



Office of the President



March 31, 2000

BY HAND DELIVERY

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

**Re: Gramm-Leach-Bliley Act Privacy Rule,
16 C.F.R. Part 313—Comment**

Dear Mr. Clark:

On behalf of the American Council on Education ("ACE") and the other higher education associations listed below, I submit these comments on the proposed Federal Trade Commission ("FTC") regulations under Title V of the Gramm-Leach-Bliley Act ("GLB Act"), Pub. L. No. 106-102 (to be codified at 15 U.S.C. § 6801 *et seq.*). See 65 Fed. Reg. 11174 (Mar. 1, 2000). We respectfully ask the FTC to clarify that higher education institutions are not "financial institutions" under the GLB Act, by expressly excluding them from the definition of "financial institutions" in the final regulations. As we show below, Congress did not design the GLB Act to apply to higher education institutions. The Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, has provided ample privacy protection for student financial and other records for over 25 years. It would grossly distort congressional intent to construe a law designed to modernize the financial services industry as imposing yet another layer of federal regulation on higher education institutions.

ACE represents all sectors of American higher education. Founded in 1918, it is a non-profit national education association whose members include more than 1800 public and private colleges, universities and educational organizations throughout the United States. As a leading participant in higher education affairs,

ACE's purpose is to promote the interests of all members of the academic community, including students and their parents. ACE members participate in various federal, state, and institutional student financial aid programs, including student loan and grant programs. See, e.g., 20 U.S.C. § 1070 et seq. (federal student financial aid programs).

1. Excluding higher education institutions from the definition of "financial institution" is consistent with the GLB Act's design and purposes.

The goal of the GLB Act was to repeal Depression-era restrictions on the business of financial institutions and to create new opportunities for affiliations among different types of financial institutions. See, e.g., H.R. Rep. No. 106-74, pt. 3, at 118 (1999) ("the benefit of affiliation . . . is the fundamental purpose of H.R. 10"). Congress viewed the privacy provisions in Title V as directly related to and necessitated by that goal. See, e.g., id. at 107, 118. As the legislative history explains, Congress was concerned that the GLB Act would create incentives for financial institutions to use consumer information for commercial purposes. Id. The purpose of Title V was to prevent entities that stood to benefit from deregulation of the financial services industry from selling customer information to third parties for marketing purposes, or otherwise misusing customer information. Id.

It would be incongruous with the GLB Act's overall design to treat higher education institutions as "financial institutions" under Title V. Higher education institutions, which are largely non-profit and public institutions, do not conduct the kinds of businesses that the GLB Act seeks to foster. To the extent higher education institutions undertake financial activities through student financial aid programs, they do so only incident to their primary educational mission and in accordance with public policy and federal and state programs that seek to increase access to higher education. 1/ Moreover, as explained more fully

1/ The proposed regulations recognize that although the definition of "financial institution" in the GLB Act is broad, institutions that are not "significantly engaged in" financial activities should not be treated as financial institutions for purposes of Title V. 65 Fed. Reg. at 11176, 11190 (16 C.F.R. § 313.3(j)).

below, FERPA prohibits higher education institutions from engaging in the types of activities that Congress sought to prevent through Title V.

The GLB Act's legislative history contains no indication that Congress intended to sweep higher education institutions into its ambit. Congress repeatedly referred to affiliations among banks, insurance companies, securities firms, and other entities that conduct commercial financial activities. *See, e.g.*, 145 Cong. Rec. H11527 (daily ed. Nov. 4, 1999) (statement of Rep. Leach); 145 Cong. Rec. S13879 (daily ed. Nov. 4, 1999) (statement of Sen. Enzi). Congress referred to similar entities in discussing Title V. *See, e.g.*, 145 Cong. Rec. H11528 (daily ed. Nov. 4, 1999) (statement of Rep. Leach); 145 Cong. Rec. H11546 (daily ed. Nov. 4, 1999) (statement of Rep. Ackerman). Congressman Leach, for whom the GLB Act is in part named, emphasized that Title V applies to banks, securities companies, insurance firms, mortgage companies, finance companies, travel agencies and credit card companies -- entities whose primary purpose, unlike higher education institutions, is to provide financial services. *See* 145 Cong. Rec. H11543 (daily ed. Nov. 4, 1999) (statement of Rep. Leach).

