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ORIGINAL

March 31, 2000

Re: Office of the Comptroller of the Currency, Docket No. 00-05
Board of Governors of the Federal Reserve System, Docket No. R-1058
Federal Reserve Insurance Corporation, Attention: Comments/OES
Office of the Thrift Supervision, Docket No. 2000-13
Federal Trade Commission, Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313-Comment
National Credit Union Administration
Securities and Exchange Commission, File No. S7-6-00

Dear Madams and Sirs:

On behalf of Assurant Group ("Assurant"), we are submitting comments on the proposed rules that were published on February 22, March 1, and March 8, 2000.[1] Although the proposed rules are not identical, for ease of reference we are submitting a single set of comments to all of the federal agencies with outstanding proposals. As noted, we identify particular agency proposals about which we have concerns.

Assurant Group is a tradename for a group of companies that includes the American Security Insurance Company and the American Bankers Insurance Group. The company was formed in August of 1999 when Fortis, Inc. purchased ABIG. Assurant provides insurance and protection programs as both a product developer and an underwriter. Assurant markets to consumers on a wholesale basis through partnerships with major financial institutions including bank holding companies, credit card issuers and consumer finance companies, retailers, modular housing manufacturers and other entities that provide consumer financing as part of their businesses. Products and services offered include specialty insurance, extended service contracts and membership programs.

Assurant supports the structure and general requirements of Title V of the Gramm-Leach-Bliley Act ("G-L-B Act"). We support a customer's right to be informed of their financial institution's privacy policies. If the institution plans to disclose nonpublic personal information about them to a nonaffiliated third party such as Assurant for marketing purposes unrelated to the financial institution's business, the customers should be given reasonable advance opportunity to opt out of that arrangement.

Assurant supports consistent rules as essential for efficient operation. Inconsistent rules will impose multiple and possibly conflicting burdens on financial institutions, and the complexity of issues will undermine compliance efforts. Recognizing this danger, Congress instructed the agencies to strive for consistency, and in the proposed rules they have by-and-large done so.

Assurant is regulated by state insurance regulators and understands that some state regulators believe that the G-L-B Act directly authorizes state regulators (without applicable state statutory authority) to issue rules that go beyond the terms of the G-L-B Act. There is no foundation for such a view, either under the express terms of the G-L-B

Act or under the principles of federalism. Assurant would ask the agencies to confirm this point in the preamble.

Further, the G-L-B Act was adopted, and the proposed rules are now being reviewed, within a larger international context involving the European Union ("EU") and its Directive on Data Protection ("the Directive"). The Directive requires an "adequate" level of privacy protections. An important issue still under negotiation between the U.S. and the EU is whether a financial institution's compliance with Title V will constitute a safe harbor that would be deemed adequate. Assurant believes that Title V compliance should entitle a financial institution to a safe harbor because Title V is the expression of the U.S. Congress' decision on appropriate privacy measures and because Title V does in fact strike the appropriate balance. In these circumstances, it is important that the final regulations follow the contours – as the proposed rules do now – of Title V. We have no reason to think that the agencies may issue regulations that would exceed the requirements of Title V, and any effort to do so would jeopardize these negotiations.

Assurant's more specific comments follow, addressing the effective date, definitional issues, the privacy notifications, and the opt-out process.. Our comments are mainly limited to the clarification of provisions that seem to be of uncertain meaning and to suggestions for less burdensome approaches in some areas where there would be no real impact on consumer privacy. In many instances additional examples may be helpful so that financial institutions have a better sense of the scope of their obligations.

I. Effective Date

The new privacy regulations will require extensive planning and business strategy, as well as significant systems changes for Assurant and its clients. The agencies have requested comment on whether the effective date of the final rules should be extended. Under section 510 of Title V, final rules should be issued by May 12, 2000, and would then take effect on November 12, 2000. The immediate practical impact would be that by December 12, 2000 (that is, within 30 days of the effective date), institutions would be required to send privacy notifications to all of their customers. Financial institutions also would have to have their opt-out procedures in place, which would then trigger a 30-day period before the institution could disclose protected information to a nonaffiliated third party for marketing and other purposes.

