

March 31, 2000

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

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

Dear Mr. Clark:

This letter is submitted on behalf of the Missouri Higher Education Loan Authority (MOHELA) in response to the Notice of Proposed Rule Making (NPRM) on privacy of consumer financial information published by the Federal Trade Commission (FTC) on March 1, 2000. We thank the FTC for the opportunity to comment on its proposed rule.

MOHELA is a secondary market for the Federal Family Education Loan Programs (FFELP), servicer for FFELP participants and originator of alternative educational loans. This letter focuses on the proposed rules as they affect the FFELP and alternative student loan programs.

#### **GENERAL COMMENTS**

*Applicability of the Gramm-Leach-Bliley Act and the FTC's Proposed Rule to Participants in the administration of the Higher Education Act and alternative educational loans which includes Institutions of Higher Education and the Commercial Partners that Assist in the Administration of Student Financial Assistance Programs*

MOHELA does not believe that institutions of higher education are considered to be "financial institutions" under Title V of the Gramm-Leach-Bliley Act ("G-L-B Act") (P.L. 106-102). Furthermore, we do not believe that the commercial partners, private or not for profit, in their role of FFELP or alternative educational loan providers or that contract with colleges and universities to administer functions or provide funding related to student financial assistance programs should be covered by the requirements of the FTC's proposed rule.

Despite the fact that institutions of higher education are not mentioned in the legislation, the definitions in the proposed rule are so broad that they may be construed by some as being applicable to institutions of higher education and the commercial partners supporting their administration and funding of student financial aid programs. While the term "financial institution" is very broad under the Act, we do not believe that Congress intended in Title V to impose additional regulatory requirements on our Nation's colleges, universities, and their commercial partners in helping needy families pay the costs of their children's education.

The student financial aid funds awarded to eligible students by an institution of higher education are conditioned upon the students' attendance at that institution. The source of these funds may be the Federal government, state governments, private organizations, or the institution itself. These funds may be in the form of grants, scholarships, loans, employment, or tuition and fee waivers. The combination of the types of assistance and the source of that assistance is unique to each individual student.

Over two-thirds of the financial aid funds awarded by college and universities are made under Federal programs with institutions acting as fiduciaries of the Federal government. These Federal funds are held in trust by an institution and awarded and disbursed to needy students. In some cases, such as alternative

education loans, the Direct loan and Federal Family Education Loan programs (FFELP), the institution determines a student's eligibility for a federally-insured loan and then delivers the loan proceeds by crediting the student's account. The source of funds and holder of the note is the Federal government (in the case of Direct loans) or a private lender in the case of the FFELP or alternative educational loans.

As a fiduciary, an institution of higher education is not a "financial institution" as defined in Section 509(3) of the G-L-B Act because it is not an "institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956." Rather, the business of an institution of higher education is to provide education beyond the secondary school level. Any financial activities performed by the institution is subordinate to the mission of the institution. The institution's fiduciary role in the delivery of federally-insured student loans is primarily done for the convenience of the Federal government as a cost-effective means for delivering funds to needy students under Title IV of the Higher Education Act of 1965, as amended.

Many institutions of higher education utilize the services of commercial partners in administering student financial programs. These services typically involve financial data processing and transmission services, servicing institutional and Federal student loans, collection of defaulted FELP loans, other student loans and student debts owed to the institution. Institutions and their servicing agents are also required under the Higher Education Act to report to national credit reporting agencies information regarding loan defaults. Some of these activities could be considered covered by Title V and the proposed rule by the cross-reference to the Federal Reserve Board's list of activities found to be closely relating to banking (12 CFR 225.28) which makes specific reference to them. However, in these instances, the institution of higher education is simply outsourcing part of its student financial aid functions to the commercial partner, generally to achieve cost savings. Participants in the FFELP are closely regulated by the Higher Education Act of 1965, as amended. Many of the regulations (34 CFR 600 and 682) require the exchange of information among participants in order to maintain the insurance on the loans. Many alternative educational loan programs mirror these same requirements.

