



CALIFORNIA ASSOCIATION OF REALTORS®

March 31, 2000

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

2000 OFFICERS

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*Executive Vice President/
State Secretary*

RE: Notice of Proposed Rulemaking, Privacy of Consumer Financial Information

Introduction

These comments are presented on behalf of the nearly 95,000 members of the California Association of REALTORS® (C.A.R.). C.A.R. is a trade organization representing real estate licensees engaged in the business of real estate brokerage, mortgage brokerage, property management, escrow services and appraisal. As such, the organization has a keen interest in the subject of this rulemaking.

Our members understand the daunting task that faces the Federal Trade Commission and applaud the Commission's effort to implement the provisions of the Gramm-Leach-Bliley Act (G-L-B). We appreciate the opportunity to address

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the questions asked in the proposed rule about the appropriateness of the proposed definitions and proposed timelines for implementation.

Summarizing, we feel that (1) the proposed rule oversteps the bounds that were laid out by the Act and intended by Congress, (2) the role of state law and regulation of the real estate settlement service industries needs to be assessed and explicitly addressed in any final regulations, (3) the implementation of the regulation as drafted would place an overwhelmingly onerous and costly burden on an industry composed primarily of small firms, and (4) the proposed six month timeline for implementation of the new requirements is not sufficient to educate the impacted industry players and place the necessary compliance procedures in place.

The Definition of a Financial Institution and Financial Activity

C.A.R. believes that the definition of who is a financial institution, what is a financial service and what is a customer relationship is so overly broad that real estate licensees engaged in a range of activities such as selling a home to a family, brokering a loan, managing property, providing escrow services or appraising a home will be defined inappropriately as a financial institution providing a financial service.

The proposed rule rightfully defines a financial institution as “any institution the business of which is engaging in the financial activities as described in section 4(k) of the Bank Holding Company Act of 1956”. As the rule’s footnote indicates, the activities that are considered financial in nature include lending, insuring, financial /investment advisory services, and the issuance, underwriting, and dealing in securities. Notably, real estate brokerage, mortgage brokerage, appraisal services and real estate settlement services are not included in the language of section 4(k).

The proposed rule commentary then goes on to add to the definition of a financial activity “those activities that the Federal Reserve Board has found to be closely related to banking, or usual in connection with the transaction of banking or other financial operations abroad.” Included in this list of activities are mortgage brokerage, leasing, real property appraisal and real estate settlement services. It is these additions that we believe are problematic and pull the real estate industry into the definition of a financial institution.

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California REALTORS® do not believe that the real estate industry was the intended target of the G-L-B legislation. We urge the Commission to examine the legislative history of the bill and reconsider its proposed rule.

As evidence of Congress' intent, we would point out that during the debate of the Gramm-Leach-Bliley Act in the Banking Committee, attempts were made to include real estate in the list of activities considered "financial services". In all cases, those efforts were defeated. Given these proactive decisions, it is clear that it was not the intent of Congress to include real estate as a covered financial service.

The proposed rule, however, includes real estate brokerage and many of the real estate services typically provided by a real estate brokerage in the definition of a financial services firm when it defines real estate settlement services as financial activities. Real estate brokerage, mortgage brokerage, appraisal and escrow services are commonly referred to as real estate settlement services.

Many real estate brokerage firms have responded to the client's request for a 'one stop shop' of home buying services and offer their clients the mortgage brokerage, appraisal and escrow services needed to complete the purchase of a home. As a result, the proposed rule would have the effect of requiring every real estate licensee and/or broker to conform with the privacy provisions that were intended by Congress to apply to banks, insurance and securities firms.

The proposed rule's logic for including these functions in the definition of a financial activity is that they are allowable non-banking functions in which a bank may engage. We would argue that while real estate settlement services may be a function in which a bank may engage in some circumstances, to infer that firms that perform real estate settlement services are financial institutions is an inappropriate bit of logic. Just because a bank can perform a given type of service does not necessarily make that service when performed by another firm a financial service that was intended to be covered by the G-L-B Act.