The agencies have asked for comment whether they should exercise to their authority under section 510(1) to extend the effective date. Assurant believes that they should extend the date at least an additional six months, for two reasons. First, the December 12 effective date will mean that institutions must prepare very substantial mailings for the holiday season and at the same time that they are preparing end-of-year tax statements for their customers. Second, creating an effective opt-out program, in which an institution does not inadvertently fail to honor an opt-out, is a difficult administrative undertaking, and six months is likely to be insufficient time for a financial institution to develop and test its system.

In addition, the agencies should consider extending the 30-day requirement for notifications to all existing customers to 90 days. Institutions with large customer bases usually communicate with their customers on a staged basis, rather than all at once, and do not have the resources to handles a distribution to all customers at the same time. Thirty days would be insufficient, given resource constraints, to comply with the initial notification requirement for all customers; ninety days, however, give these institutions an opportunity to distribute the notifications through their usual channels.

II. Definitions

"Consumer." The G-L-B Act defines this term generally as someone "who obtains ... financial products or services which are to be used primarily for personal, family, or household purposes." The proposed regulations extend further than the statute to cover any individual who merely submits an application, a response form, or otherwise provides nonpublic personal information to a financial institution in connection with obtaining a loan or account or insurance product, but never actually obtains the product from the institution. The statutory definition explicitly is limited to individuals who in fact "obtain" a financial service or product and does not cover those who apply for but do not receive such a service or product. Assurant urges the agencies to limit the definition to individuals who in fact receive a financial service or product.

"Customer Relationship." The proposed rules indicate that a financial institution that purchases a loan from another financial institution establishes a customer relationship with the borrower as a result and that the selling institution also retains the customer relationship if it continues to service the loan. Assurant believes that an institution that sells a loan should not be regarded as having a continuing customer relationship with the borrower. Assurant urges the agencies to make clear in the final rule that the customer relationship between a borrower and a dealer or other originating institution ceases when the credit is sold to another institution.

"Nonpublic personal information" and "publicly available information." Most proposals (except those of the FRB and the SEC) offer two alternatives, which vary based on the analysis of public information. Under "Alternative A," information is publicly available only if the institution in fact obtained it from a public source. Under "Alternative B" information is publicly available if it can be so obtained, even if the particular information in question did not come from a public source. The FTC has raised the question whether there is some middle ground between these alternatives.

Assurant supports Alternative B. A customer cannot reasonably expect that information about him or her that is otherwise available in a public place nevertheless should be treated as private. It makes little difference from the consumer's perspective whether information that is publicly available in fact came from such a source. The only real function that Alternative A will serve will be as a platform for litigation or other disputes over whether information that is publicly available in fact came from a public source. In other words, Alternative A presents a regulatory burden for financial institutions with no discernable public benefit. Alternative B strikes the appropriate balance between consumer privacy and the ability of financial institutions to conduct their business without undue restraint.

Assurant would recommend also that a list of customers not be treated as nonpublic personal information. Any time that an individual writes a personal check or uses a credit card, he or she is disclosing to a third party the fact that he or she is a customer of that institution. The individual could not have any reasonable expectation of privacy regarding his or her customer relationship with the institution, and the final regulation should make this point clear.

"Aggregated data." The proposals request comment on the application of the term "nonpublic personal information" to data aggregation. The agencies ask whether the term should cover information about a customer that contains no indicators of a customer's identity. The example cited in most of the proposals is mortgage loan data currently disclosed to third parties to make market studies. We note that credit scoring could be affected if aggregated data is treated as nonpublic personal information.

