



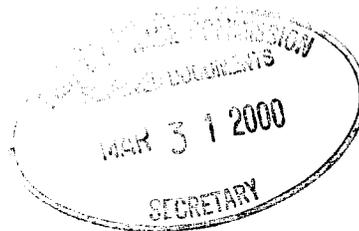
ASSOCIATION OF BANKS-IN-INSURANCE

E. Kenneth Reynolds, Executive Director

March 31, 2000

ORIGINAL

Communications Division
Office of the Comptroller of the Currency
250 E Street, S.W.
Washington, D.C. 20219
Attn: Docket No. 00-05



Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th and C Streets, N.W.
Washington, D.C. 20551

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

Manager, Dissemination Branch
Information Management & Service
Division
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Privacy of Consumer Financial Information

Dear Sir or Madam:

The Association of Banks in Insurance¹ provides the following comments on the referenced notices of proposed rulemaking. While ABI agrees with most provisions, and commends the federal regulatory authorities for their collaborative effort in the various rulemakings, there are several areas that need to be addressed.

¹ The mission of the Association of Banks in Insurance is to advance the legal and marketing capability of financial institutions to offer insurance services to their customers. The ABI is made up of banks, insurance companies, marketing firms, consultants, and other organizations active in supporting the process of offering insurance services to bank customers. ABI's 200 member organizations have assets totaling in excess of \$3 trillion and employ over 30,000 licensed insurance agents.

I. Definitional issues

There are several definitions in the proposed rules that bring within the “opt out” framework certain information that Congress clearly did not intend to include.

A. Definition of “financial product or service” (§ .3(k)(1))²

The preamble’s discussion of Section .3(k)(1) (definition of “financial product or service”) states that the definition “includes the financial institution’s evaluation of information collected in connection with an application by a consumer for a financial product or service *even if the application ultimately is rejected or withdrawn.*” (Emphasis added). That is an overly broad interpretation of what the Gramm-Leach-Bliley Act (“GLB Act”) was intended to include within that definition. The GLB Act defines “consumer” to mean “an individual who obtains, from a financial institution, financial products or services *which are to be used* primarily for personal, family or household purposes” (Emphasis added). Implicit in the definition of “consumer” is that a “financial product or service” is something that can be “used” for the listed purposes. If an application is withdrawn or rejected, how can that be a “product or service” that is “used” by an individual? In addition, the broad definition of “consumer” would create a much more complicated and expensive compliance process with no related benefit to consumers. The definition of “financial product or service”, accordingly, should be narrowed so that an individual does not become a consumer merely because he or she has an application rejected or elects to withdraw an application.

Section .9 provides an exception to the opt out requirement for “marketing of the [financial institution’s] own *products or services* or marketing of *financial products or services* offered pursuant to joint agreements between the bank and one or more financial institutions.” (Emphasis added). The term “financial product or service,” however, is defined so that it does not include an activity that is “complementary” to a financial activity. The definition should be changed so that it includes “complementary” activities. As an example, financial institutions may provide checking account supplies, such as checkbooks with calculators. Other examples include providing educational information and activities related to major transactions, such as automobile purchases; investing and insuring against risks; health care and dental discount cards, which are commonly marketed through direct mail; and extended product warranties.

If this change is made, then instead of focusing on the nature of the product or service itself, the definition will focus more on the underlying transaction.

B. Definition of “personally identifiable financial information” (§ .3(o)(1))

The term “personally identifiable financial information” should be narrowed so that it does not include the name, address or telephone number of a consumer (as long as that information is not part of a customer grouping or list derived from nonpublic personal information). As the rules are drafted, this information, in whatever form and however derived, and independent of whether Alternative A or B is used, is included in the definition of “nonpublic personal information” because it is considered to be “personally identifiable financial

² The section numbers used throughout this letter refer to the relevant sections from the respective proposed rules.

information.” The GLB Act, however, defines nonpublic personal information to include only “personally identifiable *financial* information” – not “personally identifiable information”. (GLB Act § 509(4)(A)). If Congress had intended to define “nonpublic personal information” as including information that merely identifies a person as a bank customer, it would have used the term “personally identifiable information” and not the term “personally identifiable *financial* information.”

