National Council of
Higher Education
Loan Programs, Inc.
NCHELP

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BY MESSENGER

March 31, 2000

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Gramm-Leach-Bliley Act Privacy Rule; Proposed Part 313 to 16 CFR - Comments

Dear Mr. Clark:

This letter is submitted to the Federal Trade Commission on behalf of the National Council of Higher Education Loan Programs, Inc. (NCHELP) in response to the FTC's request for comment on Proposed Regulations concerning Privacy of Consumer Financial Information (the "Proposed Rules") issued pursuant to Title V of the Gramm-Leach-Bliley Financial Modernization Act (the "Act"). NCHELP is a membership association of guaranty agencies, secondary markets, lenders, servicers, collection agencies, and other organizations that participate in the Federal Family Education Loan Program (the "FFELP"), a federally sponsored loan program which constitutes the nation's largest source of financial aid for students attending post-secondary institutions.

Title V of the Act provides broad privacy protections covering financial information collected and maintained by financial institutions (and their contractors). The Act will have a severe impact on our members. As you are no doubt aware, the Act and the Proposed Rules will require financial institutions and their contractors to make extensive system changes. We would hope that the agencies with regulatory responsibility for implementing the provisions of the Act will do so in a manner that will minimize the burden on our members and will not interfere with their ability to provide financial aid to students and their families.

NCHELP appreciates the effort you have made in developing and publishing the Proposed Rules under a very tight time deadline. Our comments respect the policy goals underlying the Act, but point out ways in which the regulatory agencies can help ensure that the burden imposed by the Act can be made more manageable.

Specific Comments

1. Section 313.3 – Definitions

   a. Definition of "clear and conspicuous"

The Proposed Rules provide that the required disclosures be "clear and conspicuous." We are concerned that the definition of this term set forth in the Proposed Rules, particularly the material set forth in the examples, establishes a new and uncertain standard, and may have the effect of diminishing the importance of protections made pursuant to other federal consumer protection statutes. Do the statements in the provided examples which state that the notice use "larger type size(s)" and "wider margins" mean that the disclosures must stand out more than other required notices (including, for example, loan disclosures required under section 433 of the Higher Education Act (20 U.S.C. 1083)). We do not believe that a detailed definition is required. We note that Regulation Z (which implements the Truth-in-Lending Act) requires that disclosures made in connection with credit be given "clearly and conspicuously." The general definition of the term "clear and conspicuous" is provided by the following Official Staff Commentary:

> "The 'clear and conspicuous' standard requires that disclosures be in a reasonably understandable form. It does not require that disclosures be segregated from other material or located in a particular place on the disclosure statement, or that numerical amounts or percentages be in any particular type size . . ."
>
> Regulation Z Commentary § 226.5, Paragraph 5(a)(1).

The Regulation Z standard has been a workable standard for many years, is familiar to industry members, and has served consumers well. The standard in the Proposed Regulation is less flexible than Regulation Z and has the potential to create unnecessary confusion. We recommend that the Proposed Rules be amended to track the Regulation Z Commentary quoted above.

   b. Definition of "consumer"

The Proposed Rule states, by way of example, that an individual is not your consumer solely because you process information about the individual on behalf of a financial institution that extended or made the loan. We presume that the same result would apply in cases where a servicer processes the loan for a secondary market purchaser rather than the initial lender. We request that the example be clarified to make this clear.

This definition, also by way of example, states that "[a] n individual who makes payments to you on a loan where you own the servicing rights is a consumer." We request clarification that a common servicing arrangement used by FFELP lenders and their servicers does not result in a customer relationship between the borrower and the servicer. Many lenders in the FFELP enter into long-term servicing relationships with organizations that service FFELP loans. Sometimes these relationships extend through the life of the loans involved. However, contact with the borrower is conducted in the name of the lender, which under the Proposed Rules would be responsible for making required disclosures to the borrowers. While the servicer continues to service the loans until they are paid off, the servicer cannot sell or otherwise transfer any servicing rights to another party. In these situations, the borrower properly is a customer of the lender and not the loan servicer, and we request clarification on this point. The servicer, of course, would be bound by the reuse limitations set forth in the Proposed Rules.

c. Definition of "financial institution"

This definition is extremely broad. You have asked for comments on this broad interpretation and its application to certain types of institutions. We have three comments on these points.

