaging in activities that are financial in nature as described in section 4(k) of the Bank Holding Company Act of 1956."

The final rules should then make clear that the definition excludes institutions that provide information or products to consumers in order to comply with other federal, state or laws, rules or other applicable legal requirements under the exception in GLB Act § 504(e)(8). Thus, the term "financial institution" would not cover consumer reporting agencies that provide consumers with copies of their consumer reports under the FCRA. Although this result is implicit in § 504(e)(8), it should be made clear in the definition of "financial institution."

E. "Personally Identifiable" Does Not Include Unattributed and Encrypted Data

The joint notice of proposed rulemaking of the Agencies other than the FTC requests specific comment "on whether either definition of 'nonpublic personal information' would cover information about a consumer that contains no indicators of a consumer's identity." Clearly, no data without indicators of identity should be or could be covered by the proposed rules. The Act's definition of "nonpublic personal information" is "*personally identifiable* financial information." There simply is no disclosure of personally identifiable information when data is provided to a third party without attribution to a consumer. In interpreting the FCRA, the FTC has long recognized that the provision of data in this manner does not constitute

a credit report under that act, and does not raise the privacy concerns that the FCRA, like the GLB Act, is intended to address. *See*, Federal Trade Commission Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act, 16 CFR Part 600, p. 18810. If the information is not personally identifiable, what possible harm could result? Similarly, the proposed rules must recognize that information without indication of consumer identity is not non-public information for purposes of the Act. Provision of data in such a manner for marketing analysis is wholly appropriate. Moreover, it is vital that the provision of such data be unimpeded for purposes of risk model validation and the like; any restrictions would impinge on the safety and soundness of the banking system. The FTC should encourage the other Agencies to adopt rules uniform with the FTC's interpretation of the FCRA in this area.

Likewise, data that is encrypted (whether account number or otherwise) where the recipient has no "key" to the encryption should not be considered "disclosed" within the meaning of the Act. This is clear with respect to GLB Act § 502(d) as it relates to account numbers, but the concept should be part of a larger exclusion from "non-public personal information." Specifically with respect to 502(d), as noted in the notice of proposed rulemaking, Congress encouraged the Agencies to create rules allowing the use of account numbers in coded form, or where the consumer specifically authorizes the use. Sensing unspecified risk in third party access to coded account numbers, the Agencies failed to allow even this circumscribed use.⁵ Utilization of encrypted account number is important in a myriad of vital account processing functions. The Agencies should, at the least, take the Congressional guidance on this issue and craft rules facilitating this use. Finally, informed, express authorization of the use of account number should always be an exception to the prohibition.

⁵ Efforts to prevent access to a consumer's account without the consumer's knowledge or consent should be more direct than this general prohibition.

II. THE PROPOSED RULES MAY NOT MODIFY THE OPERATION OF THE FAIR CREDIT REPORTING ACT

A. The Restrictions on Reuse Are Too Broad As They Apply to Consumer Reporting Agencies.

As previously noted, the proposed rules are open to interpretation that alters the operation of the FCRA with respect to data held in consumer reporting databases, despite the Congressional mandate in § 506(c) of the Act that "nothing in this title shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act." Further, the FCRA has long been interpreted to allow marketing and individual reference uses of identification data, some of which is contributed by financial institutions regulated by the Act. Indeed, Experian's use of identification data in its direct marketing file is specifically sanctioned by an Agreed Order Amending Consent Order entered between Experian's predecessor, TRW Inc., and the FTC on January 14, 1993 (the "Order"). This U.S. District Court Order states, in pertinent part, that Experian is free to create marketing lists from its consumer reporting database using "name, telephone number, mother's maiden name, address, zip code, year of birth, age, any generational designation, social security number, or substantially similar identifiers, or any combination thereof." The FTC has recently reiterated this view of the operation of the FCRA.⁶ The FTC cannot, in the face of § 506(c) of the Act, seek to limit the activities of Experian or any similarly situated consumer reporting agency through regulation under the Act. Under the Alternative A definitions as proposed, evidently no data could be transferred from a consumer reporting agency outside of a credit report without compliance with the notice and opt out provisions. Even under Alternative B, data other than name and address might be restricted, in contravention of the current operation of the FCRA, which allows the uses described herein.