Moreover, under both Alternative A and Alternative B, Section .3(o)(2)(C) states that “personally identifiable financial information” includes “the fact that an individual is or has been one of the [financial institution’s] customers or has obtained a financial product or service from the [financial institution], unless that fact is *derived* using only publicly available information, such as government real estate records or bankruptcy records.” (Emphasis added). As a result, the name, address and telephone number of a financial institution’s customer would be considered to be “nonpublic personal information” under either Alternative A or B. Especially with respect to Alternative B, this is inconsistent with how the term “publicly available information” is defined. In particular, we note that Alternative B does not require that the financial institution have actually *obtained* the publicly available information from the publicly available source for it not to be considered “nonpublic personal information”. Under that same logic, if one can determine from the public records the name, address, and telephone number of a bank customer, why should that information be characterized as “nonpublic personal information” for the financial institution?

The regulators also should define “personally identifiable financial information” as not including any information that has been depersonalized. That is, if a financial institution intends to disclose information obtained from a consumer or customer without attributing it to the particular individual, such as is often done for market studies, there is no need for a customer to be able to prohibit that disclosure. By using the term “personally identifiable,” Congress clearly intended to exclude information that contains no indicators of an individual’s identity.

The definition of “personally identifiable financial information” also appears to include health-related information. Such information will be addressed in regulations being developed by the Department of Health and Human Services as required by the Health Insurance Portability and Accountability Act of 1996. To avoid any conflict between those regulations and the privacy regulations that are the subject of these rulemakings, the regulators should carve out from the definition of “personally identifiable financial information” any type of health or medical information.

C. Definition of “nonpublic personal information” (§ .3(n))

Several of the regulators have proposed two alternatives to the definition of “nonpublic personal information” (Alternatives A and B). Alternative B requires, for information to be considered to be “publicly available,” that the information only be “available” from certain public sources, not that it actually be “obtained” from one of those sources (as required by Alternative A). Alternative B is much more consistent with Congress’s intent. It was not Congress’s intent that information that is “publicly available” is transformed into “nonpublic personal information” merely because a consumer provides it to a financial institution. To do so would likely foster disputes over the origin of the publicly available information – an issue that is totally irrelevant to protecting an individual’s financial privacy. Financial institutions should not be burdened with having to track the actual source of publicly available information, which Alternative A would require. Also, each regulator should adopt the approach of the Securities and Exchange Commission, which defines “publicly available information” as “any information that you [the

institution] reasonably believe is lawfully made available to the general public from [listed sources].”

II. Timing of initial notice to customers

Proposed section .4(a)(1) requires a financial institution to provide an initial notice prior to the establishment of a customer relationship. The GLB Act, however, only requires it “[a]t the time of establishing a customer relationship.” (GLB Act § 503(a)). When a customer relationship is established may not always be clear, and it can happen very quickly. Therefore, the rules should permit a financial institution to deliver the initial privacy notice within a reasonable period (30 days) after a customer relationship is established, so long as no nonpublic personal information relating to that customer is disclosed to a nonaffiliated third party before the initial privacy notice is provided and the customer is given sufficient time to elect to “opt out” (30 days).

III. Information to be included in privacy notices

The rules should require that the initial and annual privacy notices only include the information the GLB Act § 503(b) requires – nothing more. The detail of a notice can detract from its conspicuousness. The more information that is included in a notice, the less conspicuous the notice will be. Individuals are less likely to read -- much less comprehend -- a multi-paragraph notice that contains a significant amount of disclosure wording. Therefore, we encourage the regulators to minimize the amount of information that must be included. Additionally, financial institutions should be permitted to provide consumers and customers with *representative* samples of the categories of information required to be listed in the notices. Otherwise, financial institutions and consumers will be significantly burdened by having to constantly update these notices.