First, we do not believe that guaranty agencies participating in the FFELP should be included within the definition and request clarification on this issue. Guaranty agencies are established pursuant to the Higher Education Act. They are regulated and reinsured by the U.S. Department of Education and provide a wide range of services to lenders, schools and other participants in the FFELP. All are state or non-profit agencies designated by states to serve as guaranty agencies. For this reason, they are not engaging in a business, and therefore would not appear to come within the definition of "financial institution" or be subject to the jurisdiction of the Act. The primary functions of guaranty agencies are to provide loan insurance and default aversion assistance to lenders. We have found no indication in the legislative history of the Act that organizations such as guaranty agencies should be covered by the privacy provisions. The history is replete with mention of the potential consequences of affiliations among banks, insurance companies, securities firms, and other entities. The new affiliations permitted by the Act do not involve guaranty agencies (which by law must be state or non-profit agencies). Guaranty agencies will not benefit from the deregulation of the financial services industry and should not be burdened with the protections Congress added in conjunction with the deregulation.

Furthermore, if guaranty agencies were deemed to be "financial institutions," then borrowers of FFELP loans would receive two sets of disclosure notices, one from their lender and one from the guaranty agency. This would clearly be confusing to the individuals. Furthermore, it is unnecessary to treat guaranty agencies as "financial institutions." As contractors, guaranty agencies are bound by the reuse limitations in the Proposed Rules with respect to personal financial information they receive from lenders.

We acknowledge that there is one circumstance where a guaranty agency becomes a holder of a loan and thus enters into a more direct relationship with the borrower. This occurs when the borrower defaults on his or her loan and the guaranty agency pays an insurance claim filed by the lender and takes assignment of the loan. Even here, however, the guaranty agency is acting as a fiduciary under a contract with the U.S. Department of Education, which reinsures the guaranty agencies, regulates how guaranty agencies maintain the loan, and may have the option to take assignment of a defaulted, non-performing loan under a subrogation requirement. For this reason, we do not believe guaranty agencies should be treated as "financial institutions" even when they hold a loan. If they are deemed to be "financial institutions" in this circumstance, there should be recognition that the U.S. Department of Education also is covered if and when it assumes responsibility for the loan.

Second, under the FFELP, loans are made available to students attending post-secondary educational institutions. NCHELP understands that the associations representing post-secondary educational institutions will request clarification that they are not financial institutions. NCHELP supports this position. Schools are not in the business of engaging in financial activities. They also are subject to a comprehensive privacy policy set forth in the Family Educational Rights and Privacy Act (20 U.S.C. 1232g). It is does not make sense to subject schools to a duplicative and overlapping set of federal rules.

Third, lenders in the FFELP compete with the U.S. Department of Education, which makes student loans directly under the William D. Ford Federal Direct Loan Program. The Department of Education openly acknowledges that its program competes with the FFELP. If FFELP lenders must assume the burden of complying with the Act's requirements on financial institutions, fair competition would require the Department of Education to comply with the same requirements. This approach is consistent with the level playing field principle imbedded in the Higher Education Act, which provides that except in certain specified cases the terms of the Department of Education's Direct Loans shall be the same as those applicable to FFELP loans (20 U.S.C.1087e(a)(1)).

d. Definition of "nonpublic personal information"

Both versions of this definition contained in the Proposed Rules cover any "list, description or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information." We think this definition is too broad and that the definition should be narrowed to exclude lists, including lists of customers, that includes only publicly available information (such as name and address).

2. Section 313.4 – Initial Notice

This section of the Proposed Rules requires that a financial institution provide a specified privacy notice to individuals prior to the time the financial institution establishes a customer relationship with the individual. The timing of the requirement is problematic in the context of origination of student loans. Under the FFELP, most borrowers make their loan arrangements through their school's financial aid office. The financial aid office provides the student with a federally mandated common application form. The student and the school complete the form, and the student fills in the name of a lender (generally, but not always, from a recommended list provided by the school). The school then forwards the application to the lender, which processes the application and disburses loan funds. The goal is quick turn-around and delivery of needed loan funds. There is no lender-specific application form. Many schools do not maintain lender-specific brochures and would balk at keeping supplies of specific disclosure forms for a number of lenders in stock. If the lender was required to make the disclosure to the borrower prior to the time the student becomes a customer, loan disbursement would need to be held up while the disclosure is delivered to the borrower (which would be by mail in many cases). Thus, the timing requirement in the Proposed Rules would result in delaying loan delivery. This would be unacceptable to students and schools.

