



NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

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March 31, 2000

Secretary
Federal Trade Commission
Room H, 600 Pennsylvania Street, NW
Washington, DC 20580

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

Dear Sir/Madam:

On behalf of the National Association of REALTORS® and its affiliates, I am pleased to submit comments regarding the Proposed Rulemaking related to Title V of the Gramm-Leach-Bliley Act (“GLB Act” or the “Act”). The 750,000 members of the National Association of REALTORS® (“National Association”) are involved in all aspects of the commercial and residential real estate businesses including brokerage, appraisal, mortgage brokerage, property management, building and development and counseling. The vast majority of these members are, unlike the firms that gave rise to the concern regarding consumer privacy, individual entrepreneurs who operate as independent contractors. A prime motivator for these comments is to highlight the distinctions between the financial services and commercial businesses and demonstrate Congress’ clear intention to focus Title V of the Act on the new financial service conglomerates.

As the largest association of real estate professionals in the United States, the National Association monitored the progress of the financial services modernization legislation as it moved through the Congress and participated in shaping relevant provisions of the Act. Though the National Association’s attention was focused on issues relating to mixing banking and commerce, we were also concerned about the direction of the consumer financial privacy debate as it became intertwined with financial services modernization. Although the consumer privacy issue did not arise until late in the development and debate on financial services modernization, the same concern that caused the National Association to work to preserve the prudent separation between financial services and commercial business in the Act, also gave rise to the concern regarding how the new combinations of banking, securities and insurance services could adversely impact the ability of individual consumers to maintain their privacy and integrity. Therefore, the National Association is concerned about the implementation of the proposed Gramm-Leach-Bliley Act privacy regulations, particularly regarding their application to the “non-traditional” businesses that are described in the commentary to the Proposed Rule and which are so clearly outside the intended scope of the Act.

REALTORS[®] Committed to Consumer Privacy

Protecting consumer financial information privacy is an important issue throughout the various aspects of the real estate industry including brokerage, appraisal, property management and counseling. One of the National Association’s intentions in commenting on the Proposed Rule is to reinforce our industry’s

commitment to protecting the confidentiality and privacy of real estate clients. REALTORS^{®1} already accept the importance of consumer privacy in the real estate industry. In fact the importance of the relationship between the real estate practitioner and the consumer or customer is an historic imperative among the REALTORS[®]. Since the adoption of “agency” as the primary relationship between REALTORS[®] and their clients, the principle that REALTORS[®] must respect the confidentiality of information provided to them by their clients and not use that information inconsistent with the interests of those clients is a longstanding cornerstone of membership in organized real estate².

Gramm-Leach Bliley Act Focused on Financial Services, Not Commercial Businesses

The National Association does not believe Congress intended the real estate business to be subject to the privacy disclosure requirements found in the GLB Act. Although there are several bases for that belief, the National Association will focus only on the most obvious ones raised by the issues emphasized in the **Federal Register** notice.

The National Association is concerned about interpretations regarding the scope of the Act and, therefore, the Proposed Rule. It is apparent that this “scope” is an issue of significant concern to the Commission since the first point for comment on the Proposed Rule addresses this issue. There the commentary states: “The Commission invites comment on whether the activities as set forth in the Board regulations (many of which are listed in notes 2-3 below) may be interpreted narrowly under the language of those regulations.” The same theme is repeated later concerning the comments on Section 313.3j of the rule where it states:

Due to the wide range of activities that are defined as financial in nature under Section 4(k) of the Bank Holding Company Act, the definition of “financial institution” encompasses a broad spectrum of businesses. ... The Commission recognizes that the plain meaning of the [GLB] Act mandates this broad scope and requests general comment on this interpretation as well as comment on the application of the Rule to what might be considered the nontraditional financial institutions included in its scope.

Real estate brokers, appraisers and property managers are not financial institutions, nor are they significantly engaged in a financial activity. Certainly, the process of buying real property often involves a credit transaction and the making of a loan. It also often involves the purchase of property insurance and many of the loans made to purchase the property are eventually securitized. All of these functions, however, are performed by banking, insurance and securities industries. While those industries are within the intended scope of the GLB Act, the functions of a real estate professional are not.

¹ REALTOR[®] is a registered collective membership mark which may be used only by real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS[®] and subscribe to its strict Code of Ethics.