Assurant supports the interpretations that exclude aggregated data from the definition of public personal information. With indicators of customer identity eliminated, the aggregated data prevent the user from learning anything about identifiable customers. There can be no reasonable expectation that data that preclude the identification of individuals are entitled to special privacy protection. An interpretation that aggregated data are protected would disrupt much of the consumer analysis that many companies now undertake and that result in innovative financial products and services.

III. Notification Requirements

Assurant supports notification to customers of a privacy policy, however the proposals raise compliance concerns that should be resolved before final rules are issued.

Timing. The proposed regulations are not clear on the timing of the initial privacy notification and should be resolved consistently with the statute. The G-L-B Act requires that the initial notice be provided "at the time" of establishing a customer relationship. The proposals, however, require notice "prior to" the establishment of the relationship, although the preambles suggest the initial privacy notification may be provided at the same time as the Truth-in-Lending and other required initial disclosures.

Assurant does not believe the phrase "prior to" is consistent with the statute and, more importantly, that it does not capture the full range of circumstances in which a customer relationship is created. For example, with transactions by mail, such as the opening of a credit card account, the individual typically will reply by mail to a solicitation, and the issuing bank will respond by mail, enclosing a credit card. This mail response from the credit card bank is the most effective time for the notification because the individual will be sure to open the envelope and read the enclosed material. The individual may at that point accept or reject the card. The "prior to" language, however, suggests that the notification must accompany the solicitation. This procedure would not likely be effective, since many individuals throw away solicitations unopened, yet it would impose a tremendous expense on the industry. Accordingly, the "prior to" language should be replaced with language that tracks the statute: "at the time that" a customer relationship is established. The final regulations should incorporate the clarification now in the preambles that initial privacy notifications may provided at the same time as the Truth-in-Lending and other required notices.

The agencies should provide additional flexibility to financial institutions on the timing of the initial notification. Some institutions may find it convenient to provide the initial notification before a customer relationship is established. Some credit transactions, though, present circumstances in which a notification is likely to be meaningful only when provided within a reasonable period after a customer relationship is formed. For example, certain preapproved credit card solicitations permit a consumer to accept the solicitation and begin using the credit line before the credit card itself is sent to the consumer. Inclusion of a privacy notification with the solicitation would impose an unnecessary expense on the soliciting institution without advancing consumer interests; the only effect would be to send notifications to individuals who do not provide any information and who do not become customers. Similarly, some financial institutions permit a consumer who opens a credit card account at the point of sale to use the card immediately. Typically a third party accepts the application at the point of sale. The institution cannot necessarily rely on the third party to make the necessary notification, and the point of sale is likely not the most convenient time for a customer to review a privacy policy. A more effective means of communication would be to include the notification with the card itself (if the card is sent later) or with other welcoming materials from the institution. The final rule should make some provision for the initial notification to occur within a reasonable period before or after formation of the customer relationship.

Annual notices. Title V requires privacy notifications not less than annually during the continuation of a customer relationship. The proposed rules contain the same requirement and explain that annually means at least once in any period of 12 consecutive months. Some additional clarification would be helpful, such as whether the institution can select a month of the year for notifications to all customers, or whether the institution may provide notices on the anniversary date of the customer relationship. Assurant believes financial institutions should be allowed flexibility to select the method that best fits their business operations, and we would appreciate confirmation from the agencies on this point.

Content. The proposals require the initial and annual notifications to include an explanation of the opt-out right for disclosures to nonaffiliated third parties, including the methods by which the consumer may exercise the right. An institution may offer a more simplified notice under the proposed rule, however, if it can represent that it does not disclose information to affiliates or nonaffiliates. Assurant believes these provisions contain two elements that are likely to create compliance issues for institutions complying with Title V.

First, under the terms of the proposal, an institution that discloses protected information only to affiliates or only to nonaffiliates where the disclosures are exempt from the opt-out requirements nevertheless would be required to create an opt-out process. That is, an institution that shares information only with an affiliate would still, under the proposals, be required to develop an opt-out process – even though Title V is clear that the opt-out requirement does not apply to disclosures to affiliates. This process will be one a customer will never have cause to review, and will be an unnecessary burden for the institution. This result is not mandated by Title V.

