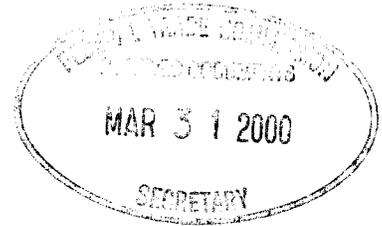


**United States of America
Before the Federal Trade Commission**



In the Matter of)

Gramm-Leach-Bliley Act Privacy Rule,)
16 C.F.R. Part 313 — Comment)
_____)

FTC File No. 002 3054

**COMMENTS OF GATEWAY, INC. ON THE COMMISSION'S PROPOSED
TRADE REGULATION RULE PURSUANT TO SECTION 504 OF THE
GRAMM-LEACH-BLILEY ACT**

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Dated: March 31, 2000

Gateway, Inc. (“Gateway”), through its undersigned counsel, respectfully files these comments pursuant to the Federal Trade Commission’s (“Commission”) Notice of Proposed Rule Making (“NPR”), 65 Fed. Reg. 11174-11195 (Mar. 1, 2000), regarding the Commission’s Proposed Trade Regulation Rule pursuant to the Gramm-Leach-Bliley Act (“GLBA”), 15 U.S.C. § 6801 (2000).

Gateway, a direct marketer of computer hardware and software, is a Fortune 250 company founded in 1985. It is ranked number one in United States consumer PC revenue, and has earned one of the ten best corporate reputations in America, according to a 1999 survey published in The Wall Street Journal.

I. SUMMARY OF RECOMMENDATION

Gateway submits these comments pursuant to the Federal Trade Commission's request for comment on the application of the Commission's proposed Trade Regulation Rule Pursuant to the Gramm-Leach-Bliley Act (“the Proposal”) to nontraditional financial institutions. See 65 Fed. Reg. at 11177. Specifically, Gateway's comments focus on the definition of “financial institution,” which the Commission itself recognizes to have broad application. Id. Gateway is concerned that the Rule, as drafted, may apply not only to companies that provide financial services directly to consumers, but also to companies that merely provide their customers access to financial services. This would take the Rule far beyond Congress' intent, and would impose substantial costs on such companies, all without providing consumers with substantially greater protection than they would otherwise have.

II. ARGUMENT

The GLBA defines a “financial institution” as “any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956” (“the BHCA”). See 15 U.S.C. § 6809 (2000). The BHCA defines “financial activities” as:

- Lending, exchanging, transferring, investing for others, or safeguarding money or securities;
- Insuring or guaranteeing, or indemnifying against loss, harm, damage, illness, disability or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State;
- Providing financial, investment or economic advisory services . . . ;
- Issuing or selling interests . . . in pools of assets permissible for a bank to hold directly;
- Underwriting, dealing in or making a market in securities; and
- Engaging in any activity that the Board has determined, by order or regulation that is in effect on the date of the enactment of [the GLBA], to be so closely related to banking or managing or controlling banks as to be a proper incident thereto.

12 U.S.C. § 1843.¹

¹The BHCA also includes engaging in banking outside the United States and affiliating with certain non-bank institutions. See 12 U.S.C. § 1843(k)(4)(G), (H).

In its Proposal, the Commission adopts the GLBA definition of “financial institution,” but adds that it would only consider companies that are “significantly engaged in financial activities” to be “financial institutions.” See 65 Fed. Reg. at 11190. Accordingly, retailers that extend their own credit would be “financial institutions” under the Proposal,² while retail businesses that only accept payment by check, cash, or credit or charge cards issued by third parties, or allow deferred payment or lay-away plans, would not be “financial institutions” under the Proposal.³ Id.

Based on the Commission's proposed definition of the term “customer relationship,” Gateway is concerned that the Commission may also consider companies that merely arrange for third parties to issue credit to be “financial institutions.” The Commission's definition of “customer relationship,” in relevant part, is as follows:

²The Commission further explains that the definition of a “financial institution” may include a nontraditional financial institution such as a manufacturer of computer software and hardware, see 65 Fed. Reg. at 11177, although the Commission has offered no guidance regarding the circumstances under which this would be so.

³Of the agencies required to establish financial privacy standards under the GLBA, the Commission is the only one that has expanded the GLBA’s definition of “financial institution.” Indeed, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Securities and Exchange Commission, and the National Credit Union Administration Board have each proposed regulations that mirror the GLBA’s definition of “financial institution” and its exemptions. See Privacy of Consumer Financial Information, 65 Fed. Reg. 8770 (Feb. 22, 2000) (Federal Reserve, FDIC, OCC and OTS); Privacy of Consumer Financial Information (Regulation S-P), 65 Fed. Reg. 12371 (Mar. 8, 2000) (SEC); Privacy of Consumer Financial Information, Requirements for Insurance, 65 Fed. Reg. 10988 (Mar. 1, 2000) (NCUAB).

(i) Customer relationship means a continuing relationship between a consumer and you under which you provide one or more financial products or services to the consumer that are to be used primarily for personal family or household purposes. . . .

Examples: A consumer has a continuing relationship with you if the consumer: (D) enters into an agreement or understanding with you whereby you undertake to arrange or broker a home mortgage loan, or credit to purchase a vehicle, for the consumer

See 65 Fed. Reg. 11176. This definition appears to assume that by “arranging” for customers to obtain credit from third parties, a company would be providing “financial products or services” to consumers, and thus be a “financial institution” under the Rule.