² Standard of Practice 1-9: The obligation of Realtors[®] to preserve confidential information (as defined by state law) provided by their clients in the course of any agency relationship or non-agency relationship recognized by law continues after termination of agency relationships or any non-agency relationships recognized by law. Realtors[®] shall not knowingly, during or following the termination of professional relationships with their clients: (1) reveal confidential information of clients; or (2) use confidential information of clients to the disadvantage of clients; or (3) use confidential information of clients for the REALTOR[®]'s advantage or the advantage of third parties unless: a) clients consent after full disclosure; or (b) Realtors[®] are required by court order; or (c) it is the intention of a client to commit a crime and the information is necessary to prevent the crime; or (d) it is necessary to defend a Realtor[®] or the REALTOR[®]'s employees or associates against an accusation of wrongful conduct.

The role of the real estate professional is the sale and marketing of real estate – bringing buyers and sellers together. The real estate broker/agent identifies properties of interest to the consumer or provides services concerning the sale and marketing of the real property. For this reason, real estate professionals' functions are commercial, more akin to that of the local store accepting a credit card for a purchase, than it is a banking activity. Just as the retail merchant selling consumer dry goods who uses a layaway or deferred payment plan should not be considered to be engaged in an activity related to banking, so should his neighbor who is providing the same consumer with information regarding real estate, appraising or properties under management.

Proposed Rule Scope

The careful consideration of the scope of the Proposed Rule proposed by the National Association is well founded, as the scope of the Act is easily confused because Congress did not address privacy issues with the same thoroughness as it did removing the barriers between banking, brokerage and insurance. This is despite the fact that Congress also clearly felt that the purposes behind the Act and the Bank Holding Company Act were important to understanding the scope of the GLB Act. This conclusion regarding the intent of Congress is unavoidable in light of the new Section 4(k) of the Bank Holding Act introduced in Section 103 of the Act.

As a part of the new Section 4(k) the Federal Reserve Board and the Treasury are charged with responsibility for determining whether an activity is financial in nature or incidental to a financial activity (the same issue discussed above). The first factor to be considered in determining whether an activity is financial in nature or incidental to a financial activity (Section 4(k)(3) of the Bank Holding Company Act) is the purposes of the Bank Holding Company Act and the GLB Act. Although as noted neither Act expressly provides for its purpose, the purpose of both is clear. The Bank Holding Company Act delineates and limits lines of business for financial holding companies. As amended by the Gramm-Leach-Bliley Act, this purpose of the Bank Holding Company Act remains in tact and applicable.

After years of failed attempts, Congress repealed Sections 20 and 32 of the Banking Act of 1933, the Glass-Steagall Act. Banking, securities brokerage, and insurance businesses are freed to affiliate and exercise new investment powers, with deliberately chosen restrictions. Significantly, throughout the protracted legislative attempts to reform the Glass-Steagall Act real estate was repeatedly asserted by the representatives of the financial services industries to be a new activity in which financial institutions should be permitted to engage. Congress, however, continually and consistently resisted the efforts to include real estate activities among the new financial services activities. In fact, Congress engaged in a thorough debate on the issue and decisively voted in both chambers to exclude real estate development and investment as a permissible activity for national banks' financial subsidiaries. There were attempts at various points in the House Banking Committee debate to include real estate brokerage as a permissible new financial services activity. The Committee endorsed none of these attempts.

Congress addressed these concerns about the mix of banking and commerce in its debate about financial institutions and commercial firms owning each other and issues related to the commercial-owned unitary thrifts. Ultimately the conclusion must be that Congress had no intention to regulate real estate activities under the provision of the Act because those activities were always considered by Congress to be commercial, not financial, in nature.

The implication of the conclusion is unmistakable, the scope of the bill is to be interpreted broadly within the banking, securities, and insurance companies, including activities, but not businesses, which are so closely related to banking or managing or controlling banks as to be a proper incident thereto. As suggested in the commentary on Section 313.1, the traditional areas of banking, insurance and securities can generally be found to be described in Section 4(k)(4)(A-E) of the Bank Holding Company Act. There

can be little disagreement about the descriptions contained therein. However, the limited purposes of the Acts do not support a broad reading of Section 4(k)(4)(F) to reach beyond the traditional business lines of banks, insurance companies and securities firms.