Second, the inclusion of the opt-out process in the privacy notices complicates matters for institutions that may or may not make disclosures triggering the opt-out in the future. For these institutions, there is a substantial possibility that the opt-out described in the notification will be insufficient, when the time comes, to meet the requirements of the opt-out regulation itself. The institution might also later decide to offer partial as well as full opt-outs, but the possibility of a partial opt-out cannot be described until a concrete disclosure arrangement is in place. Such an institution then will be required by the opt-out regulation to send a second notice, and the original opt-out process in the notification will have achieved no result.

In light of these issues, and the fact that a detailed description of the opt-out process in the notification is likely to be more confusing than helpful to customers, Assurant recommends that the requirement of the description be omitted from the final regulation. Institutions still would have the option of describing the process. The structure of the proposed regulations also builds in an incentive for those institutions that are able to describe the opt-out process at the inception of the customer relationship to do so because the institution can meet the notification and opt-out requirements in a single communication.

IV. Opt-Out

Assurant supports a consumer's right to instruct a financial institution not to disclose protected information to a non-affiliate for certain purposes. The proposed regulations contain some features that need correction or improvement so that institutions will be able to achieve compliance without undue burden.

Reasonable Opportunity to Opt Out. Assurant urges the agencies to include an additional example of a reasonable opt-out mechanism: a toll-free telephone number. A financial institution should be allowed to notify consumers or customers of a toll-free telephone number that they may call to exercise their right to opt out. Since mail delays involved in a response would not be an issue, Assurant suggests that 15 days advance notice for this kind of mechanism would be sufficient. This procedure would reduce the paperwork burden that the opt-out presents for financial institutions, and, since telephone operators presumably would be entering opt-out information electronically, would probably reduce the errors in the opt-out process.

Exercise of the opt-out. Assurant urges the agencies to clarify the exercise of the opt-out in order to reduce the possibility of disputes over whether a consumer effectively opted out. First, the final rule should provide that a financial institution may require consumers to respond to the address, telephone number, or e-mail address provided in the opt-out notice in order for the opt-out to be effective. Allowing a consumer otherwise to select his or her own method of opting out will place an insurmountable burden on financial institutions in trying to keep track of opt-outs. Second, a financial institution should be able to require certain identifying information from the consumer in the opt-out that will enable the institution to link the opt-out to the appropriate account.

Disclosures to Service Providers – Use in Credit Scoring or Other Analysis. Certain disclosures to nonaffiliated service providers are permitted by Title V, provided that, among other requirements, the recipient uses the information solely for the purposes for which the information was received. The agencies have requested comment on whether third parties who receive information to process transactions should be permitted to use this information to improve credit scoring models or analyze marketing trends, so long as the third party does not maintain the information in any way that would permit identification of a particular consumer.

Assurant believes such use would be consistent with the statute and would not affect the privacy expectations of customers. Of course, if the term "nonpublic personal information" is defined to exclude similar aggregations of data (comments above), this result would necessarily follow. Leaving that definition aside, analysis of data that relates to a transaction involving the customer should be regarded as a part of that transaction. The purpose of such analysis is to improve the procedures of the original financial institution or the third party and cannot have an adverse effect on the transaction that the customer has requested. The opt-out here would disrupt the regular order of business by compromising the analysis. The analysis would be based on incomplete groups of data, and would have no benefit for institutions or consumers. Please note that under Assurant's suggested interpretation, the service provider would not be entitled to engage in marketing or sales based on that information (without going through the opt-out procedure).

Joint agreements. Under Title V, the opt-out is not required for disclosure to a nonaffiliated third party pursuant to a joint financial institution marketing agreement, provided that certain requirements are met.[2] The agencies have requested comment on whether the regulations should require a financial institution to take steps to assure itself that the product being jointly marketed and the other participants do not present undue risks for the institution. Assurant would suggest that no such revision is necessary and might ultimately impair a financial institution's risk management process.

