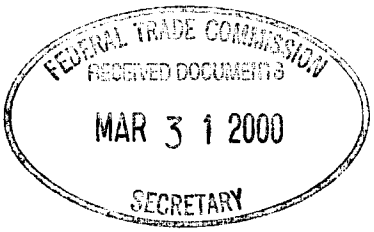



# FAX

**To:** Mr. Donald S. Clark

Company: Federal Trade Commission

Phone:

Fax: 202-326-2496

**From:** Lisa A. Menelly
Associate General Counsel

Phone: 617-563-7936

Fax: 617-476-7217

Cc:

Date: March 31, 2000

Pages inc. cover: 9

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

☐ Urgent

☐ For review

☐ Reply ASAP

☐ Please comment

Caution: The message and any documents accompanying this transmission (the "Transmission") contain information from FMR Corp. or its affiliates, which is proprietary, confidential, and/or subject to the attorney-client privilege. The transmission is intended only for the person specifically named above. If you are not the intended recipient of this information, or the employee/agent responsible for delivering this message, you are hereby notified that any dissemination, distribution, or copying of this information is strictly prohibited. If you have received this message in error, please notify us immediately by telephone (call us collect if you wish) and return the original to us at the address below, at our cost.

**Fidelity Investments**
**Corp. Legal**

82 Devonshire Street, F7A
Boston, MA 02109-3614

FMR Corp. Legal Department

**Lisa A. Menelly**
Associate General Counsel

82 Devonshire Street
Boston, MA 02109-3614
Phone: 617 563-7936
Fax: 617 476-7217
E-mail: lisa.menelly@fmr.com

March 31, 2000

Mr. 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:

FMR Corp. is a holding company for a diverse group of companies engaged in numerous financial and non-financial activities throughout the United States and around the world. FMR Corp.'s financial subsidiaries (commonly referred to as "Fidelity Investments" and collectively herein as "Fidelity") include registered investment advisors, broker-dealers, a trust company, and an insurance company. We are submitting this comment letter in response to the proposed rules (the "Proposal") to implement Title V ("Title V") of the Gramm-Leach-Bliley Act (the "Act"), published for comment on March 1, 2000 in the Federal Register by the Federal Trade Commission (the "Commission").

Through its membership in various trade associations, Fidelity has provided comments regarding a variety of aspects of the Proposal, and the related ones published by other agencies. In this letter, however, we would like to bring to the Commission's attention several issues the Proposal has raised with regard to the administration of employee benefit and retirement plans. Because plans of this type play an important role in the lives of most consumers, and because they concern sensitive information about individuals, we urge the Commission to provide explicit guidance in its final rule as to the applicability of the Act to the various relationships under such plans.

We commend the Commission for the comprehensive Proposal it has issued within the time frame set by the Act. In general, we support the balanced approach taken by the Commission in the Proposal. Our comments today focus on areas where we believe the Proposal should be expanded to clarify its applicability, or inapplicability, to the employee benefit and retirement plan arena. To aid in the Commission's analysis, we first describe typical relationships in the benefits industry, and then discuss particular sections of the Proposal that cause us some concern.

## I. Basic Retirement Plan Structures

### A. Information Sharing in Employer-Sponsored Retirement Plans

Most employees are familiar with the workplace 401(k) plan which is an employer-sponsored, defined contribution retirement plan with certain tax advantages under Section 401(k) (and, more broadly, Section 401(a)) of the Internal Revenue Code (the "Code"). Similar plans are available under Code Section 403(b) for employees of tax-exempt organizations and under Code Section 457 for governmental employees. Defined contribution plans such as these provide for the allocation of employer and employee contributions to individual accounts for each plan participant. The participant's benefit under the plan is determined by his or her ultimate account balance as adjusted for investment returns.

In the typical 401(k) plan, the employer will be the plan sponsor and the "named fiduciary" under the plan and, in that capacity, has duties imposed by the Employee Retirement Income Security Act ("ERISA") to act prudently and for the exclusive benefit of plan participants and beneficiaries. The plan generally has a separate trustee (or, for 403(b) plans, a custodian), that is responsible for holding the assets of the plan. Both the named fiduciary and the trustee/custodian may delegate their tasks, although they may not delegate the responsibility for those tasks.