The Proposed Rules do permit subsequent delivery of the notice in certain cases. However, the exceptions cited do not cover the situation described above. We propose adding FFELP loans to listed exceptions, and propose that lenders be given ninety days to provide the notice. This same timing requirement should also apply to private supplemental student loans made by financial institutions so that financial institutions can implement one process for their entire student loan program. Specifically, we propose adding a new exception to section 313.4(d)(2) as follows:

> "(iii) the lender and customer establish a customer relationship under a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S. C. 1070 et seq.) or similar federally insured or non-federally insured student loan programs, in which case the notice can be provided within ninety (90) days of initial loan disbursement."

3. Section 313.4(d) - Initial Notices for Certain Loan Sales

This section requires that an initial notice be provided to a customer prior to the time a customer relationship is established, except in the case of an asset sale where the purchaser can provide the notice within a reasonable time after the new customer relationship is established. In some cases where there is a loan sale, including but not limited to asset securitizations, the loan will be serviced by the same entity following the loan sale as before the sale and the applicable privacy policy will not change despite the fact that legal ownership may have transferred to a new entity. In these cases, it is unnecessary and may in fact be confusing, to provide the borrower with a new introductory privacy notice. Generally, a borrower under the FFELP need not be notified of an ownership change if the party to whom payments and customer service questions is directed does not change. We recommend that section 313.4(d) be amended to provide that a new notice need be given in the case of a loan sale only if the applicable privacy policy (or the means to exercise the opt out right) changes as a result of the sale. Of course, the new owner will be responsible for providing future annual privacy notices.

4. Section 313.4(d) - Initial Notice for Joint Accounts

This section states that the initial notice be provided so that each recipient can reasonably be expected to receive it. The Preamble to the Proposed Rules requests comment as to who should receive the initial notice when there is more than one party to the account. The same question arises with respect to the annual notices required under section 313.5. We believe that in all cases involving multiple parties to an account (including joint accounts and accounts with co-signers), the regulation should state that the recipient of the notice should be the party to whom the lender sends account statements. Other consumer regulations such as the Federal Reserve Board's Regulations Z, DD, and CC allow single disclosures for jointly held accounts, and we would urge a similar approach focused on the recipient of the account statement, which would be the procedure most consistent with existing practices.

5. Section 313.4(d)(5)(i) – Electronic Delivery of Initial Notice

The Preamble to this Section states that:

> ". . . it would not be sufficient to provide the initial notice only on a Web page, unless the consumer is <u>required</u> to access that page to obtain the product or service in question. Electronic delivery generally should be in the form of electronic mail so as to ensure that a consumer actually receives the notice. In those circumstances where a consumer is in the process of conducting a transaction over the Internet, electronic delivery may include posting the notice on a Web page as described above." (emphasis added)

We find this language confusing and overly prohibitive in a number of respects. First, for transactions conducted over the Internet, it should be acceptable for a financial institution to display a privacy icon which the consumer would click to view. Although the privacy notice would not automatically appear unless the icon were clicked, the consumer would be required to acknowledge receipt of the notice before proceeding in the screen sequence.

Second, the Preamble language does not contemplate "mixed media" communications with customers. As an illustration, a financial institution may offer customers different ways of applying for its electronic banking services - by paper application, for example, as well as by online application. The financial institution may wish to give those customers applying by paper a choice of viewing the privacy notice on its webpage or receiving a paper notice by mail. Customers who choose to view the notice on the webpage would have to provide an acknowledgement that they did so in order to obtain the financial product or service. This would afford the financial institution significant savings in printing costs as well as provide customers with a simple electronic alternative to receiving a paper notice.