Finally, the requirement to disclose information about the financial institution’s sharing of nonpublic personal information with affiliates is clearly beyond the scope of the GLB Act. Congress elected not to restrict the sharing of nonpublic personal information with affiliates. That issue, consequently, is addressed only by the Fair Credit Reporting Act. If a consumer or customer may not prohibit a financial institution from sharing nonpublic personal information with an affiliate, why is it relevant that the individual know what information is to be shared with an affiliate? That would serve no privacy purpose and would only further burden financial institutions with an arbitrary requirement and would, as discussed previously, add to the content of the notice.

IV. Enforcement jurisdiction

A. Definition of “customer relationship” and related examples **(§ .3(k)(1)-(2))**

The various examples of a “customer relationship” set forth in the proposed rule are helpful, but the one involving the purchase of an insurance product from a financial institution (§ .3(k)(2)(i)(B)) is confusing when applied to a financial institution regulated by a federal regulator. That is because pursuant to Section 505, federal regulators will not regulate a financial institution’s *insurance* activities. For example, if a subsidiary of a national bank sells insurance to a consumer, a state insurance regulator would have jurisdiction to enforce the privacy provisions in the GLB Act (see Sec. 505(a)(6)). It does not make sense to use an example involving the sale of insurance as an example that would create a customer relationship for a

financial institution regulated by a federal regulator, if the insurance activity would not be overseen by the federal regulator.

B. Need for a definition of the term “person” with respect to enforcement

The term “person” needs to be defined. While the term “financial institution” is defined in both the GLB Act and the proposed rules, the term “person” is not defined (although it is included in the definition of “financial institution”). Moreover, the enforcement provisions in Section 505 of the GLB Act use the terms “financial institution” (Subsections 505(a), 505(a)(7), 505(b)(2)) and “person” (Subsections 505(a), 505(a)(1)(A)-(D), 505(a)(6), 505(a)(7), 505(b)(2)) in a way that suggests that they are mutually exclusive terms. Consequently, when the GLB Act states in Section 505(a)(6) that state insurance authorities have jurisdiction over “any person engaged in providing insurance,” it is unclear whether they have oversight responsibility over (1) an insurance agency affiliated with a bank (that is, a “financial institution”) or (2) an insurance agent affiliated with a bank (arguably a “person”). The regulations should clarify the oversight authority by defining the term “person”.

V. Limits on sharing of account numbers for marketing purposes (§ .13)

A customer should be able to consent to the disclosure of his or her account number, and such an exception should be added by regulation. If a customer has provided informed consent for the disclosure of an account number, no privacy concerns are implicated. Individuals routinely provide companies with their credit card numbers. Likewise, they should not be prevented from authorizing the disclosure of other account numbers.

The standards that apply to such consent should relate to the type of marketing arrangement involved. An example of a commonly used marketing arrangement is what is referred to as an “affinity card.” A customer uses the affinity card – a special type of a charge card – with the understanding that the card number will be shared with nonaffiliated third parties for marketing purposes. That is the fundamental nature of the product. The customer’s consent is implied with his or her election to use the card. Such implied consent, because it is clearly informed consent, should be adequate.

Finally, we seek clarification as to the intended scope of the general prohibition in Section .13 (which quotes Section 502(d) of the GLB Act). The section generally prohibits the sharing of an account number with a nonaffiliated third party “*for use in telemarketing, direct mail marketing or other marketing through electronic mail to the consumer.*” (Emphasis added.) There should be a statement added to the regulations clarifying that the phrase “for use in [marketing]” does not include fulfillment (the process of effecting an order after a customer has chosen to purchase the product or service marketed).

Sincerely,



E. Kenneth Reynolds