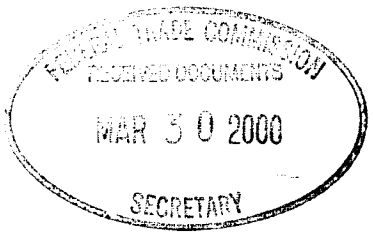


March 30, 2000

VIA MESSENGER

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

Ladies and Gentlemen:

This letter is in response to your agency's request for public comments regarding its proposed Privacy of Consumer Financial Information regulations (the "Privacy Rule") prescribed by Section 504 of the Gramm-Leach-Bliley Act, as published in the Federal Register on March 1, 2000.

The American Resort Development Association ("ARDA") is the Washington, D.C. based trade association representing the vacation ownership industry. Established in 1969, ARDA today has over 800 members, ranging from small, privately held firms to publicly traded companies and international corporations. ARDA's diverse membership includes companies with vacation timeshare resorts, private camp resorts, land development, lots sales, second homes and resort communities; however, the majority of ARDA's membership is related to the timeshare industry. ARDA appreciates the opportunity to comment upon various aspects of the proposed Privacy Rule as they would apply to the vacation ownership industry in particular as well as many other business entities that provide financing for their sales of nonfinancial products and services to individual consumers.

Summary of Comments on the Proposed Privacy Rule

We respectfully submit that the notice and opt out provisions of your agency's proposed Privacy Rule should not apply to entities such as timeshare developers whose principal businesses do not involve providing financial products and services to individual consumers and whose sole "financial activity" involves offering and providing financing in order to facilitate sales of their products and services. In such instances, especially where such financing is not being actively marketed or promoted as an alternative to loans from banks or other entities, the financial activity only constitutes an incidental or ancillary part of the entities' overall business operations. In our view, such businesses that provide financing as an accommodation to purchasers of their nonfinancial goods and services should not be regarded as being significantly engaged in financial activities and, accordingly, should not be deemed to be "financial institutions" subject to the Privacy Rule.

Should the Federal Trade Commission ("Commission") decide nonetheless to include timeshare developers and other similar entities that finance sales of their nonfinancial products and services to individual consumers within the scope of the proposed Privacy Rule, we would request, in the alternative, that the notice and opt-out provisions of the regulations be drafted in such a way as to only apply to the financial services-related activities of such entities and the information obtained and used by them in that financial activities context. Specifically, we would request clarification/ confirmation of the following:

1. Prospective purchasers of nonfinancial products, goods and services such as timeshare interests are not "consumers" based on the fact that they might request or apply for financing by the seller in the event that they elect to make a purchase. They do not become "consumers" or "customers" for purposes of the Privacy Rule until the earlier of their application for financing or their agreement to obtain financing from the seller in connection with their making a timeshare purchase.

2. Where payments for a good or service are made on an installment, monthly or other periodic basis (e.g., a lease or monthly membership fee), there is no "financial activity" engaged in or financial product or service being provided unless all or a portion of the payment consists of interest or some other type of "finance charge" as defined in the Federal Reserve Board's Regulation Z.

3. Where an individual has both a continuing financial and nonfinancial customer relationship with a business entity, as in the case of a purchaser of a timeshare interest who obtains financing from the developer, that individual ceases to be a "customer" for purposes of the Privacy Rule once the financial relationship terminates (e.g., the loan is sold to a third party or is repaid) even though the individual has a continuing nonfinancial relationship with the entity.

4. Where generalized information (e.g., name address, phone number, indication of satisfaction of minimum financial threshholds) is requested from all prospective purchasers regardless of whether a financial product or service is being provided, as in the case of a prospective timeshare interest purchaser who might either pay in cash or obtain seller financing, such information is not "nonpublic personal information" that is subject to the Privacy Rule. Only such additional more specific information that is requested by the seller or provided or obtained in connection with the financial product or service (e.g., set forth in a loan application) would qualify as nonpublic personal information.