To the extent the Commission intends to regulate as “financial institutions” any retailer that merely assists its customers in obtaining financing, the Proposal goes far beyond what Congress intended. Nothing in the GLBA itself anticipates this outcome. Nothing in the Bank Holding Company Act of 1956 requires this outcome. No other federal agency issuing regulations under the GLBA has proposed such an expansive definition.

Gateway has been unable to find any support in the legislative history for treating as “financial institutions” companies that sell a product or service and arrange for consumers to take credit from a third party lender. To the contrary, it is clear that Congress anticipated that the GLBA would treat companies that market financial services, such as telemarketing companies, as “nonaffiliated third parties” of financial institutions. See 145 Cong. Rec. S13892, 13903 (daily ed. November 4, 1999) (statement

of Senators Bryan and Feinstein)⁴; Cong. Rec. H11546 (statement of Representative Ackerman). Retailers that take consumers' financial information and forward it to third-party lenders serve the same function as companies that market financial services: both direct consumers to financial institutions. Accordingly, the Commission's final rule should treat retailers that provide their customers' financial information to third-party lenders as "nonaffiliated third parties," and not as "financial institutions."

Retailers nationwide provide customers with the convenience of financing their purchases with credit obtained from third-party lenders. If each of these retailers is a "financial institution" under the Proposal, then the effect of the Commission's Proposal would be to establish a federal privacy rule of general application, for which the Commission has not been given Congressional authority, and which the Administration opposes.⁵

Gateway understands the importance of protecting consumers' personal information. Nevertheless, Gateway is concerned that the Commission's Proposal would impose unnecessary costs upon it and other companies that provide their customers with access to credit. For example, if Gateway would be a "financial institution" under the final rule, it would be required to do all of the following (among other things), at the risk of provoking an FTC enforcement action and possible civil penalties:

⁴See also Cong. Rec. H11524 (daily ed. November 4, 1999) (statement of Representative Baker).

⁵See Elements of Effective Self-Regulation for Protection of Privacy (Discussion Draft January 1998), located at <http://www.ntia.doc.gov/reports/privacydraft/198dftprin.htm>.

- Provide initial and annual notices of its privacy policy (the Proposal appears to suggest that Gateway could not do this on a Web page and/or electronic mail for all customers), see 65 Fed. Reg. at 11191-11192;
- Make sure that each “opt out” request is communicated to each nonaffiliated third party to whom Gateway has already transferred the consumers' information, see 65 Fed. Reg. at 11195; and
- Engage in detailed contractual agreements with service providers and joint marketers, with no safe harbor for protection against the third party's inappropriate use of the information. See id.

This level of federal regulation is inappropriate absent a specific mandate from Congress.

To the extent that retailers receive nonpublic personal information from a financial institution, they would be governed by the Rule's protections governing nonaffiliated third parties. See 65 Fed. Reg. at 11195. To accomplish Congress' purpose of protecting consumers' nonpublic financial information, the Commission need only amend its proposal to make clear that companies that supply information to financial institutions must disclose to consumers that they are doing so and provide notice of the financial institution's privacy policy. Beyond that, retailers would be governed by their own privacy policies, and would compete in the marketplace on the basis of their privacy protections. This is consistent with Commission policy, as it provides a market-based incentive for companies to self-regulate.⁶ Any further regulation of retailers that supply

⁶See, e.g., Sheila F. Anthony, Commissioner, “The Federal Trade Commission’s Advertising Program: A Big Stick, a Keen Eye, and Some Help from Our Friends,” Remarks to the

nonpublic information to financial institutions is unnecessary, contrary to the Commission's policy and without Congressional authority.

III. PROPOSAL

Based on the analysis above, Gateway proposes the following amendments to the Proposal (proposed additions are in *italics*):

16 C.F.R. § 313.3(j)(3):

(j)(3) Financial institution does not include:

- (v) *A business that only arranges for a consumer to obtain credit with an independent third party lender but does not directly extend credit.*

16 C.F.R. § 313.12

- (c) *Limits on disclosing personal information to financial institutions.*
- (1) *Except as otherwise provided in this part, if you provide nonpublic personal information to a financial institution, you must disclose that fact and provide consumers with a means of obtaining the financial institution's privacy policy.*

American Advertising Federation (Mar. 25, 1999), available at <http://ftc.gov/speeches/anthony/aafspeech.htm>; Orson Swindle, Commissioner, "Fair Lending: An FTC Perspective," Remarks at the Nat'l Home Equity Ass'n Conference 2000 (Mar. 18, 2000), available at <http://www.ftc.gov/speeches/swindle/nhema-01.htm>; Debra A. Valentine, General Counsel, "Privacy on the Internet: The Evolving Legal Landscape," Remarks before Santa Clara University (Feb. 11-12, 2000), available at <http://www.ftc.gov/speeches/other/dvsantaclaraspeech.htm>.

IV. CONCLUSION

For the foregoing reasons, Gateway respectfully requests that the Commission revise its current proposed Trade Regulation Rule Pursuant to Section 504 of the Gramm-Leach-Bliley Act to take account of the proposal discussed herein.

Respectfully submitted,

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