Congress' delegation of rulemaking authority to the FTC supports excluding higher education institutions from the definition of "financial institution." The FTC traditionally has not regulated higher education institutions. In addition, the FTC has long recognized that the Federal Trade Commission Act, the specified basis of the FTC's rulemaking authority under Title V, does not apply to non-profit entities. *See* Pub. L. No. 106-102, § 505(a)(7); 15 U.S.C. §§ 44, 45(a)(2); *College Football Ass'n*, 117 F.T.C. 971 (1994). Thus, the FTC would be well within its authority to exclude higher education institutions from the definition of "financial institution" in the final regulations. Any other interpretation would be inconsistent with the GLB Act's purposes and legislative history.

2. Federal law already imposes strict privacy requirements on higher education institutions.

Congress addressed privacy matters in the education context long before enacting the GLB Act. FERPA, which is enforced by the U.S. Department of Education, forbids higher education institutions to disclose education records, and personally identifiable information contained in such records, unless the student or parent consents in writing. *See* 20 U.S.C. § 1232g(b). FERPA broadly defines "education record" as

those records, files, documents, and other materials which—

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A). Courts have found that education records include student financial records. See, e.g., Red & Black Publishing Co., Inc. v. Board of Regents, 427 S.E.2d 257, 261 (Ga. 1993) (FERPA "is intended to protect [records] relating to . . . financial aid"). Courts also have recognized that FERPA protects student privacy notwithstanding state open records laws. See, e.g., United States v. Miami Univ., ___ F. Supp.2d ___, 2000 WL 301340 (S.D. Ohio Mar. 20, 2000). Institutions take their obligations under FERPA seriously, and those that violate FERPA risk losing federal funds. See 34 C.F.R. § 99.67 (1999). Thus, FERPA provides substantial protection for student financial and other information.

Although FERPA permits disclosure of financial aid information for certain limited purposes related to administration of financial aid programs, see 34 C.F.R. § 99.31(a)(4), this narrow exception is similar to the GLB Act's notice and opt-out exceptions for matters such as processing and servicing transactions, see Pub. L. No. 106-102, § 502(b)(2), (e). Such disclosures, which are necessary for effective and efficient administration of financial aid programs, enable institutions to comply with their fiduciary obligations under Title IV of the Higher Education Act, 20 U.S.C. § 1070 et seq. See 34 C.F.R. § 668.82(a). Recipients of such information are subject to FERPA's limitations on redisclosure. Id. § 99.33.

FERPA provides privacy protections comparable to those in Title V of the GLB Act. For example, FERPA requires that institutions annually notify parents and students of their rights under FERPA. See 34 C.F.R. § 99.7. Institutions must obtain detailed written consents before releasing personally identifiable information. Id. § 99.30. Institutions that release information to third parties as permitted under FERPA must ensure that the recipient complies with FERPA. Id. § 99.33. In light of such similarities, it would flout FTC policy to subject higher education institutions to Title V. See 16 C.F.R. § 4.6 (1999) ("It is the policy of the Commission to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions.").

Moreover, the legislative history of the GLB Act confirms that Congress did not intend to impose Title V obligations on higher education institutions. Congress repeatedly emphasized that the GLB Act was imposing federal privacy requirements on "financial institutions" for the first time.^{2/} FERPA has prohibited higher education institutions from disclosing student financial and other information without consent since 1974. Thus, it is simply unnecessary -- and would be arbitrary and capricious -- to require higher education institutions to comply with Title V requirements.

3. Including higher education institutions within the definition of "financial institution" would impose needless, expensive burdens on them, and increase college costs.

Compliance with a redundant regulatory regime inevitably involves substantial new, duplicative, and confusing paperwork with attendant interpretive questions, complications, and uncertainty. Regulatory burdens on higher education institutions are already prodigious and impose costs. A congressionally-created commission on the cost of higher education recently found that increasingly burdensome and wide-ranging regulation of higher education institutions has