5. In the case of a business entity that sells nonfinancial products and services to individual consumers and finances a portion of those sales, a list of that entity's purchasers and/or prospective purchasers is not "nonpublic personal information" so long as (i) the list does not designate which of those purchasers obtained financing (and would hence be "customers" under the Privacy Rule), and (ii) not all purchasers obtain financing.

As a final more general matter, we would also respectfully submit that, in our view, the Commission's inclusion of the description of Section 603(d)(2)(A)(iii) of the Fair Credit Reporting Act ("FCRA") in footnote 11 of the preamble to the proposed Privacy Rule at 65 Fed. Reg. 11179 appears to be contrary to or, at a minimum, inconsistent with the statutory mandate set forth in Section 506(c) of the Gramm-Leach-Bliley Act ("GLB Act")(and reiterated in Section 313.14 of the proposed Privacy Rule) that no inference be drawn from the privacy provisions of the Act as to whether particular types of information constitute "transaction or experience" information under the FCRA to the extent that the description sets forth an interpretation of that phrase. We do not believe that this proposed rulemaking is the proper forum in which to advance this particular reading of that other statute even though it may be nothing more than a restatement of a longstanding Commission position.

The Proposed Privacy Rule Should Not Apply to Entities That Finance Sales of Their Own Nonfinancial Products And Services to Individual Consumers as an Incidental or Ancillary Part of Their Business

The notification and opt-out requirements set forth in the proposed Privacy Rule will apply to all "financial institutions", which are defined in Section 509(3) of the GLB Act and proposed Section 313.3(j)(1) as "any institution[s] 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." In the preamble to the proposed Privacy Rule, the Commission expresses the view that an entity is a financial institution "only if it is significantly engaged in a financial activity." Proposed Section 313.3(j)(2) provides as an example of such an entity "a retailer that extends credit by issuing its own credit card directly to consumers."

Under this proposed standard as reflected in the example given, many companies in the vacation ownership industry would constitute "financial institutions" subject to proposed Part 313 because in many instances they provide financing to purchasers of timeshare interests as a means of facilitating and increasing sales. The proposed Privacy Rule would also cover practically any other entity that financed the sale of its nonfinancial goods and services to the public.

ARDA agrees with the Commission's general statement that an entity must be "significantly engaged" in a financial activity in order for it to be deemed to be a financial institution subject to the Privacy Rule. However, we do not believe that a business that provides financing for sales of its own nonfinancial goods and services and does nothing more in the way of offering financial products and services to individual consumers meets this standard. In such a situation, this incidental financing, which in our industry is done as an accommodation to purchasers of timeshare interests because of the difficulty such purchasers sometimes encounter in being able to obtain conventional third-party financing from a bank or other lender, should not cause the entity that is offering the financing to be deemed to be "in the business of" engaging in financial activities. The true character of the timeshare company's business -- developing resort properties and selling timeshare interests -- remains the same.[1]

[1] Thus, we would also take the view that a department store which offers a credit card that can only be used to make purchases from the store similarly should not be deemed to be a "financial institution" under the Privacy Rule.

ARDA acknowledges that at some point it is possible for an ancillary financial activity to rise to the level where the entity conducting the activity becomes "significantly engaged" in it. One example of this might be where a department store promotes the fact that holders of its credit card may also use the card to make purchases from other merchants. A business such as a timeshare resort developer could also become significantly engaged in a financial activity if it aggressively promoted its own financing in competition with other residential lenders and providers of credit or if it offered to make loans to those who had already made timeshare purchases -- the timeshare equivalent of a home equity line of credit secured by the borrower's timeshare interest. However, where the financing is not actively marketed and is being offered solely as an accommodation in order to facilitate and thereby increase the number of timeshare interest (or other nonfinancial) sales, the entity offering the financing cannot be said to be in that "business" and is not "significantly engaged" in financial activities as that phrase is commonly understood.