While these commercial entities may generally be subject to the Title V of the G-L-B Act and the proposed rule because of the cross-reference to 12 CFR 225.28, we do not believe that activities done solely to support the Higher Education Act of 1965, as amended which are administered by institutions of higher education, servicers, secondary markets and contractors should be covered by the proposed rule. Since the financial aid programs of institutions of higher education do not appear to be a "financial activity" because the college or university is not considered to be a "financial institution", then it would logically follow that if a college or university were to outsource one or more functions related to administering these aid programs, that act should not invoke the requirements of Title V. We believe that the final rule should clarify in an example that student financial aid activities are not covered.

*Duplication, Overlap and Conflict with Current Federal Rules Applying to Institutions of Higher Education and the Commercial Partners that Assist in Their Administration of Student Financial Assistance Programs*

Subtitle A of Title V of the G-L-B Act, Disclosure of Nonpublic Personal Information, limits the disclosure of nonpublic personal information about a consumer to nonaffiliated third parties and requires consumer disclosure regarding an institution's privacy policies and practices. Application of these requirements to student financial aid participants would duplicate, overlap, and, in some cases, conflict with the other current Federal requirements. Colleges and universities are already required to protect personally identifiable information of students and their parents by the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. 1232g) and its implementing regulations (34 CFR Part 99). The FERPA requirements address many of the same types of issues in Title V of the G-L-B Act and the proposed rule, and in many cases provide greater protection of privacy by not allowing disclosure of information without consent. FERPA also requires that institutions provide annual notification to students and parents of their privacy rights and the privacy policy regarding educational records. Under FERPA, a student and family's financial aid-related information is considered to be an "educational record" and subject to its limitations on disclosure.

FERPA regulations (34 CFR 99.31) allow limited disclosures of financial aid information of individuals who have applied for or received financial aid at the institution to non-affiliated third-parties for four specific purposes:

- Determination of eligibility for aid
- Determine of the amount of aid
- Determination of the conditions for the aid; or
- Enforcement of the terms and conditions of the aid.

Many institutions utilize commercial partners to service or provide the funding for their student loans. The third-party receiving this information may only use the information for these purposes. The regulations (34 CFR 99.33) prohibit the redisclosure of information. If the third party violates this requirement, the institution of higher education is barred from disclosing information to that third party for at least five years. The U.S. Department of Education is also given a number of sweeping powers to enforce the FERPA requirements.

### **SPECIFIC COMMENTS**

In addition to these general comments, we are also providing the following comments on how specific sections of the proposed rule relate to these general concerns.

#### **Part 313.1 Purpose and scope.**

Section 313.1(b) of the proposed rule specifically includes account servicers and debt collectors as "financial institutions" for purposes of the rule. However, we do not believe that the rule applies to these organizations in their role as third-party servicers and contractors to institutions of higher education in their administration and funding of the student financial assistance programs. The final rule should be clarified to reflect this.

#### **Part 313.2 Rule of construction.**

We support the "safe harbor" established in section 313.2 which considers compliance with an example to constitute compliance with the regulatory requirements. However, because the proposed rule of construction does not consider the examples to be exclusive, the broad definitions contained in the rule could be construed by some as applying to institutions of higher education with regard to their administration of student financial assistance, and to the commercial organizations that assist them in performing this activity. We believe that the final rule needs to include examples that specifically exclude institutions of higher education and commercial organizations that assist them in administering and funding student financial assistance from the regulations.

#### **Part 313.9 Exceptions to notice and opt out requirements for processing and servicing transactions.**

We do not believe that the rule should apply to organizations in their role as FFELP or alternative educational loan providers, third-party servicers and contractors to institutions of higher education in their administration and funding of the student financial assistance programs. The final rule should be clarified to reflect this.

Thank you again for the opportunity to comment. If you have any questions regarding the comments or need further clarification, please contact Ann Hollenberg at (314) 469-0600 ext. 3319.

Sincerely,

Ann Hollenberg  
Senior Vice President