Although the Proposed Rules would allow the financial institution such flexibility in designing its application process and offering meaningful choices to the consumer, the language in the Preamble would not. We suggest that the section of the Preamble quoted above be replaced with the following:

> "Similarly, it would not be sufficient to provide the initial notice only on a Web page unless the consumer is in the process of conducting a transaction or applying for a service over the Internet, or the consumer chooses to view the notice on the Web page instead of receiving the notice by other means. In either case, the consumer would be required to acknowledge receipt of the notice before obtaining the particular financial product or service."

6. Section 313.5(b) – Electronic Delivery of Annual Notice

We recommend that this section be amended by adding the following language before the final period in the sentence:

> "except that, if the customer has previously agreed to receive notices in electronic form, a financial institution can provide the annual notice by notifying the customer annually of a web site or other electronic location where the customer can view the annual notice."

In situations where a customer has previously agreed to electronic notices, this addition will allow a financial institution to provide a "link" to the location of the annual disclosure, as opposed to e-mailing a potentially lengthy message.

This change will also eliminate the requirement that a customer acknowledge receipt of the annual, as opposed to initial, notice. Without this change, because of the cross reference to requirements which are set forth in Section 313.4(d)(5)(i)(C), the Proposed Rule would suggest that a financial institution must obtain and record the acknowledgment of both initial <u>and</u> annual electronic notices. There is little benefit to either the customer or the financial institution in requiring an acknowledgment of the annual notices.

7. Sections 313.7 and 313.8 - Exercise of Opt Out Right

These sections provide that certain disclosures of nonpublic personal information cannot be made to nonaffiliated third parties unless the consumer has been given notice of the right to opt out of the disclosure, including a reasonable opportunity and means to exercise the right. The Preamble discussion for section 313.8 asks for comment on whether financial institutions should be required to accept opt out exercise notices delivered through any means the institution has established to communicate with customers. The answer should be a definite "no." Financial institutions are required to establish a reasonable means for consumers to exercise the opt out right. By the same token, consumers should be required to utilize this communication method. This response is particularly necessary in the case of student loans, where most lenders use third party servicers to service their loans. We expect that many student loan lenders will ask their student loan servicer to administer the opt out provision. The servicer in this case will establish a means for borrowers to exercise the opt out right. It would be administratively unmanageable if the borrower could ignore this opportunity and, for example, deliver an exercise notice to a bank teller in a branch bank that has nothing to do with the lender's student lending program. We recommend that the Proposed Rule be revised to make clear that a financial institution has no obligation to honor an opt out notice that is not delivered by the established method.

We do appreciate the flexibility you have given in the examples of the means by which a financial institution can provide a method for consumers to exercise the opt out right. The opportunity to provide a toll-free number is helpful guidance. We would, however, like you to add a statement that the customer's phone response (like electronic responses) can be made through an automated response system.

8. Sections 313.10 and 313.11 - Exceptions to Notice and Opt Out Requirements

(a) The servicing of student loans is a complex process that involves two-way communication with a number of entities and individuals, including but not limited to the borrower, educational institutions, guaranty agencies, the Department of Education, credit bureaus, collection agencies, employers (in the case of wage garnishments) and numerous state agencies (to locate and assist in the collection of loans). While some of this activity is specifically required under the Higher Education Act, much of the normal servicing activity is undertaken as a result of routine business decisions and the need to provide good customer service. In the FFELP, two-way communication between financial institutions and schools is particularly important, to assure the continued eligibility of the student for aid and loan benefits, to maintain good customer service and to maintain the eligibility of the school to participate in federal financial assistance programs. Both the Act and the Proposed Rules authorize disclosures that are "usual, appropriate or acceptable" means of servicing an account. It would be unfortunate and contrary to the public interest if there were any concern that these normal disclosures were not permitted under the routine exceptions set forth in these sections. By entering into the financial transaction involved, the borrower in essence has provided consent to disclosures involved in normal servicing. We would strongly object to any modifications of the Proposed Rules that would limit the scope of these exceptions.

(b) Section 313.10(a)(4) sets forth routine uses relating to loan sales and certain types of asset financing. NCHELP believes that this exception should be expanded to make clear that all disclosures relating to loan sales and loan financing transactions are covered by the routine exception. We recommend that the following be provided, by way of further example, at the end of this section:

> "Included as recognized entities who are covered by the exception are parties involved in a proposed or completed asset securitization, asset sale, financing transaction or similar transaction, including loan servicers, investment bankers, financing lenders (including parties holding a security interest in the assets), financial advisors, rating agencies, credit providers and enhancers, auditors, loan purchasers, loan sellers, attorneys, bond counsel and trustees."