As a final matter, ARDA notes that application of the Privacy Rule to sellers of nonfinancial goods and services that finance their sales could have the very perverse and undesirable effect of causing many sellers to no longer offer this accommodation to prospective purchasers and purchasers. Such sellers, particularly where financing is provided as an ancillary service to a relatively small number of purchasers, might very reasonably conclude that the costs associated with compliance with the Privacy Rule outweigh the benefits that it derives from being able to offer financing to purchasers. Not only could the resultant absence of seller-provided financing make it much more difficult, expensive and cumbersome for people to purchase higher-cost goods and services (i.e., where checks and credit cards would not be viable means of payment and longer term financing is necessary), such lack could also make it virtually impossible for many lower- and moderate-income individuals who have no or less-than-favorable credit histories to make these types of purchases.

ARDA therefore respectfully recommends that entities such as timeshare developers that offer financing merely as an adjunct to their existing nonfinancial business and as an accommodation to purchasers in order to facilitate the sale of their own nonfinancial products and services not be included within the definition of "financial institution" in the Commission's final Privacy Rule.

Prospective Purchasers of Nonfinancial Products and Services Who May Obtain Financing from the Seller Are Not "Consumers" and Do Not Become "Customers" Until Such Financing Is Applied For or Obtained

Under Section 313.4(a) of the proposed Privacy Rule, the point at which a business entity must provide an initial notice of its privacy policies and the opportunity to opt out before sharing information about an individual with any nonaffiliated third party is (i) in the case of a "customer," when the customer relationship is established, or (ii) in the case of a "consumer", prior to the time that "nonpublic personal information" is disclosed to a nonaffiliated third party. A "consumer" is defined in Section 509(9) of the GLB Act and Section 313.3(e) of the proposed Privacy Rule as "an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes. . . ." Once a "consumer" enters into a continuing customer relationship with a financial institution pursuant to which the institution provides one or more financial products or services, the individual becomes a "customer" as defined in Section 313.3(h)(1) of the proposed Privacy Rule.

As an alternative to its request that sellers of nonfinancial goods and services which provide financing be exempted from the definition of a "financial institution," ARDA seeks confirmation from the Commission, either in the final Privacy Rule or the preamble to the rule, that prospective purchasers of timeshare interests and other nonfinancial products and services who may be interested in obtaining financing for such purchases do not become either "consumers" or "customers" until such time as they apply for financing or enter into a loan agreement with the seller. The purpose of this request is to obtain assurance that the privacy notice and opt out provisions of the proposed Privacy Rule will not apply to an individual who either (i) has not yet made a purchase of a timeshare interest or applied for financing or (ii) makes a purchase and either pays cash or obtains financing from another source (without having applied for or obtained credit from the seller).

Under proposed Section 313.3(e)(1), the point at which an individual becomes a "consumer" is when he/she obtains a financial product or service. The Commission has defined the term "financial service" in proposed Section 313.3(k)(2) to include an entity's "evaluation, brokerage or distribution of information that [it collects] in connection with a request or an application from a consumer for a financial product or service." Thus, as indicated in the example given in proposed Section 313.3(e)(2)(i), one who applies for credit can be a "consumer" even if no loan is ever made.

A prospective purchaser, prior to his/her decision to purchase a timeshare interest, does not fit within either definition. First, the individual has not "obtained" a financial product or service in the traditional sense to the extent that, at this early stage, it has not entered into any agreement or arrangement relating to a financial product or service. Second, the individual has not applied for credit, and there has been no "evaluation, brokerage or distribution of information" relating to a request or an application by a consumer for a financial product or service. The individual will not become a "consumer" until he/she applies for credit or, if no formal application is made, the individual enters into an agreement or arrangement for financing to be provided by the seller. Furthermore, an individual who is not and does not become a "consumer", by definition, can never be a customer or have a customer relationship with a financial institution.