Experian gathers identifying data in its consumer reporting database from many sources. Subscribers, including both "financial institutions" within the definition of the Act and non-financial institutions, contribute this data along with financial, or "tradeline," data. Experian also gathers

⁶ See In Re Trans Union, (March 1, 2000).

data from a number of public record sources, including bankruptcy records and other public records, and state child welfare enforcement agencies. This data is compiled for a particular consumer, with analysis of the identifying data with respect to currentness and accuracy. The result is homogenized identification data from numerous sources that conveys no information about any financial relationship (or, indeed, about whether the consumer has any financial relationships at all, given the use of public record and non-financial institution data). This data can be linked to financial data to create a credit report or used simply as a source of "best address" for reference service products or target marketing. Congress clearly did not intend to limit these activities in the Act.

B. The Proposed Rules Alter the Operation of the Affiliate Sharing Provisions of the FCRA.

The FTC's interpretation of § 503(b)(4) improperly alters the operation of the FCRA. Section 603(d)(2)(A)(iii) of the FCRA requires that affiliates clearly and conspicuously disclose that information will be shared. GLB § 503(b)(4) requires that the initial and annual disclosures required by § 503(a) include the FCRA § 603(d)(2)(A)(iii) required disclosures, "if any." The FCRA disclosures are required at only one time. No amendment to FCRA § 603(d)(2)(A)(iii) is effected by GLB Act § 506(a) or (b), and all other modifications, limits, etc. are specifically disclaimed in § 506(c) of the Act. Therefore, the FTC may not require annual notices of disclosures under § 603(d)(2)(A)(iii).

III. THE MECHANICS OF DISCLOSURES AND OPT-OUT MUST BE SIMPLIFIED

A. Data Properly Released By a Financial Institution Should Not be Restricted Under Subsequent Opt Out.

Any interpretation of the proposed rules that a third party that receives data from a financial institution is effectively precluded from redisclosing the data is overly broad. The FCRA operates to allow a financial institution in possession of a consumer report (data akin to that covered under the GLB Act) to give one time notice and opportunity to opt out. After the transfer of that report to an affiliate, the data is no longer a credit report and no longer regulated. Individual financial data contained in

a credit report is particularly sensitive. Notwithstanding this sensitivity, after notice and opt out, this information can be shared with an affiliate and once shared is evidently no longer regulated at all, in complete compliance with the FCRA. The proposed rules reach an anomalous result that apparently restricts the onward transfer of nonpublic personal information, even after notice and opt out. Since the data governed by the GLB Act is no more sensitive than that governed by the FCRA, we must conclude that this interpretation of the Act is overly broad. Data released by a financial institution pursuant to appropriate notice describing potential onward transfer should not be subject to retroactive opt-out.

B. The Proposed Rule With Respect to the Content of Notices Regarding Disclosures Permitted By Law Is Adequate.

We note that the proposed rules require financial institutions to provide what will prove to be an extremely detailed notice with respect to information collected and disclosed. This notice would only be further complicated by including any statute regarding information provided pursuant to the Act's exceptions. The simple statement provided in the rules that a financial institution makes other disclosures "as permitted by law to non-affiliated persons" is wholly adequate, and will serve to reduce consumer confusion.

We hope that you will carefully consider these comments on the proposed rules. If you have any questions or would like to discuss any comments further, please feel free to contact either Jason Engel at 847-598-8194 or me at 714-385-8296.

Sincerely



Thomas A. Gasparini

Senior Vice President and General Counsel

cc: Communications Division
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219
Attn: Docket No. 00-05

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th and C Streets, NW
Washington, DC 20551
Attn: Docket No. R-1058

Robert E. Feldman
Executive Secretary
Attn: Comments/OES
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Manager
Dissemination Branch
Information Management & Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attn: Docket No. 2000-13