In this regard Representative Jim Leach, Chairman of the House Banking Committee, addressing the ABA Leadership Council spoke specifically to the scope of the Gramm-Leach Bliley Act. Rep. Leach said, “ ...let me stress that it is important to note what the bill does not do. While opening financial markets to greater competition between banks, insurance companies and securities firms, it forestalls the mixing of commerce and banking and plugs the loophole in current law that breaches this principle.”³

To disregard the clear distinction between the real estate business and financial institutions perceived by the Congress and dilute the effectiveness of the limitation imposed by Title V by extending them to a myriad of businesses outside the traditional financial services would only frustrate the purposes sought to be serviced by Congress in adding these provisions to the Act.

Definitions – “ Financial Institution” and “ Financial Activities”

The Proposed Regulation adopts the definition of “financial institution” that is used in the GLB Act. Any institution that engages in the activities described in section 4(k) of the Bank Holding Company Act, with certain exceptions noted and set out in the Proposed Rule, is a financial institution. The Commission views an entity as a financial institution “the business of which is engaging in financial activities” only if it is significantly engaged in a financial practice. The Commission invites comments to clarify “significant engaged”. Simply stated, the National Association of REALTORS[®] believes that real estate activities are not financial and therefore real estate professionals are not “significantly engaged” in a financial activity.

The National Association believes that in order to give effect to the Congressional direction regarding determining whether an activity is incidental to banking, the elements must be viewed as limited to functions, not additional lines of business outside the traditional understanding of banking, insurance and securities as described in 4(k)(4)(A-E). The basis for this belief lies in the Act itself, the various definitions it contains, and the existing regulations.

For example, incidental activities are limited in the regulation to those “in connection with making, acquiring, brokering or servicing loans....” 12 CFR 225.28(b)(2). This clearly requires that in engaging in the permitted “non-banking” functions, a banking company must be doing so in connection with making a loan. Therefore, real estate appraising is not incidental to banking unless performed in connection with evaluating a property for lending purposes and property management is not incidental to banking unless it is in connection with owned properties. Only where the function is provided in connection with another financial activity of the bank is the function encompassed under the terms of the Act. Thus, a bank might perform an appraisal on a property that it was making, acquiring, brokering or servicing a loan. In doing so, the bank would be obligated by the terms of the Act. However, property appraisal firms would not be included within the scope of the Act and banks could not be in the business of property appraising except as an incident to making, acquiring, brokering or servicing of a loan. The same would be true concerning the other traditional real estate industries represented by property management and real estate settlement services⁴.

³ Representative James A. Leach, Chairman, House Banking and Financial Services Committee. “Excerpts of Remarks Before ABA Leadership Council, March 28, 2000. Pentagon City Ritz-Carlton.” Press Release, House Committee on Banking and Financial Services.

⁴ Real estate settlement services is a term used in 12 CFR 225.28 in listing the functions, which if performed in connection with making, acquiring, brokering and servicing loans may be determined to be incidental to banking

Among the services included in settlement services is the making of federal insured loans so some of the functions obviously includes banking activity, but it also includes other functions such as real estate brokerage, termite inspections and surveying. These other functions are not normally a part of the making or extending of a loan, although they may all be a part of a transaction that includes a loan. Simply being associated with a transaction, a part of which involves a consumer obtaining a loan from a third party, should not be sufficient to cause a party to be significantly engaged in the financial activity.

Also important is the definition of an activity that is incidental to a financial activity found in Section 4(k)3(A-D). The impact of the purpose of the Act has previously been discussed, but similar conclusions must be drawn from subparagraphs B through D. Financial holding companies compete in business activities described in the amended Bank Holding Company Act and do not include lines of business outside banking, insurance and securities. Similarly, a holding company's competing effectively, delivering information, and making emerging technologies available all relate to the traditional functions of financial services found in the banking, securities and insurance industries and do not suggest those additional lines of business outside that traditional scope.

The existing regulation also calls for a narrow interpretation of type of activities which will be considered incidental to banking activities. In determining what might be acceptable "non-banking" functions for bank holding companies the regulation always referred to them as activities not businesses. The Bank Holding Company Act has and should be interpreted as continuing to prohibit the expansion of these companies into businesses restricted by that Act except to the extent the affiliation of banking, insurance and securities businesses are expressly authorized by the GLB Act. It can not be separate from the making, acquiring, brokering or servicing of that loan.