All corporations, and especially financial institutions such as banks and insurance companies, are expected to have in place appropriate risk management systems. The nature of the systems may vary on an institution-by-institution basis, subject to such variables as an institution's actual exposure on a given risk, its size, and the nature of its business. The basic point, though, is that each financial institution already is required to understand the risks that all of its transactions present and to have appropriate policies or procedures to manage or control these risks.

Certainly, traditional financial institutions will be subject to examination and supervision on precisely this point – whether they have managed their privacy-related risks appropriately. Making this particular risk management issue the subject of a specific regulation will tend to create a one-size-fits-all approach to privacy risks, which invariably will prove excessive in some instances and insufficient in others.

Co-branding and affinity programs. The final regulations should make it clear that certain credit card programs –co-branded and affinity cárds –are a matter of notice and consent, rather than notice and opt out. By entering into the co-brand or affinity program, the consumer has chosen to participate in an arrangement which necessarily involves the use of information by both the financial institution and the co-brand or affinity partner in connection with what is essentially the same customer relationship.

Private label credit card programs. The opt-out exemption in the proposed rules for private label credit card programs does not appear to be substantively identical to the statutory language, although the preamble to the proposals states that any language changes are "only stylistic" and "intended to make the exceptions easier to read." The Title V exemption covers disclosures "in connection with-- ... maintaining or servicing

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[2] Of course, the Gramm-Leach-Bliley Act also permits other disclosures to nonaffiliated third parties where no joint agreement exists, but where the third party is performing services on behalf of the disclosing

the consumer's account ... with another entity as part of a private label credit card program or other extension of credit on behalf of such entity." *See* section 502(e)(1)(B). The proposed regulations, however, limit the exemption to disclosures that are made "to maintain or service" such an account. The phrase "in connection with" is critical to private label credit card programs. A key purpose of this exception is to permit the sharing of information between card-issuing institution and its partner (typically a non-financial institution or organization). This enables the partner to tailor products or membership benefits to its customers or members. From the customer's perspective, the institution he or she is dealing with – and the one that he or she would expect to have protected information about customers – is the partner of the issuing bank. A customer who holds a card with the name of a major retailer on it expects that his or her transactions are with the retailer. The proposed rules, however, would erode this whole series of expectations simply because a retailer has made the economic decision to out-source its credit function to another entity.

This wording of the exception for private label credit card programs was, moreover, carefully negotiated during Congress' final deliberations on Title V and the G-L-B Act. The agencies should not, even if inadvertently, reverse Congress' intent and should revise the regulations to capture the meaning of the statute.

As with co-brand and affinity programs, a consumer's consent to information sharing with the retail partner is implicit in the private label relationship, and this fact

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institution.

should be acknowledged in the final rule. Therefore, the final rule should, by way of example, make it clear that such consent exists in a private label relationship.

Exercising the opt-out in a private label credit card or co-branded or affinity card program. Assurant is concerned that once a customer has signed on to a private label credit card or co-branded or affinity card program, he or she may later opt out of information sharing between the institutional participants in the program. One purpose of such programs is to expand the offerings to customers, including discounts, coupons, and special products. This enables a retailer to offer discounts to the cardholders after analyzing the information that the private label credit card issuer has collected. Similarly, co-branded or affinity card programs permit the co-brander of the card, or the affinity group, to receive information and tailor programs to their customers or members. An opt-out, however, enables a customer to "free-ride" on the program. Accordingly, Assurant urges that the regulation recognize that a financial institution whose customer opts out have options either to move the account to a different part of the institution or to close the account.

Consumer consent. The proposed rules exempt a financial institution from the opt-out requirement if a consumer has consented to the disclosure and has not revoked the consent. The revocation would be effective simply by exercising the opt-out. This last phrase about revocation is not a part of Title V and raises substantial uncertainties and possibly tremendous administrative expense for financial institutions. A financial institution could, for example, receive a consent and proceed on the basis of that consent.

