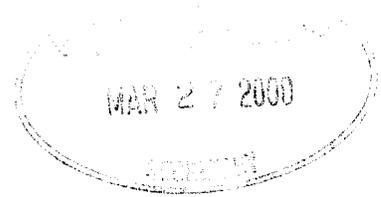




## COMMERCIAL LAW LEAGUE OF AMERICA®



### COMMENT OF THE COMMERCIAL LAW LEAGUE OF AMERICA ON FEDERAL TRADE COMMISSION PROPOSED REGULATIONS:

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

March 27, 2000

The Commercial Law League of America ("CLLA"), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance actively engaged in the fields of commercial law, bankruptcy and reorganization. Its membership exceeds 4,600 individuals. The CLLA has long been associated with the representation of creditor interests, while at the same time seeking fair, equitable and efficient treatment of all parties in interest. The CLLA has testified on numerous occasions before Congress as experts in fields related to creditor interests.

The CLLA has carefully reviewed and considered the effect of the provisions of the recently proposed 16 C.F.R. 313 (the "Proposed Rule"), along with the accompanying analysis (the "Analysis") of the Federal Trade Commission (the "Commission") implementing the provisions of Title V of Pub. L. 106-102, the Gramm-Leach-Bliley Act (the "Act"). Title V of the Act requires financial institutions to safeguard the privacy of information relating to its consumer customers, requires notice to consumer customers of those safeguards, and limits the ability of financial institutions to disseminate nonpublic personal information.

The foremost concern of the CLLA is that the Proposed Rule allows an interpretation of the Act that defines collectors of delinquent debt as "financial institutions" whose interactions with consumers constitute "customer relationships," thereby triggering the full panoply of notice requirements. This is particularly true with respect to collection agencies, including attorneys, that collect past due amounts on behalf of financial institutions ("collection agents") as opposed to collectors who actually purchase delinquent accounts from financial institutions ("debt purchasers").

The CLLA urges the Commission to revise the Proposed Rule to expressly exclude collection agents from the definition of "financial institution." A correlative revision is also required to ensure that the interaction between collection agents and account debtors is not subject to an interpretation that a "customer relationship" exists. Should the Commission determine that distinguishing collection agents from debt purchasers for purposes of the Act is not feasible, the CLLA suggests that the prudent alternative is to expressly require that neither be considered financial institutions having customer relationships with account debtors. Under either alternative, the position of the CLLA is consistent with the intent of both the Act and the Proposed Rule, resolves conflicts



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inherent within the Proposed Rule, and avoids the flood of litigation that is otherwise certain to occur.

The Act itself does not define “financial institution” to include collectors of delinquent debt, whether they be collection agents or debt purchasers. Instead, that term is defined as “any institution the business of which is engaging in activities that are financial in nature as described in section 4(k) of the Bank Holding Company Act of 1956” (the “Bank Act”). In the past, however, the Commission has interpreted the Bank Act to include collectors of delinquent debt and clearly contemplates their inclusions within this Proposed Rule.

Whether an entity is a financial institution is only half of the equation for purposes of the Act because that term must be read in conjunction with the definition of a “customer relationship” to determine whether compliance with initial privacy notice requirements is necessary. In other words, if a consumer does not have a customer relationship with a financial institution, then notice is required only where there is an intent to disclose nonpublic personal information to nonaffiliated third parties.

A “customer relationship” is established under the Proposed Rule when there is a continuing relationship between the financial institution and a consumer under which the financial institution provides one or more financial products or services to the consumer that are to be used primarily for personal, family or household purposes. Here, the Commission’s intent to distinguish between collection agents and debt purchasers emerges. In its Analysis, the Commission reasons that a customer relationship exists when collectors of delinquent debt purchase accounts from a financial institution for the purpose of collecting past due amounts because the consumer would have a credit account with the collector. On the other hand, the Analysis expresses the Commission’s belief that no customer relationship exists when a collection agent simply attempts to collect amounts owed to the financial institution.

Unfortunately, the Proposed Rule does not implement the Commission’s intent to distinguish collection agents from debt purchasers and its Analysis does not have the force of law. The Proposed Rule simply recites the definition of a financial institution verbatim from the Act, and provides an example that is so broad that the term is seemingly without limitation. Thus, in interpreting the Proposed Rule, reference would likely be made to 12 C.F.R. 225.28, with the result that collection agents would be brought within the ambit of the Act’s definition. The same interpretive result would likely occur with respect to debt purchasers. Of course, it is through an onslaught of litigation that these and other questions will be raised and answered.

Previous determinations by the Commission would fail to lend clarity to the distinction that is desired, for the Commission itself has considered collection agents to be no



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different than debt purchasers in other contexts. For example, the Commission has previously determined that debt purchasers are to be treated the same as collection agents for purposes of the Fair Debt Collection Practices Act (the "FDCPA"). In the context of the FDCPA, however, including debt purchasers effectuated the statutory intent, for it closed what could be interpreted as a loophole in the FDCPA protections. It would, indeed, be anomalous to create a statutory framework designed to ensure that consumers and legitimate debt collection agencies are not harmed by the actions of unscrupulous collectors, only to allow an exception based on nothing more than the manner in which the account was acquired.

The Commission's determination under the FDCPA could easily be applied to the present context if presented for review in a court of law. Indeed, given the expansion of liability under the FDCPA, this result is likely, irrespective of the intent expressed in the Commission's Analysis or that of the Act itself. The Commission's clear guidance now would avoid a similar expansion of liability under the Act. Such guidance is essential because, unlike the FDCPA, the intent of the Act does not even reach the activities of collection agents or, it could fairly be argued, debt purchasers.