Finally, another definition requires the narrow application of the GLB Act. In Section 509 of the GLB Act, a financial institution is defined as one the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956. In doing so, the definition does not specify where in section 4(k). A conflict is created by this direction because Section 4(k)4 contains a lengthy list of items which shall "for purposes of this subsection" "be considered to be financial in nature", but a second list, which is not restricted to the subsection, appears in Section 4(k)5 and the Board is required to define those activities as being financial in nature. The lists are not mutually exclusive, so the only way they can be reconciled is by looking for their common elements. The common elements found in these two sections are the traditional elements of financial transaction and not the non-financial, commercial businesses represented by the non-traditional businesses referred to by the Commission in its Proposed Rule.

Real Estate Commerce Is Already Regulated

If the Proposed Rule were interpreted to apply to real estate brokers and agents, together with the non-financial professionals associated with the sale and marketing real estate, namely appraisers and property managers, it would not result in any new consumer protection. These independent contractors would be required to perform GLB Act privacy disclosures that would duplicate existing national standards of practice, state and federal regulation, and general principles of agency law affecting how real estate professionals handle confidential information.

activities. The term, adopted from the Real Estate Settlement Procedures Act (12 USC 2601, et seq.), includes a multitude of services.

For nearly ninety years, the NATIONAL ASSOCIATION OF REALTORS[®] Code of Ethics and Standards of Practice governed the professional activities of real estate brokers and agents who are members of the National Association. Standard of Practice 1-9 lays out the REALTOR[®] obligation to preserve the confidential information of their clients.

REALTORS[®] do gather limited information, some of it financial, from clients with whom they are working, but they do so only in connection with the provision of a specific service, be it brokerage, property management, appraisal or some other facet of the business. Much of this information is only general and not even confirmed as accurate, such as when a prospective buyer or tenant provides income information for purposes of prequalification. The only purpose in receiving this information is to assist in determining the types of properties provided to the consumer, not to create the type of dossier which was of concern to Congress. If the real estate professional sought to confirm the information through, for instance, credit reports, the real estate business would then be subject to the terms of the existing laws regulating that conduct. There are, therefore, significant protections for consumer confidential information with which real estate professionals must already comply whether it be based upon membership in the National Association or through other state and federal regulation. The inclusion of real estate professionals under this rule does not serve the purposes of the Act.

The National Association urges the Commission to exercise its broad regulatory authority under the Gramm-Leach-Bliley Act and exempt real estate professionals, not associated with lending institutions from the compliance with the proposed regulation implementing Title V of the Act. Despite the broad definition of financial institution and financial activity, the Act clearly addressed the framework for modernizing the financial services industry. Commercial, nonfinancial activities were excluded from the scope of the Act. Moreover, the matter of consumer financial information privacy and the disclosure requirements that would permit financial services industry consumer to opt-out of having nonpublic information shared with nonaffiliated companies was aimed squarely at the financial conglomerates, not commercial companies.

REALTORS[®] do gather confidential information, some of it financial. Nevertheless, real estate professionals already comply with significant protections for consumer confidential information.

Real Estate Appraisal

The National Association has 32,000 real estate appraiser members. These appraisers are subject to the National Association of REALTORS[®] Code of Ethics and Standards of Practice. Professional real estate appraisers are further subject to the Uniform Standards of Professional Appraisal Practices (USPAP), which includes specifically direction on treating data confidentiality.⁵ It should be noted that appraisers, given the nature of their business, do not share information with a third party. Any single family real estate appraisal performed for a loan on a property insured by the Department of Housing and Urban Development, or that will be sold to Fannie Mae or Freddie Mac requires a **Statement of Limiting Conditions and Appraiser's Certification** that treats disclosure of information gathered.⁶ The appraiser must execute a Form 1004B/Form 439 with each appraisal performed. An appraiser can make no changes to the certification, but may make additional certifications on separate a separate form. Acceptable additional certifications include those required by state law and those related to the appraiser's continuing education or membership in an appraisal organization. The appraiser may not add additional limiting conditions.

⁵ See Statement of Appraisal Standards No. 5 (SMT-5), Confidentiality. 2000 Uniform Standards of Professional Appraisal Practice. The Appraisal Foundation, Washington, D.C.