^{2/} See, e.g., H.R. Rep. No. 106-74, pt. 3, at 117-18 ("Under current law, there is no requirement that financial institutions take any particular measures to fully protect the security and confidentiality of the personal, nonpublic information about their customers. H.R. 10 fills in this gap."); 145 Cong. Rec. H11525 (daily ed. Nov. 4, 1999) (statement of Rep. Hooley) ("Current law today, current law provides no protection for consumers' financial privacy. None. Zero. Zip. . . . With the enactment of this legislation, . . . for the first time ever, companies will have to allow consumers to say no to the sharing of personal information with third parties."); 145 Cong. Rec. H11548 (daily ed. Nov. 4, 1999) (statement of Rep. Gillmor) ("This bill for the first time put in place strong privacy provisions for the financial services industry."); 145 Cong. Rec. H11518 (daily ed. Nov. 4, 1999) (statement of Rep. Menendez) ("[W]ithout this bill, consumers will continue to have no privacy protections and will have no access to these lower-priced services."); 145 Cong. Rec. H11519 (daily ed. Nov. 4, 1999) (statement of Rep. Lafalce) ("In the financial services context, federal law now offers consumers no protection of their personal financial information, and regulators have no authority to impose any. We are creating federal privacy protections, for the first time.").

contributed to rising tuition costs, and it urged the government to take steps to deregulate higher education. See National Commission on the Cost of Higher Education, *Straight Talk About College Cost and Prices* (Jan. 21, 1998). Congress has expressed its agreement: Under the Higher Education Amendments of 1998, the U.S. Department of Education must review its regulations that apply to higher education institutions, identify duplicative or unnecessary regulations, and report its findings to Congress. See 20 U.S.C. § 1099c-2.

A fundamental tenet of regulatory reform is that agencies should avoid duplicating other federal agencies' regulations, consider the cost of cumulative regulations, and aim to minimize burdens on regulated entities. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993), reprinted in 5 U.S.C. § 601; see also 16 C.F.R. § 4.6 (1999). FERPA and the U.S. Department of Education's regulations already impose privacy-related obligations on higher education institutions. In order to comply with Title V, higher education institutions would need to reprogram substantially their information systems for handling student records, even though the current systems serve the same purpose, and result in essentially the same protections, as Title V. At a time when higher education is striving to lower educational costs, the imposition of duplicative and unnecessary regulatory burdens on higher education institutions would only disserve students and their families.

4. The FTC should clarify in the final regulations that higher education institutions are not subject to the GLB Act's privacy provisions.

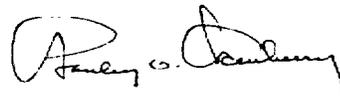
For the foregoing reasons, we respectfully request that the FTC's final regulations clarify that higher education institutions are not "financial institutions" for purposes of the GLB Act. Specifically, we propose that the FTC revise § 313.3(J)(3) by adding a new subsection (v) as follows:

"(v) an educational agency or institution that is subject to the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g." 3/

3/ In the event that the FTC should nonetheless conclude that higher education institutions are "financial institutions" for purposes of the GLB Act, we request that the FTC add a new provision indicating that compliance with FERPA satisfies the GLB Act's privacy requirements. We propose the following:

We appreciate your consideration of these comments. Please call me if you have any questions or need additional information.

Sincerely,



Stanley O. Ikenberry
President

The following higher education associations join in these comments:
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities

"§ X. Institutions that comply with the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, shall be deemed in compliance with Title V of the Gramm-Leach-Bliley Act and these regulations. The U.S. Department of Education is responsible for enforcing FERPA."

Whether or not the FTC considers higher education institutions themselves to be "financial institutions" under the GLB Act, higher education institutions routinely work with loan servicers, guaranty agencies, credit bureaus, collection agencies, federal agencies, and others in administering the federal student financial aid programs under Title IV of the Higher Education Act, 20 U.S.C. § 1070 et seq. See, e.g., 34 C.F.R. §§ 674.48 (loan servicers), 682.416 (same), 682.603 (school certification of student loan application), 682.610 (student status confirmation reports). Ease of exchange of information among the various participants in federal student financial aid programs facilitates service to borrowers and helps to avoid defaults on student loans. Accordingly, ACE joins other commenters in requesting that the FTC preserve the scope of the notice and opt-out exceptions as set forth in the proposed regulations. See 65 Fed. Reg. at 11194-95 (16 C.F.R. §§ 313.9-313.11); see also 34 C.F.R. § 99.31(a)(4).

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Association of Jesuit Colleges and Universities

Council of Independent Colleges

National Association for Equal Opportunity in Higher Education

National Association of College and University Business Officers

National Association of Independent Colleges and Universities

National Association of State Universities and Land-Grant Colleges

National Association of Student Financial Aid Administrators