Typically, the plan sponsor will hire a recordkeeper to maintain the records of the plan and its participants. In providing retirement plan services, most financial institutions, including Fidelity, act as trustee for the plan, provide recordkeeping services and also provide one or more investment options under the plan (a "bundled service provider"). Some of these institutions also provide a prototype plan document to the employer. The plan sponsor may also hire unrelated service providers to perform one or more of these services (an "unbundled service provider"). In addition, the plan sponsor may hire the bundled service provider, or one or more unbundled service providers, to provide additional services such as discrimination testing, employee communications, or preparation of annual reports and similar documents. In any of these situations, the employer may instruct Fidelity to provide plan and participant account information to one or more service providers which are (i) chosen by the employer, (ii) unrelated to Fidelity, and (iii) with whom Fidelity has no contractual relationship. Similar considerations may apply in the context of defined benefit plans where the financial institution also provides administrative services. (In defined benefit plans, participants do not have an individual account, but benefits are determined using individual participant data such as salary histories.)

In addition to the roles described above, Fidelity, as well as other financial institutions, act as plan sponsors for their own employee plans.

### B. Information Sharing in Individual Retirement Accounts

Individuals may directly contact financial institutions to establish individual retirement accounts ("IRAs"). In these situations, the financial institution typically furnishes documents to the individual to establish the IRA, acts as custodian/trustee and recordkeeper of the account and also will provide one or more of the investment options held in the account. IRA custodians and trustees may, in some instances, engage the services of an unaffiliated third party to assist in preparing tax reporting, participant communications, or mailings which may be related to the servicing of an account but also may constitute marketing materials.

Other plans, generally for small businesses, may be viewed as "hybrids" of IRAs and employer-sponsored plans. Plans in this category include SIMPLE IRA plans and SEP-IRA plans. Such plans are sponsored by the employer, but essentially consist of a group of IRAs established by each plan participant individually. In this scenario, a trustee or custodian will have a separate agreement with each individual IRA owner in the plan in addition to any agreement the employer may execute to establish the plan.

## II. COMMENTS REGARDING EMPLOYER-SPONSORED RETIREMENT PLANS

With the basic structures described above in mind, we request that the Commission clarify certain issues in the final rule to ensure that the final rule does not inadvertently or unduly interfere with the operation of retirement or other employee benefit plans or individual retirement accounts discussed above.

Exemption for Plan Sponsors. We request that the definition of "financial institution" in Section 313.3(j) of the Proposal include an example to clarify that sponsors of employee benefit plans do not fall within the definition of "financial institution." We believe that the statutory language of the Act supports such an interpretation. Section 509(3) of the Act defines a financial institution as "any institution *the business of which* is engaging in financial activities...." (Emphasis added.) Employers are not in the business of sponsoring a retirement or benefit plan for its employees; thus, it would be inappropriate to extend the definition of "financial institution" to cover activities of employers in their role as plan sponsors. A failure to exempt plan sponsors would impose significant burdens and costs on the plans, thereby causing a possible increase in the costs or reduction in benefits of such plans to the participants. We strongly urge the Commission to explicitly exempt plan sponsors of employee benefit and retirement plans from the definition of "financial institution."

Clarification that Employee Benefit Plans Are Not Financial Institutions. We request that the final rule include an example in Section 313.3(j) of the Proposal to exclude retirement and other employee benefit plans from the definition of "financial institution." In the Analysis section of the Proposal, the Commission has indicated that "it views an entity as a financial institution 'the business of which is engaging in financial activities' only if it is significantly engaged in a financial activity." While plans may

engage in investment activities, the primary purpose of an employer-sponsored plan is to provide retirement or welfare benefits, such as medical benefits, to participants and their beneficiaries. We believe this interpretation is consistent with the Commission's views and do not believe that Congress intended to encompass employee benefit plans within the meaning of "financial institution."

Clarification of Financial Institution's Role as Employer. We request that the final rule include an example under the definition of "financial product or service" to clarify that retirement or other benefit plans offered by employers to their employees are not "financial products or services" covered by the Act. Without such a clarification, a financial institution, solely in its role as plan sponsor for its own employees, would be subject to the provisions of the Act whereas a plan sponsor who was not a financial institution would not. Such a result could not possibly have been intended by Congress. There is no difference between financial institutions and non-financial institutions in their role as employers that could warrant the imposition of a significant burden on employers which are financial institutions that is not similarly imposed upon employers that are not financial institutions.

Clarification of the definition of "Consumer" With Respect to Employer-Sponsored Plans. We request the Commission to clarify the definition of "consumer" and subsequently "customer" with respect to employer-sponsored plans. Section 313.3(e) of the Proposal defines "consumer" as "an *individual* who obtains or has obtained a financial product or service...." (Emphasis added.) In the typical arrangement regarding the provision of services to an employer-sponsored plan, the plan sponsor selects the retirement plan service providers and establishes the contractual relationships between itself as plan sponsor and the service providers. In effect, the plan sponsor acts as the participants' legal representative for these matters and the participants cannot act individually with respect to the servicing of their plan account. As a result, Fidelity, and other institutions which provide retirement plan services directly to a plan sponsor, treat the plan sponsor as their "customer."