Privacy Protections in Existing State Agency Law

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We would also like to point out that the privacy protections that G-L-B imposes on the financial community have already been the practice and the law in the real estate brokerage industry in California and other states for some time now.

In California, real estate brokers may act as sales brokers, mortgage brokers, and escrow service providers under their real estate brokers licenses. In all three capacities they are subject to state law and regulation by the California Department of Real Estate (DRE). Among the many state laws and regulations, which must be observed, are agency law and its attendant regulations.

California agency law imposes a fiduciary responsibility to a client on a real estate broker/licensee. As such, the broker/licensee is required by agency law to maintain the confidentiality of any information given them by their client unless specifically released from that obligation by the client for a particular pre-approved purpose.

C.A.R. believes that the imposition of the proposed rules provisions on the licensee sales, mortgage brokerage, property management, appraisal and/or escrow practitioners would be redundant and provide no new privacy benefits to the consumer who is already protected by California agency law.

Given the protections already inherent in state laws and regulations, we would hope that a regulatory exemption to the new disclosures would be provided for those firms already subject to existing and more protective state laws that prohibit firms or individuals from disclosing confidential private information.

Real Estate Is a Creature of State Law and Regulation

As the previous discussion the confidentiality requirements of state agency law indicates, real estate law is a creature of state law. As such the real estate industry, like the insurance industry, is heavily regulated at the state level.

The proposed rule acknowledges the state regulatory framework that exists in the insurance industry in the definitions of a government regulator in Sections 313.3(l) and 313.11(a)(4) but fail to provide a similar acknowledgement for the real estate industry's state regulatory framework.

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C.A.R. believes that if the Commission does in fact go ahead with the rule in any form that would impact the mortgage brokerage, real estate sales, property management, escrow or appraisal professions, it is imperative that (1) the role of state law in regulating these professions be explicitly acknowledge in the regulatory language and (2) the appropriate exemptions to the non-disclosure language be made for regulatory purposes for the these professions as has been made in the case of the insurance industry.

Scope of the Regulatory Burden Imposed

The commission should be cognizant that the proposed rule would also impose a significant, costly and burdensome reporting requirement on the licensee population imposed on the real estate firm. Under the proposed regulations, a separate initial disclosure statement could be generated by the licensee who act as real estate sales agent, mortgage broker, escrow agent, or appraiser for a sales transaction. In addition, since mortgage brokers are not the lenders but intermediaries, it would be logical to assume that another loan related disclosure would have been generated.

An average of five separate disclosures could be generated for each sales transaction if the rule is implemented as proposed. In California alone, 538,000 home sales occurred in 1999. Consequently, as many as 2,690,000 new disclosure statements would have been generated had the regulations been in effect in California last year. Nationwide, over 5 million transactions were complete in 1999; using the same methodology, over 25 million additional disclosures would have been generated from existing home sales transactions.

To gauge the magnitude of the total number of new disclosure statements that would be required by the proposed rule, the annual disclosure requirement must also be considered. If a covered firm has been in contact with a consumer in the prior 12-month period, an annual privacy statement must be furnished. Estimating the magnitude of these disclosures is less straightforward and must consider with the type of licensee who must disclose and the nature of their customer relationships.

Real Estate Sales Agent/Broker. Real estate sales is a relationship business. It is common practice for sales licensees to keep in touch with past clients in order to maintain a pool of likely future clients. So while the formal relationship may end when a home sale closes, the informal relationship with the consumer may continue as follow up calls are made to help the new homeowner settle in, to assist an old client who has encountered problems with the home, his loan, insurance, or other home-related

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situations or just to remind a client that the licensee is still in the business and available to help with any future transaction.