The driving force behind Title V of the Act is consumer choice. The notice requirements with respect to privacy policies are intended to allow potential customers the opportunity to review, in advance, the policies of a financial institution and to make an informed choice as to which financial institution they will patronize. A potential customer who considers privacy of his or her information to be of significant importance may compare the privacy policies of various institutions and voluntarily select the one that is perceived as affording the greatest protection. The Act's privacy provisions are also likely compelled by the unparalleled access financial institutions will have to customer information given the significant expansion of services such institutions may provide under the Act. *See e.g.*, Cong. Rec., Nov. 4, 1999, p. S13877, 13879.

The relationship in the context of debt collection, which may be characterized only as adversarial, simply does not arise in this manner. The only role the account debtor plays in the process is in creating the delinquency; the freedom to select from among various collectors is not a choice that is available to the account debtor. Informed, voluntary decisions, so important in the development and enactment of Title V of the Act, are wholly removed from the process once the financial institution enlists the services of a collection agent to enforce payment obligations on a past due account.



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Nor does the actual interaction between collection agents and account debtors bear any similarity to the type of customer relationship contemplated by either the Act or the Proposed Rule. The goal of debt collection is the enforcement of payment obligations previously established between financial institutions and their account debtors. Inherent in this goal is finality, not continuity. This is particularly true with respect to collection agents, which do not acquire the rights to an account as do debt purchasers and will have no ongoing interaction with the consumer once the obligation is either honored or charged off. Even if the account is purchased, the account debtor is likely, if not certain, to have no further right to make use of the account, and the debt purchaser has no interest in reactivating such rights after the delinquent sums are recovered.

Specific language of both the Act and the Proposed Rule further compels the result that collection agents are not financial institutions having customer relationships with account debtors. For example, the initial disclosure must be made prior to the point at which the customer relationship is established. This not only emphasizes the primacy of voluntary and informed consumer decisions, it creates a requirement that is impractical in the context of debt collection because it is the financial institution that determines when and with whom the collection agent will interact.

In addition, an explicit exception is created that permits a financial institution to disclose nonpublic personal information as necessary to effect, administer, or enforce a transaction in connection with servicing or processing a financial product or service requested or authorized by the consumer. The Proposed Rule defines this permissible disclosure as including lawful or appropriate methods required for the enforcement of the financial institution's rights. Thus, the financial institution that has a customer relationship may disclose nonpublic personal information to collection agents, without regard to initial notice requirements. This demonstrates that collection agents are not financial institutions under the Act, for it is an odd result that the recipient of excepted information should become bound by initial notice requirements based on disclosure that may freely be made. At the same time, however, it is not clear that a collection agent would be entitled to this same protection to effectuate collection because no rights are acquired in the accounts that would bring the collection agent within the enforcement exception.

Finally, the Commission is urged to consider two aspects of the Proposed Rule that give rise to concerns that are not broadly applicable to collection agents. The first relates to the effect of the Proposed Rule on attorneys when their practice includes the collection of debt. Attorneys as debt collectors certainly must be excepted from the Proposed Rule's expansive definition of a financial institution. Law firms are not financial institutions and no stretch of the imagination can interpret them as being so. This is especially true in light of the fact that a customer relationship simply cannot exist between the attorney and the account debtor. To interpret the Act otherwise would be at odds with state ethical



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rules governing attorneys, whose duty it is to zealously represent the entity to whom a debt may be owed. Imposing on an attorney a concurrent duty to the adversary of the client creates, by statute, an impermissible conflict of interest, particularly since the attorney's ethical obligations may require otherwise impermissible disclosure in order to advocate the client's interest.

Debt purchasers also face a unique problem under the Proposed Rule. Moving well beyond the language of the Act, the Commission implies that commercial debt may fall within the ambit of the Proposed Rule. There can be no credible dispute that commercial debtors are not intended to be protected by the Act, yet the definition of "consumer" could lead to that very result. According to the Analysis, an individual will be deemed to be a consumer of a financial institution if that institution purchases the individual's account from some other institution. The Proposed Rule must ensure that an obviously commercial account cannot be transformed into a consumer account solely by virtue of its purchase from a financial institution.

It must be stressed that the CLLA does not suggest that collectors of delinquent accounts, whether collection agents or debt purchasers, should be fully excepted from the reach of the Act because that is not the intent. To the contrary, the CLLA fully recognizes that if an entity purchases accounts from a financial institution, only some of which are delinquent, that entity would be a financial institution having customer relationships with respect to each account purchased. A similar result is true if a collection agent intends to disclose nonpublic personal information of consumers to nonaffiliated third parties. The restrictions on the reuse of nonpublic personal information are also fully applicable. Collectors of delinquent debt should not, however, be defined as financial institutions *per se* because, as the foregoing demonstrates, that conclusion is not within the intent of the Act.

In conclusion, the CLLA urges the Commission to give further consideration to the Proposed Rule and its effect on collection agents. At a minimum, the Commission should consider the intended and practical consequences of both the Act and the Proposed Rule on collectors of delinquent debt generally and collection agents, including attorneys, in particular. The CLLA welcomes the opportunity to provide assistance or comments on the necessary revisions.

Respectfully submitted,

Daniel J. Goldberg, President  
Commercial Law League of America