As a practical matter, however, the vast majority of plan sponsors are corporations, partnerships, governmental or other legal entities which do not fall within the definition of "consumer" and therefore do not appear to be covered by the provisions of the Act. Accordingly, we request the Commission to clarify that, when a financial institution directly provides retirement plan services to a plan, the financial institution may treat the plan sponsor as its "consumer" and "customer" under the Proposal with the understanding that the plan sponsor typically is not an "individual." This approach is consistent with existing plan administration and fiduciary rules under ERISA and would require a financial institution to provide notices and opt-outs only to the plan sponsor and not to participants under the plan.

## III. TYPICAL RETIREMENT PLAN THIRD-PARTY DISTRIBUTION ARRANGEMENTS

In addition to providing retirement plans and IRAs directly to employers and individuals, Fidelity also provides "full service" products, "investment only" products, and clearing and execution services for the retirement plan market through unaffiliated intermediaries, including broker-dealers, insurance companies, banks, registered investment advisers and third-party administrators. In a "full service" product, Fidelity will provide plan documents, trustee and recordkeeping services, and one or more investment options. In an "investment only" product, Fidelity only provides one or more investment options under the plan or IRA and typically has no contractual relationships with any of the plan fiduciaries or service providers. For plans and IRAs which offer a self-directed brokerage option, Fidelity may simply provide clearing and execution services. In many of these cases, the account is established so that the intermediary has full access to the participant's account information, and may have transaction authority over the account as well.

Many employers choose not to, or do not have the resources or expertise to, research retirement plan options in depth. Those employers may seek the help of an intermediary that can offer an array of plan products for consideration by the employer. Those intermediary firms, in turn, assist the employer in selecting from the retirement products offered by Fidelity and its competitors by providing the employers with information about a variety of retirement products and providers. In addition, the intermediaries may provide ongoing support after the product selection is made in the form of enrollment meetings, education regarding investment options and other services.

In the course of providing "full service" retirement products, Fidelity must obtain, use and, in some instances, disclose plan and participant information to discharge its obligations under ERISA as recordkeeper and trustee. In the employer-sponsored plan "full service" relationships, the financial institution providing the retirement services would treat the plan sponsor as its "consumer" and "customer," as discussed above.

We request that the Commission's final rule clarify that these intermediary relationships fall within the service provider exceptions in Sections 313.9 and 313.10 of the Proposal and therefore that any such intermediaries acting as service providers are exempt from the notice and opt-out requirements of the Act. We believe that the failure to clarify these relationships may otherwise result in participants and plan sponsors receiving multiple notices and opt-outs from each service provider with additional and unnecessary costs to the plans, plan sponsors and participants.

In the "investment only" and clearing service relationships established on an omnibus or plan level basis, the financial institution never has a direct relationship with the plan sponsor or IRA owner. Accordingly, the financial institution has no ability to identify or contact the participants directly. We respectfully request that the Commission clarify that to the extent a financial institution's services are limited to "investment only" or clearing services for a plan or IRA, the financial institution (i) acts only as an

unaffiliated third-party service provider to the plan or IRA, and (ii) is not in a "customer relationship" which would require the provision of notice and opt-out provisions to the plan, the plan sponsor, plan participants or IRA owner.

Finally, we request the Commission to provide an exemption under Section 313.9 of the Proposal for joint marketing in the intermediary context. As noted above, unrelated service providers may include materials that could be considered "marketing" materials as part of account statement mailings or other communications. To the extent that these service providers are selected by a plan sponsor through an intermediary, the financial institution has no contractual relationship with other service providers and therefore could not meet the contractual requirements under Section 313.9 of the Proposal. We believe that this information is sufficiently protected as the unrelated service providers should themselves be subject to the redisclosure and reuse limitations in Section 313.12 of the Proposal.

## IV. EMPLOYER-SPONSORED WELFARE PLANS

Welfare benefit plans encompass benefits such as health, dental and life insurance plans. Some welfare plans may have a trust that funds the welfare benefits, with a trust agreement between the plan and a trustee. Other plans may be self-insured by the employer, so there is no trust or trustee. More and more employers are choosing to outsource the administration of their welfare benefit plans to unaffiliated service providers. Under these arrangements, the employer typically will hire a recordkeeper to maintain the records and perform other administrative duties.

Fidelity frequently undertakes recordkeeping and administrative roles for such plans. When functioning as a recordkeeper and/or administrator for these plans, Fidelity will receive from its customer, the employer, employee benefit data (name, address, salary, benefit elections, benefit costs and related information) and forward that information as necessary to unrelated service providers such as disbursement agents, benefit plan trustees, payroll vendors, insurance carriers, health maintenance plans, and communication vendors (to produce personalized communication pieces such as benefit enrollment forms).