The rule as proposed would not provide the real estate sales agent with a definitive answer to the question of when does the sales licensee's customer relationship end and when the annual disclosure requirement ends. For an agent, who actively markets themselves to past clients, the potential number of disclosures under a strict reading of the proposed rule could be an onerous and costly undertaking.

Escrow Agent/Appraiser. In the case of the licensee who acts as an escrow agent or appraiser, the questions of who constitutes a consumer with whom the licensee has an ongoing relationship is also problematic. Even though both the licensee escrow agent and licensee appraiser have some connection to the mortgage transaction, their involvement is transitory. Does it make sense for them to be subject to an annual disclosure for the life of the mortgage in which they have been involved? Does it make sense for them to be subject to even a second disclosure if they have had some nominal contact with the consumer in the twelve month period after the close of the loan, say for purposes of a refunding excess funds or to provide a copy of the appraisal submitted? We think not but again the wording of the proposed rule is not clear if an exception would be allowed.

Property Manager. In the case of the licensee who acts as a property manager, the licensee is also subject to the confidentiality duties resulting from the agency relationship. The requirements of the regulation would again provide no new protections but would impose an implementation burden on the property manager.

Mortgage Broker. In the case of the licensee who serves as a mortgage broker, the rule would seem to imply that the licensee would have an obligation to provide an annual disclosure until such time as the loan is terminated. We would argue that while that approach would be the appropriate one for a lender who funds or services the loan, it is not the appropriate one for the mortgage broker who simply brokers the loan.

Unlike the funding or servicing lender, the mortgage broker does not necessarily have an ongoing relationship with the borrower and as a third party to the loan transaction has no ability to determine whether or not the loan is still in existence. In this case, the mortgage broker is more akin to the sales agent, escrow officer and appraiser whose point of contact with the borrower is the transaction.

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In each of the situations outlined, a number of questions must be answered if it is the intent of the Federal Trade Commission to include the real estate industry in the scope of the proposed regulations. Without clarification, compliance will be extremely problematic for the real estate industry and all its component professionals.

Finally, C.A.R. would hope that the Commission will recognize that the burden that would be imposed on the brokerage industry would be particularly onerous given that the burden would fall on an industry with is still very much the purview of the very small firm and individual entrepreneur.

In 1999, for example, 60% of all real estate brokerage firms had fewer than five sales agents and 77% had fewer than 10 agents. Firms with eleven to twenty agents constituted 11% of the total while only 12% of firms had more than twenty agents. For small entrepreneurs working with a mobile population of independent contractor agents compliance would constitute a costly burden.

The Proposed Implementation Timeframe

In section 313.16, the proposed rule outlines proposes a November 13, 2000 effective date. In essence, this timeline allows only 6 months for the affected firms and participants to become educated as to what their new duties are, to put in place the necessary procedures and train their employees or, in the case of the real estate brokerage industry, its independent contractors.

C.A.R. believes that given the potential wide-ranging scope of this regulation this timeline is unrealistic if it is to be applied to the real estate industry. We would propose a nine or twelve month implementation timeframe as more realistic given the needs to educate an industry characterized by many, small firms and independent contractors.

Conclusions

In conclusion, the California Association urges the Commission to exercise the broad regulatory authority granted it under the Gramm-Leach-Bliley Act and exempt real estate professionals not associated with lending institutions from the compliance with the proposed regulation implementing the Act. Despite the Act's broad definition of financial institutions and financial activities, the Act was intended to provide a framework for the modernization of the financial services industry not the commercial, non-financial activities embodied in the real estate brokerage industry.

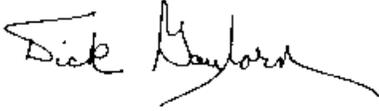
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We thank you for the opportunity to share the views of the California Association of REALTORS®. Should you have any questions, please feel free to contact Marcia Salkin, C.A.R.'s Director of Public Policy at 213.739.8272 or at marcia_salkin@car.org.

Cordially,



Richard Gaylord
President

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