⁶ Fannie Mae Form 1004B; Freddie Mac Form 439

Property Management

The National Association's affiliate, the Institute of Real Estate Management (IREM), is a professional association of more than 9,000 members engaged in the management and development of real estate assets. Like other commercial activities of the real estate business, property management is not a "financial activity" under the proposed rule. According to 12 CFR 211.5(d), the Federal Reserve Board considers, "Leasing real or personal property, or acting as agent, broker, or advisor in leasing real or personal property, if the lease serves as the functional equivalent of an extension of credit to the lessee of the property". However, property leases are not the equivalent of an extension of credit. A lease, even if granted on an annual (or longer) basis, is simply an agreement to pay -- not an extension of credit. Payment for services rendered are required before commencement of those services. For example, in a residential lease, payment may be required on the first of the month -- for housing to be provided in that month. If payment is not received, the resident's lease may be terminated, and housing services denied. Therefore, a lease cannot be considered an extension of credit, since payment is expected before the delivery of services.

Furthermore, under 12 CFR 225.28 the Federal Reserve Board considers a company engaged in leasing real and personal property a financial institution, only if the leases exist on a "non-operating basis." According to 12 CFR 225.28, a non-operating lease is one in which the lessor does not, directly or indirectly, operate, service, maintain, or repair the leased property at all during the lease term. Therefore, because rental property providers grant leases on an operating basis, they would not be considered a financial institution by the terms of the rule.

In terms of the use of nonpublic personal information, property management professionals may use this type of information when determining if a prospective lessor is qualified for the lease. This information gathering may include obtaining a copy of the consumer's credit report, or soliciting input from consumer-provided references regarding payment history. However, any transactions of this kind are strictly regulated by the Fair Credit Reporting Act, and any further government regulation would be duplicative.

Further Impact on Real Estate

The Commission has broad regulatory authority to implement the proposed rule on the privacy of consumer financial information. The Proposed Rule may well, however, impose regulatory burdens on real estate professions that are duplicative and unnecessary given confidentiality and privacy protection requirements currently governing real estate practitioners. Indeed, critics of mortgage lending and real estate sales often argue that the process is more difficult because of the voluminous number of forms and mounds of paper, which vitiate the meaning and effectiveness of disclosures and certifications to consumers. Additional regulations adding to this paperwork would not provide any benefit to the consumer.

As proposed, the Rule sets out specific consumer-related disclosure for independent real estate professionals duplicate of disclosures already required under the federal Fair Credit Reporting Act, the Real Estate Settlement Procedures Act, and the Truth In Lending Act and other federal disclosure requirements. As a practical matter, the very nature of the real estate sales and marketing businesses tends to limit consumer information gathering to the transaction at hand. There is little subsequent use by real estate professionals or others of the information gathered. The independent contractor status of the overwhelming majority of real estate professionals and the competition engendered work against any desire to share information with other parties.

Conclusion

The National Association urges the Commission to apply a narrow interpretation of the regulation under Section 313.1, Purpose and Scope. Despite the broad definition of “financial institution” and “financial activity”, the GLB Act pertained to the financial services industry – banking, securities brokerage and insurance. The Act does not posit a mix of banking and commerce; it deliberately separates financial activities from commercial businesses. Clearly, real estate sales and marketing are commercial activities. The real estate product – the sale and marketing of a real estate property -- is not financial, but commercial. Though financing facilitates the transaction, real estate professionals, unless they are performing mortgage brokerage functions, are not financial institutions, nor are they engaging in a financial activity.

Under Section 313.3 of the Proposed Rule, the Commission requested comment on whether “significantly engaged” in a financial activity should be specifically defined. The National Association would suggest that “significantly engaged” should be defined. Even as the real estate industry consolidates and there is the trend to larger companies, real estate sales and marketing remains largely carried out by independent contractors. This independent contractor status sets real estate professionals apart, essentially making each one a sole proprietor of their own business. This is in stark contrast to the vast size of financial conglomerates that are the subject of the Act and whose information gathering practices are the intended subject of Title V.

The impact of privacy disclosure as contemplated by the Proposed Rule is extremely broad, indeed broader than was ever intended by Congress. By judiciously exercising its regulatory authority the Commission can properly reshape the Rule to conform to the language of the Act. The legislative history of the debate of the Act as discussed herein, clearly establishes that the reach of the consumer financial privacy initiative was intended to be limited to types of firms which were the subject of the Act in order to address the fear of large, impersonal financial service conglomerates marketing consumer financial information to nonaffiliated third parties. This would not include real estate businesses, which are only tangentially related to the financial services industries. The National Association therefore urges a narrow interpretation of the scope of Rule consistent with the language and intent of Congress, which would exclude real estate professionals who are not affiliated with a financial services firm.

The National Association of REALTORS® appreciates the opportunity to comment on the Proposed Rule.

Sincerely,

Jerry Giovaniello
Vice-President