As is the case with employer-sponsored retirement plans, these services typically are provided pursuant to a contract between the financial institution and the plan sponsor. It is the plan sponsor who contracts for, and therefore, obtains these services. It is the plan sponsor who is the consumer of these services and the financial institution's customer. As in the retirement plan context, we therefore request the Commission to clarify that the employer sponsor of a welfare plan is the "consumer" and subsequently "customer" of a financial institution providing services to such a plan. We also request that that the Commission's final rule establish the same guidelines applicable to service providers in retirement plan administration.

In addition, we request the Commission to clarify whether medical, dental and similar information constitutes "personally identifiable financial information" within the meaning of Section 313(o) of the Proposal. Much of this information does not appear to constitute "personally identifiable *financial* information" (emphasis added) and the disclosure of such information may also be restricted by the proposed regulations under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Accordingly, we also request the Commission to clarify that, to the extent any such information is medically-related information subject to the provisions of the HIPAA regulations, such information does not constitute "personally identifiable financial information" under the Proposal. Such clarification would provide needed guidance in this area and would prevent the imposition of multiple notice requirements and unnecessary expenses on plan sponsors and their service providers.

## V. PAYROLL SERVICES

Many employers also outsource similar functions regarding its payroll. A payroll service provider typically will receive and forward employee payroll data from and to employers, banks (for direct deposits), and other third parties for garnishments and levies pursuant to court orders. The payroll service provider may also forward data to third party vendors for escheatment services and tax filing services provided on the employer's behalf. As with retirement and welfare plan administration, many of these service providers are selected by the employer, are unrelated to the financial institution providing retirement services and have no contractual relationship with the financial institution. Accordingly, we request the Commission to clarify that (i) the employer selecting the payroll service provider will be treated as the "consumer" and subsequently the "customer" of the financial institution providing payroll services, and (ii) that the provision of payroll services will be eligible for the service provider exemptions set forth in Sections 313.9 and 313.10 of the Proposal in a manner consistent with the provision of welfare and retirement plan benefit services. In addition, we request the Commission to clarify that, as with welfare plan information, any payroll data which supports the administration of a welfare plan and which is subject to the provisions of HIPAA does not constitute "personally identifiable financial institution" under the Proposal.

## VI. METHODS OF OPT-OUT

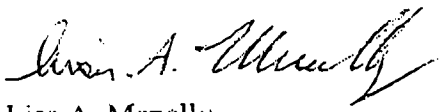
We applaud the Commission's flexibility and foresight in Section 313.8 of the Proposal which, in particular, would permit consumers to opt-out via electronic means and through the use of a designated toll-free number. In the retirement context in particular, telephonic and electronic communication are now the primary methods by which individuals who may be customers of a financial institution, such as IRA owners, communicate with their IRA providers. We believe the proposed methods are both cost-effective and consumer friendly and will best implement the opt-out provisions of the Act.

## VII. EFFECTIVE DATE

The Commission has proposed that the final rule take effect on November 13, 2000, the earliest date permitted by the Act. The Act clearly authorizes the Commission to delay the effective date, and the Commission has invited comment as to whether the effective date should be delayed for more than six months after issuance of the final rules. We strongly urge the Commission to delay the effective date to no earlier than May 13, 2001, to provide financial institutions with adequate time to prepare necessary notices and establish tracking systems necessary to accommodate the required opt-out provisions. We also request that financial institutions be permitted to stagger the mailing to existing customers over a time period greater than 30 days to allow financial institutions with large customer bases the opportunity to provide the necessary notices without disruption of the normal course of business. More specifically, as many existing customers currently receive account statements on at least a quarterly basis, we request the Commission explicitly authorize that the initial notices may be provided as part of the next regularly scheduled statement, provided that such mailing occurs within 140 days of the effective date.

Thank you for the opportunity to comment on the Proposal. If you have any questions or would like to discuss our comments further, please contact the undersigned at (617) 563-7936.

Very truly yours,



Lisa A. Menelly

**Via Facsimile and Airborne**

cc: Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Company
550 17th Street, N.W.
Washington, D.C. 20429

**********
*** RX REPORT ***
**********

RECEPTION OK

| | |
|---|---|
| TX/RX NO | 5047 |
| CONNECTION TEL | 617 476 7217 |
| SUBADDRESS | |
| CONNECTION ID | FIDELITY LEGAL-E |
| ST. TIME | 03/31 16:09 |
| USAGE T | 03'49 |
| PGS. | 9 |
| RESULT | OK |