



March 31, 2000

VIA E-MAIL

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

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

Dear Mr. Clark:

The National Association of Mortgage Brokers (NAMB) appreciates the opportunity to comment on the referenced proposal (the Proposal), which the Federal Trade Commission (the Commission, or FTC) published on March 1, 2000. NAMB is the nation's largest organization exclusively representing the interests of the mortgage brokerage industry. NAMB now has more than 14,000 members and 39 state affiliates nationwide. NAMB provides education, certification, industry representation, and publications for the mortgage broker industry. NAMB members subscribe to a strict code of ethics and a set of best business practices that promote integrity, confidentiality, and above all, the highest levels of professional service to the consumer.

Today, the nation enjoys an all-time record rate of homeownership. While many factors have contributed to this record of success, one of the principal factors has been the rise of wholesale lending through mortgage brokers. Mortgage brokers have brought consumers more choices in loan programs and products than they can obtain from a branch office of even the largest national retail lender. Brokers also offer consumers superior expertise and assistance in getting through the tedious and complicated loan process, often finding loans for borrowers that may have been turned down by other lenders. Meanwhile, mortgage brokers offer lenders a far less expensive alternative for nationwide product distribution without huge investments in "brick and mortar."

In light of these realities, it is no surprise that consumers have increasingly turned to mortgage brokers. Today, mortgage brokers originate more than sixty percent of all residential mortgages in America. The rise of the mortgage broker has been accompanied by a decline in mortgage interest rates and closing costs, an increase in the homeownership rate, and an explosion in the number of mortgage products available to consumers. These positive developments are not mere coincidences. They would not have been possible without the advent of wholesale lending through mortgage brokers.

The Proposal would implement Title V of the Gramm-Leach-Bliley Act (the Act) for those entities subject to the Commission's enforcement jurisdiction. NAMB's membership comprises almost exclusively mortgage brokers that are not depository institutions and thus fall under the Commission's regulatory authority. Accordingly, we submit the following comments on the FTC's Proposal.

Definition of “Non-Public Personal Information”

The Proposal offers two alternative definitions of “non-public personal information” (NPPI). Under one, personal information about a consumer would be considered public, and therefore outside the scope of the Proposal’s restrictions on disclosures of NPPI, only if it actually was obtained by the financial institution in question from public sources (Alternative A). Under the other approach, such information would be considered public as long as it is available from public sources, regardless of how the financial institution in question actually obtained it (Alternative B). NAMB strongly favors Alternative B.

The Act’s purpose is to protect and to vindicate consumers’ reasonable expectations of privacy in their personal information when financial institutions come into possession of it. We see a prerequisite that institutions actually obtain such information from public sources as inconsistent with the plain meaning of “public.” If information is available from public sources, it is in fact public information, irrespective of how any particular person should have obtained it. And, accordingly, a consumer has no reasonable expectation of privacy in information that is available from public sources, irrespective of how any particular person obtained it.

We also note that the FTC would create an inconsistency among the various federal regulators’ interpretations of the Act if it should implement Alternative A. At least two of the federal agencies that have published proposed rules included no alternatives, but rather proposed only one definition that coincides with the Commission’s Alternative B. This regulatory inconsistency would be contrary to Congress’s intent, expressed in Section 504(a)(2) of the Act, that the federal regulators issue regulations that are “consistent and comparable.” For this reason, as well as the plain meaning of the word “public,” we urge the Commission to adopt Alternative B.

Issues Directly Relating to Mortgage Brokers

A. What Constitutes “Disclosure”

The Proposal does not explicitly define “disclose” or “disclosure” for purposes of the requirement that the initial notice be given to any consumer before disclosing NPPI to non-affiliated third parties. Mortgage brokers routinely provide detailed information about consumers who have applied to them for mortgage loans to several possible sources of funding. Such transmittals of loan application files are a necessary part of their business process. From a mortgage broker’s perspective, then, it is crucial that such routine transmittals not trigger the initial notice requirements in proposed section 313.4(a)(2). In fact, we believe that the exceptions in proposed section 313.10(a)(1) and (2) reasonably can be read as applying to routine submission for underwriting of loan application packages by mortgage brokers to potential funding sources. In all such cases, by virtue of having submitted a loan application, the consumer has “requested or authorized” the “transaction” or the “financial product or service” that the broker seeks to “effect” or to “process.” If the Commission agrees with our reading, we support these exception provisions, although we urge the Commission to make this understanding more explicit. If, on the other hand, the Commission does not intend the exceptions as we interpret them, we urge it to reconsider. It would be an absurd result if mortgage brokers were required to provide the disclosure before presenting applications to wholesale lenders, when clearly that is what the consumer intends in making a loan application with a broker in the first place.