While ARDA believes that the foregoing is to some extent self-evident under the current provisions of the proposed regulation, we believe that it would nonetheless be helpful if the final Privacy Rule or the preamble to the regulation specifically indicated that its provisions are not triggered in the case of prospective purchasers or purchasers of nonfinancial products or services who have not applied for credit or otherwise obtained a financial product or service.

Installment and Other Types of Periodic Payments for Nonfinancial Products and Services Do Not Constitute a Financial Product or Service If They Do Not Include Interest or Any Other Finance Charge

Purchasers of both long-term (e.g., a one- or two-week period of time over a number of years) and short-term (e.g., a one-week "trial" stay) timeshare interests will oftentimes pay for these interests in a series of payments. These payments are sometimes variously referred to "membership fees", "condominium fees", or "leases". In the preamble to the proposed Privacy Rule at 65 Fed. Reg. 11176-77, your agency expresses the view that "a retail business that merely establishes layaway or deferred payment plans is not a financial institution."

We would request that the Commission expand upon this statement to confirm that any periodic or installment payment arrangement for a nonfinancial product or service will not, as a general matter, constitute the seller's providing a financial product or service to the purchaser. In our view, the only circumstances under which such a payment arrangement would qualify as a financial product or service is where the payments include an

interest or some other finance charge component.[2] Such guidance would better enable timeshare developers and other nonfinancial entities that receive a series of payments from purchasers of their products and services to know whether or not such entities are also providing a financial product or service.

One possible place to include this clarification would be in Section 313.3(j)(3)(iv), which as proposed refers to certain payment arrangements that will not cause an entity to be deemed a "financial institution." The first part of this provision could be a general statement to the effect that if there is no interest or other finance charge included in the payment, the recipient of the payment will not be a financial institution. The second part could set forth the specific examples (e.g., check or cash, third-party credit card, "lay-away" plans) of payment arrangements where no finance charge is assessed.

An Individual Who Ceases a Financial Services Relationship with a Financial Institution Is No Longer a "Customer" Even Though Other Nonfinancial Relationships Continue

In the event that sellers of nonfinancial products and services that provide financing for purchases are determined to be "financial institutions" covered by the Privacy Rule, ARDA would request that it be made clear in the definition of "customer relationship" currently set forth in Section 313.3(i)(1) of the proposed regulation that such a relationship ends (with the result that the purchaser is no longer a "customer") once the financial service relationship has ended. This situation would arise, for example, where (i) an individual purchases a timeshare interest and has obtained financing for the purchase from the developer and (ii) the loan is subsequently repaid or sold (with servicing rights) to a third party. In such circumstances, ARDA believes that the purchaser ceases being a "customer" and the seller of the nonfinancial product or service is no longer subject to the annual notice

[2] An easy cross-reference or rule of thumb that we would recommend would be Section 226.1(c) of the Federal Reserve Board's Regulation Z, 12 CFR 226.1(c), regarding the scope of coverage of Regulation Z. If the periodic payment arrangement is such that it constitutes the extension of credit subject to a "finance charge" (as defined in Section 226.4 of Regulation Z) and would therefore come within the coverage of Regulation Z, it would be presumed to be the providing of a financial product or service by the seller of the nonfinancial good or service. In the absence of any interest component or other finance charge, the use of a periodic payment plan by the seller would presumptively not cause the seller to be deemed to be providing a financial product or service.

requirements set forth in proposed Section 313.5.[3] (ARDA understands, however, that the opt out requirements set forth in proposed Section 313.7 would continue to apply to its former "customers".)

"Personally Identifiable Financial Information" Should Not Include Information Obtained from an Individual Regardless of Whether or Not a Financial Product or Service Is Provided

In the course of their dealings with purchasers and prospective purchasers of timeshare interests, timeshare developers will collect various types of information about these individuals, including their names and addresses and whether they satisfy certain minimum financial threshholds. Sometimes individuals who elect to purchase a timeshare interest will obtain financing from a developer; sometimes they will pay cash or obtain other third-party financing. As the Commission suggests in the preamble to the proposed Privacy Rule (although as set forth above we respectfully disagree with that suggestion), a seller of nonfinancial goods and services such as a timeshare developer becomes a financial institution by providing financing to purchasers; whereas, at least with respect to those individuals with whom it has no financial services relationship, the seller is not transformed into a financial institution and the other individuals who do not obtain seller financing do not become "consumers" or "customers".