The customer could then opt-out, although since opt-outs would cover all disclosures, most institutions would probably handle them in different channels than the consent. Yet if the opt-out came in before the disclosure was made, then the institution would face some liability. Assurant urges the agencies to return to the statutory language and make clear that consents for one-time disclosures – e.g., a mortgage lender may disclose information about a borrower to a property insurer – are not revocable. Also, institutions should be permitted to prescribe reasonable methods for revoking consent and should have a reasonable time period, say, 30 days, in which to make the revocation effective.

Limits on redisclosure and reuse. The agencies have requested comment on whether the regulations should require a financial institution that discloses nonpersonal public information to a third party to develop policies and procedures to ensure that the third party complies with the limits on redisclosure of the information. Assurant believes that such a requirement is unnecessary and would proved to be inordinately burdensome. To the extent that the disclosing financial institution may have liability for improprieties at the recipient third party, the institution should already have in place procedures to manage this risk that are tailored to the institution's own circumstances. A required set of procedures will, in fact, merely complicate the institute's efforts to promote compliance by the third party. Additionally, to the extent that the financial institution does not face liability for events at the third party, the financial institution would not be in a position to exert any control over compliance by the third party, and the regulations should not mandate such a task.

Account numbers. Assurant believes that the final rules should permit disclosure of account numbers to unaffiliated third parties in situations where customers have consented. The affirmative consent process – effectively an "opt in" – should remove any concern about customer privacy. With respect to other potential risks, the disclosing institution will still have an obligation to protect customer data, and the recipient institution likewise will be subject to requirements now in the FTC proposal that limit its ability to re-disclose or re-use the information.

Furthermore, Assurant believes that provided that a recipient receives only an account number in encrypted form, without a decryption key, it should be outside the scope of the Section 502(d) prohibition. As the agencies discuss in the Joint Notice, the Section 502(d) prohibition is designed to avoid the risks associated with direct access by a third party to a consumer's account, whereby the third party can directly post charges or debits to the consumer's account by using the account number. These risks are not present, however, when encrypted accounts numbers are used, because the third party marketer cannot use these numbers to post a charge or debit against a consumer's account.

Additionally, the agencies should clarify that the proscription on the disclosure of account numbers to third parties for marketing purposes applies only to marketing on behalf of the third party, rather than on behalf of the institution making the disclosure. Many financial institutions out-source their billing operations to third parties, which necessarily includes account numbers, and is a form of disclosure permitted by the statute. As part of the out-sourcing, however, many institutions ask that the third parties include an advertising insert on behalf of the institution. This is a form of marketing that the institution is permitted to engage in directly, that is time-honored, and that is not especially intrusive for customers. The statute does not specifically bar this practice, and Assurant asks that the agencies recognize it as a permissible one.

Furthermore, the prohibition on sharing account numbers is intended to address situations where the recipient of the account number does not have another legitimate business need for such information, other than for marketing purposes. In certain situations, for example private label credit card programs and many affinity programs, the account number is the key customer identifier and both the financial institution and the retailer or affinity partner are appropriately in possession of the number at all times. For example, a retailer may use an account number as a club membership number, or it may use the account number to maintain a loyalty or rewards program. Section 504(b) of the GLB Act provides the regulators with the authority to grant additional exceptions to Section 502(d) that are consistent with the purposes of the GLB Act. Assurant believes that the final Rule should make it clear, by way of example, additional exception or otherwise, that Section 502(d) does not prohibit a financial institution from providing account numbers to its private label retailer or similar partners. Congress simply did not intend to so interfere with long-standing relationships.

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We thank the agencies for the opportunity to comment on the proposals, and would be pleased to respond to any questions that you may have.

Sincerely,

Elizabeth H. Purcell
Senior Counsel
Assurant Group

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