



NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive • McLean, Virginia 22102
703/821-7040 • 703/821-7041



Legal & Regulatory Group

March 31, 2000

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., NW
Washington, DC 20580

Re: *Gramm-Leach-Bliley Act Privacy Rule, 1 CFR Part 313– Comment*

Dear Secretary:

The National Automobile Dealers Association (“NADA”), which represents over 19,000 franchised new automobile and truck dealerships in the United States, submits these comments on the Federal Trade Commission’s (“FTC”) proposed financial privacy regulations under the Gramm-Leach-Bliley Act (“GLB Act”).

NADA supports the goals of the GLB Act to protect the privacy interests of individuals in the information they provide to financial institutions. While NADA recognizes that much of the proposed rule is dictated in detail by the GLB Act, there are a few provisions on which we feel the need to comment or seek clarification.

Definition of customer relationship, § 313.3(h).

The proposed rule’s definition of customer relationship needs some clarification. The definition provides that a customer relationship exists with a consumer when there is a “continuing relationship.” Section 313.3(h)(i)(2)(i) provides examples of continuing relationships, including “if the consumer . . . (D) Enters into an agreement or understanding with you whereby you undertake to arrange or broker . . . credit to purchase a vehicle, for the consumer.” That section also provides, in § 313.3(h)(i)(2)(ii), example situations that are not continuing relationships, including “(B) You sell the consumer’s loan and do not retain the rights to service that loan.”

These two examples produce an ambiguous definition in the context of certain types of automobile financing. Frequently automobile dealerships provide installment credit using third-party finance sources. The dealerships submit the consumers’ credit applications to the finance sources, and the latter then state whether they will buy the paper and under what conditions. Within one or two days after executing a contract with a consumer, the dealership sells or assigns

the loan to the finance source. The dealership does not retain the right to service the loan. Assuming “undertake or arrange to broker” describes the dealership’s role in these transactions – an assumption some might debate – it is unclear whether a continuing relationship ever existed. The one-to-three day relationship was certainly not “continuing” as that word is ordinarily used. The FTC should clarify this situation by providing that a continuing relationship is not established when the financial institution holds a note for only a *de minimis* amount of time.

Definition of *financial institution*, § 313.3(j).

The phrase “significantly engaged in financial activities” may not provide sufficient guidance and certainty to enable businesses confidently to determine their status. The FTC should define the term or use a different term. Although we offer no specific definitional language, we do offer these thoughts.

If the term “significantly” is defined too broadly, it may capture more businesses than the definition in the GLB Act suggests it should. The Act’s definition of financial institution, which is repeated in the regulation, is “any institution *the business of which is* engaging in financial activities.” The phrase “the business of which is” suggests predominance or primary function.

We note that the Bank Holding Company Act defines “predominantly financial” as follows:

For purposes of this subsection, a company is predominantly engaged in financial activities if the annual gross revenues derived by the holding company and all subsidiaries of the holding company (excluding revenues derived from subsidiary depository institutions), on a consolidated basis, from engaging in activities that are financial in nature or are incidental to a financial activity under subsection (k) represent at least 85 percent of the consolidated annual gross revenues of the company.

12 U.S.C. § 1843 (n)(2).

If predominance occurs when 85 percent of gross revenues are derived from financial activities, what percent of gross revenues would rise to the level of “significance?” A business which derives less than half of its gross revenue from financial activity, it would seem, cannot fairly be considered an “institution the business of which is engaging in financial activities.”

Definition of *nonpublic personal information*, § 313.3(n-o-p).

Alternative B is the more appropriate definition. The definition of “publicly available information” in alternative A rests on an artificial construct rather than the statute’s plain language. If the information could be obtained from a public source, it is available publicly.

Requiring that the information must actually be obtained from a public source to be deemed publicly available effectively reads the word "available" out of "publicly available information."

Initial notice to consumers, § 313.4.

When you establish a customer relationship, § 313.4(c).

This section provides that "you establish a customer relationship at the time you and the consumer enter into a continuing relationship." One included example indicates that you establish a continuing relationship "when the consumer . . . (ii) Executes the contract to obtain credit from you . . ." It is not clear whether this example is subordinate to the example in section 313.3 (i)(2)(ii)(B) indicating that there is no continuing relationship when "you sell the consumer's loan and do not retain the rights to service that loan." In most cases an automobile dealership sells a consumer's loan within three days of execution, and sometimes even the day of execution. It strains the ordinary meaning of the word "continuing" to conclude that a dealership establishes a continuing relationship with a customer the day the contract is executed, and then terminates the continuing relationship later that day or the next day when the dealership sells the loan. The rule should provide that a continuing relationship is not established at contract execution if "you" know that you will hold the loan only a de minimis amount of time.

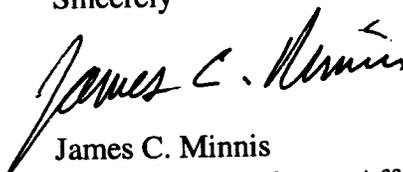
Exceptions to allow subsequent delivery of notice, § 313.4(d)(2).

Subparagraph (i) provides that initial notice may be delivered after you establish a customer relationship if "[y]ou purchase a loan from another financial institution and the customer of that loan does not have a choice about your purchase." The use of customer choice as a test raises a potential ambiguity. For example, an automobile dealership may present a customer with several finance options through different banks or finance sources. The customer may have a choice at this stage among the several options. After the contract is executed, the customer may have no choice as to whether the dealership sells the note. One might anticipate hindsight disagreement as to whether the exception applies in that case.

Conclusion

NADA appreciates the opportunity to comment on the FTC's proposed privacy regulations under the GLB Act.

Sincerely



James C. Minnis
Director of Regulatory Affairs