B. Establishment of a "Customer" Relationship

The Proposal provides that a "customer" relationship arises when a financial institution enters into a "continuing" relationship with a consumer whereby it provides financial products or services. Under the examples given, a financial institution that "undertake[s] to arrange or broker a home mortgage loan" enters into such a continuing relationship. This language clearly embraces the normal activities of mortgage brokers. We urge the FTC to reconsider this aspect of the Proposal.

The chief ramification of a customer relationship is that the financial institution must provide the initial notice, even if it has no intention of disclosing NPPI to any third party, and must provide it again annually during the "continuation of the customer relationship." Proposed sections 313.4(c) and 313.5. It is a strange result to require mortgage brokers to provide such notices under their particular circumstances, because they rarely remain in a continuing relationship for more than a year with any one consumer. Their situation is more analogous to the explicit exception provided in the Proposal for financial institutions that "sell the consumer's loan and do not retain the rights to service that loan." Proposed section 313.3(h)(2)(ii)(B). This reflects what actually occurs between a mortgage broker and consumer, from a practical standpoint, even when the mortgage broker never owns the loan and thus cannot "sell" it to the lender/servicer. We ask that the FTC reconsider including the transaction between mortgage broker and consumer in the definition of "customer relationship." Such a result would not deprive consumers of anything meaningful, as they never have any expectation that their relationship with a mortgage broker will be "continuing." Moreover, a mortgage broker that actually intends to disclose NPPI to a third party still would be required to provide the initial notice.

Issues Involving the Right to Opt Out

A. Opt Out in Joint Account Cases

The FTC solicits comment on how the consumer's right to opt out of having his or her NPPI disclosed should apply in cases where there is more than one consumer in connection with the transaction. This is frequently the case with mortgage loans. We believe it would be unduly restrictive to make one consumer's opt out effective as to the other consumer on a joint application or account. We believe the Act intended each individual to be regarded as a distinct consumer; Section 509(9) of the Act defines "consumer" as an *individual* who obtains financial products or services for personal, family, or household purposes. We recognize, however, that coordinating independent opt out preferences on joint accounts may be burdensome for financial institutions. We recommend that the Commission refrain from requiring either approach, but rather allow financial institutions to determine their policy and require that they articulate it as part of the required notice.

B. "Reasonable Means"

The FTC solicits comment on whether it would be appropriate to require that a financial institution honor opt out requests exercised by any means of communication that has been established by the financial institution for any purpose. Thus, for instance, if a financial institution has a toll-free telephone number for marketing or customer support purposes, it would be required to accept opt outs through that number. We oppose this idea because of the undue

Donald S. Clark, Secretary
Federal Trade Commission
March 31, 2000
Page 4 of 4

burden it would impose. It would require financial institutions to ensure that all personnel that may receive any form of communication from consumers for any purpose are adequately trained to accept and process opt out requests. Many such individuals are specialists in various customer support functions that have nothing to do with the handling of customer databases, and there would be too great a risk of non-compliance as a result. Further, they may be in capacities that make it inappropriate for them to access and alter the databases in which opt out status is maintained. We believe it is appropriate to permit financial institutions to establish one or more means by which a consumer may opt out; this would permit financial institutions to establish systems that will handle opt out requests successfully.

Effective Date

The Proposal would provide only a six-month period for implementation before becoming effective, assuming as the Proposal does that the final rule is published by its deadline of May 12, 2000. Thus, the Proposal would establish a compliance date of November 13, 2000. The Commission solicits comment on whether this timeframe is adequate. The Proposal's requirements will necessitate the development and implementation of entirely new automated systems. For instance, customer databases will have to be expanded to include a new field for "opt out status." Procedures will have to be established for triggering and delivering the initial and annual notices and for accepting and processing opt out requests. Financial institutions also will have to devise and conduct extensive training for appropriate personnel. Finally, financial institutions will have to develop new forms for use in complying with the Proposal's notice requirements. For these reasons, we believe a one-year delay of effectiveness would be more appropriate, and we urge the Commission to reconsider the Proposal's current effective date.

* * *

We thank the Commission for the opportunity to comment on the Proposal. Overall, we believe the Proposal represents an excellent job of balancing the Act's mandates and consumers' privacy rights against industry's needs to pursue marketing and technological innovation and to avoid undue regulatory burdens. Ultimately, both ends of the balance will inure to the benefit of consumers. We ask that the Commission take our concerns and recommendations into consideration, however, in fashioning the final rule. If you have any questions about the foregoing discussion, please do not hesitate to contact NAMB's legal counsel, Robert Lotstein, of Lotstein Buckman, LLP, at (202) 237-6000, ext. 110.

Sincerely,

Michael Hindman
President