This dual "financial institution/nonfinancial institution" status can lead to certain anomalies, especially when it comes to determining what is and what is not "personally identifiable financial information" subject to the disclosure provisions of the Privacy Rule. In our view, where the same kinds of generalized information about a purchaser or prospective purchaser are collected or obtained in the normal course by a seller of a nonfinancial product or service, regardless of whether or not a financial product or service such as financing is ever provided, that information should not be treated as "personally identifiable financial information."

The above conclusion can be derived from the Commission's definitions of "personally identifiable financial information" at Section 313.3(o) in both of the alternatives (A and B) proposed, but the definitions could permit a

[3]Such a clarification would eliminate the need for a seller of a nonfinancial good or service to establish a separate financing subsidiary or affiliate to finance the purchase in order to achieve this same result. In the financing subsidiary situation, if the seller were not providing the financing itself, the purchaser would only be a "customer" of the financing subsidiary and the customer relationship would terminate once the loan (including servicing) was sold to a third party or repaid. Conversely, the seller would never be a "financial institution", and a purchaser would never be a "customer" of the seller.

different result depending on how they are interpreted. Information that is obtained from all purchasers of nonfinancial goods and services alike, whether or not they also happen to be "consumers" or "customers", cannot be said to be "provided by a consumer. . . to obtain a financial product or service" (proposed Section 313.3(o)(1)(i)). Such information also would not appear to be information "resulting from any transaction involving a financial product or service between [a financial institution] and a consumer" (proposed Section 313.3(o)(1)(ii)). The only proposed definitional provision under which information obtained from "customers" and non-customers alike could be characterized as "personally identifiable financial information" for purposes of the Privacy Rule is proposed Section 313.3(o)(1)(iii), which refers to information a financial institution "otherwise obtain[s] in connection with providing a financial product or service to that consumer. . . ."

Arguably, all information that a seller collects from all purchasers could be said to have been obtained in connection with providing a financial product or service where the seller also provides financing for the purchase. However, this would lead to a situation (that we believe makes no sense) in which the exact same types of information about an entity's purchasers will be treated differently depending upon how the purchase is paid for and whether or not the purchaser obtains financing from the seller.

In our view, a more reasonable approach would be for the Commission to define as "personally identifiable financial information" only that additional specific information which is obtained from purchasers who are seeking financing as well. All other generalized information obtained from purchasers without regard to the financing arrangements, we would submit, is not truly "personally identifiable financial information" under those circumstances.[4]

A List Including the Names of Purchasers of Nonfinancial Products and Services Is Not "Nonpublic Personal Information" Even Though the Seller in Some Contexts May Be a "Financial Institution"

In our view, whichever definitions of "nonpublic personal information" and "personally identifiable financial information" are ultimately adopted by

[4]A similar result can once again be achieved by the seller establishing a separate financing subsidiary affiliate that would finance an individual's purchase of a nonfinancial good or service. While information provided by the customer to the financing subsidiary in connection with applying for and obtaining a loan would constitute "personally identifiable financial information", that information in the possession of the seller would not fall within the definition. In that situation, if the seller did not provide financing, it would not be a "financial institution" and the purchaser would not be a "customer."

the Commission in its final Privacy Rule, those definitions need to more clearly indicate that a list of purchasers of nonfinancial products and services does not constitute "nonpublic personal information", whether or not the seller also happens to be a "financial institution" in other contexts. Such a list, we would submit, only becomes "nonpublic personal information" if it can be determined from the list those individuals who were provided financial products and services (e.g., if all purchasers of the nonfinancial products and services also obtain financial products and services). In the absence of this kind of identity, such a list should not come within the scope of the Privacy Rule.