9. Section 313.12 – Limits on Redisclosure and Reuse

The Preamble to this section invites comment on whether the final rule should require a financial institution that discloses nonpublic personal information to a nonaffiliated third party to develop policies and procedures to ensure that the third party complies with the limits on redisclosure of that information. Although there are contexts in which a financial institution will contractually limit its contractors, we do not believe a general matter that financial institutions should be expected to monitor the activities of its disclosees, which in many cases will not have a contractual relationship with the financial institution. The Act and the Proposed Rules create an independent obligation for such third parties to comply with the legal requirements, and the Act vests enforcement authority with a federal agency (in most cases, the FTC).

10. Section 313.13 – Limits on Sharing of Account Numbers

This section provides that a financial institution cannot disclose an account number to any nonaffiliated third party for use in telemarketing, direct mail marketing or other marketing through electronic mail. This rule is too broad. By way of example, the rule as currently written would appear to prohibit the inclusion of the borrower's account number on a monthly statement printed or mailed by a third party servicer if the statement includes marketing material. We cannot believe that this is intended. We have a more basic comment, however. Many student loan servicers use account numbers that are based on the borrower's social security number. The Proposed Rule would prohibit a financial institution which could otherwise disclose a customer list to a third party (i.e. the borrower has not responded to the opt out notice) from providing that list to the third party if the borrower's social security number is included in the customer list. We propose a revision to the Proposed Rules that would make it clear that the prohibition contained in this section does not apply to simply any account number or code, but rather only to an account number or code "for a credit card account, deposit account, or transaction account" as provided in Section 502(d) of the Act. Loan account numbers, for example, should not be regarded as within the scope of section 313.13 of the Proposed Rules, both because they are not covered by the words of the Act and because a loan account number cannot be used to effectuate a payment instruction against a consumer's funds. At a minimum, we recommend that the Proposed Rules specify that this section only reaches an account number beyond those specified in the Act if it permits the initiation of a binding payment instruction against a consumer's account.

11. Section 313.16 – Effective Date; Transition Rule

a. The Act specifies that regulations implementing the privacy provision in Title V shall take effect six months after publication of final rules unless otherwise specified in the final rule. The Proposed Rules state that they will be effective on November 13, 2000. We strongly recommend that the regulators utilize their discretion to extend the effective date.

Implementing the rules will have a pervasive effect on financial institutions, requiring extensive system changes that can only be made after a detailed review of all of the institutions' operational policies and practices. We know that for each financial institution, implementation of the privacy regulations will entail, among other things, developing computer systems to handle the notices and opt outs, developing compliance and training procedures and manuals, training line, marketing and operations staff, revising customer forms and contracts, and communicating with a multitude of individual customers (millions in some cases). In addition, financial institutions will need to notify vendors of the new privacy standards, educate these vendors regarding the new requirements, and where appropriate revise the vendor contracts. All such revisions will need to be made on a case-by-case basis. Frankly, the full scope of the new privacy provisions is just sinking in. The task is massive.

For these reasons, we respectfully request that section 313.16 of the Proposed Rules be revised to provide that the effective date be 18 months after the regulations are issued in final form.

b. Section 313.16(b) provides that the initial customer notice must be provided to existing customers within 30 days of the effective date of the final rule. The Preamble discussion for this section invites comment on whether this 30-day period is sufficient. In response, the 30-day window for providing notices to existing customers should be widened. A number of the student loan servicing operations process several million borrower loan accounts. It is impractical to expect these servicers to undertake the processing of a huge number of notices within a 30-day period. The volume is just too great. Furthermore, for servicers that have contracts with a number of financial institutions, the notices for each client will need to be different, reflecting the privacy policies of each individual financial institution. We recommend that the transition rule be revised to provide for a 120 day period to provide required notices to existing customers.

NCHELP appreciates this opportunity to comment on the Proposed Rules. If you have any questions concerning this letter or would like us to provide additional information, please do not hesitate to contact me at (202) 822-2106.

Sincerely,

Sheldon D. Repp
General Counsel