The definitional provision that comes closest to accomplishing this result at present is proposed Section 313.3(o)(2)(ii)(B) in Alternative A, which states that "personally identifiable financial information" does not include "[a] list of names and addresses of consumers to whom you provided a nonfinancial product or service." We believe, however, that the use of the term "consumers" in that provision is inappropriate because it assumes that the purchaser of the nonfinancial product or service is, in fact, a "consumer", which may or may not be the case. In lieu of the language quoted above, therefore, we would recommend a provision that read as follows: "(B) A list of names and addresses of individuals to whom you provided a nonfinancial product or service, whether or not you are a financial institution."

The Commission's Description of the FCRA "Transactions and Experiences" Exemption Footnote 11 of the Preamble to the Proposed Privacy Rule Appears to Be in Contravention of Section 506(c) of the GLB Act

Section 506(c) of the GLB Act provides that "[e]xcept for the amendments made by [Sections 506(a) and (b) with regard to the Federal government agencies' rulemaking authority under the FCRA], nothing in this title shall be construed to modify, limit, or supersede the operation of the [FCRA], and no inference shall be drawn on the basis of the provisions of this title regarding whether information is transaction or experience information under section 603 of [the FCRA]." This statutory provision is repeated almost verbatim in Section 313.14 of the proposed Privacy Rule. As the Commission is aware, Section 603(d)(2)(A)(ii) of the FCRA excludes from the definition of a "consumer report" therein communications of information "solely as to transactions and experiences between the consumer and the person making the report" among affiliated entities.

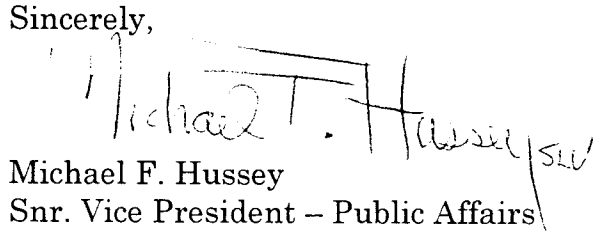
In footnote 11 to the preamble to the proposed Privacy Rule at 65 Fed. Reg. 11179, the Commission describes the FCRA "transactions or experience" provision quoted above as not covering "information obtained from other

sources, such as consumer applications or credit reports." While ARDA agrees that this FCRA exemption does not apply to credit report information, it is not readily apparent to us why information contained in an application would not constitute "information solely as to transactions" to the same extent that information obtained in an application for a financial product or service would constitute "nonpublic financial information" under the GLB Act.

Regardless of whether footnote 11 to the preamble is merely a reiteration by the Commission of a longstanding interpretation of Section 603(d)(2)(A)(ii) of the FCRA or represents a possible narrowing of that provision,[5] however, we believe that it should not be included in the preamble due to its inconsistency with the mandates set forth in Section 506(c) and proposed Section 313.14. While it is perhaps true that nothing in the proposed Privacy Rule itself "modifies, limits or supercedes" the above provision of the FCRA, footnote 11 could be easily construed as an attempt to accomplish the same result indirectly and, to that extent, is certainly inconsistent with the spirit if not the letter of Section 506(c). Consequently, any reference that is made to the "transactions and experience" provisions of the FCRA in the final Privacy Rule or its preamble should not attempt to elaborate upon that language or otherwise attempt to distinguish between what kinds of information are and are not covered by those provisions.

Again, we very much appreciate the opportunity to comment upon your proposed Privacy Rule.

Sincerely,



Michael F. Hussey
Snr. Vice President – Public Affairs

MFH:jab

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[5] Although we have been advised by Commission staff that footnote 11 does nothing more than simply restate the staff's longstanding reading of Section 603(d)(2)(A)(ii) of the FCRA, staff acknowledged that this interpretation has not been previously set forth in any Commission opinion or discussion of the FCRA.