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FEDERAL TRADE COMMISSION
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March 29, 2000

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

Re: Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313
Comments of Herbert A. Rosenthal, Chartered, a collection litigation firm

I write to urge the Commission to revise the Proposed Rule referenced above to expressly exclude debt collection agents (collection agencies and collection law firms) from the definition of "financial institution." A parallel revision is also required to ensure that the interaction between collection agents and account debtors is not subject to an interpretation that a "customer relationship" exists.

Such a revision is consistent with the intent of both the Gramm-Leach-Bliley Act (the "Act") and the Proposed Rule. In addition, it will avoid the flood of litigation that is otherwise certain to occur as debtors' lawyer try to persuade Courts that compliance or failure thereof with the Commission's regulations (for which there is no private right of action) constitutes a violation of the Fair Debt Collection Procedures Act.

One concern is that the Proposed Rule allows an interpretation of the Act that defines third party debt collectors as "financial institutions" whose interactions with consumers suddenly constitute "customer relationships," thereby triggering the full panoply of notice requirements. The proposed definition of a "financial institution" appears to include debt collection agents and, contrary to the Commission's expressly stated belief, the broad definition of "customer relationship" lends itself to being applied to debt collection agents. Of course, it is only through an onslaught of litigation that these and other questions will be raised and answered. The Commission should not be responsible for creating that opportunity when it is clear that a debt collector under the Fair Debt Collection Procedures Act has not extended credit to or established the "Customer Relationship" that the G-L-B Act contemplated when Congress promulgated the notice and disclosure limitation requirements.

The Commission's clear guidance now would avoid extensive litigation and the potential expansion of liability for debt collection agents similar to that which occurred under the Fair Debt Collection Practices Act ("FDCPA"). A clear exception for debt collection agents is imperative under the Proposed Rule because, unlike the FDCPA, the Act is not intended to apply to the interactions between collection agents and account debtors.

The driving force behind the Act is consumer choice. The notice requirements with respect to privacy policies are intended to allow potential customers the opportunity to review, in advance, the policies of a financial institution and to make an informed choice as to which financial institution they will patronize and establish a "customer relationship" with. By the time a third party debt collector or purchaser of defaulted debt becomes involved, the consumer, for whatever reason, has chosen to terminate the "customer relationship" by not paying. The federal banking agencies recognized that because in their proposed rules to implement the G-L-B Act, that relationship terminates essentially at charge-off.

A "customer relationship" in the context of debt collection, which may be characterized primarily as adversarial, simply does not arise in this manner. The only role the account debtor plays in the process is in creating the delinquency; the freedom to select from among various collectors is not a choice that is available to the account debtor. Informed, voluntary decisions are wholly removed from the process once the financial institution enlists the services of a collection agent to enforce payment obligations on a past due account. By this time, the customer by his/her non-payment has terminated the "customer relationship".

It is also important that consideration be given to the effect of the Proposed Rule on attorneys whose practice includes debt collection. Attorneys as debt collectors certainly must be excepted from the Proposed Rule's expansive definition of a financial institution. Law firms are not financial institutions, and no stretch of the imagination can interpret them as being so. Moreover, a customer relationship simply cannot exist between the attorney and the account debtor because such an interpretation would be at odds with state ethical rules governing attorneys, whose duty it is to zealously represent the entity to whom a debt may be owed. Imposing on an attorney a concurrent duty to the adversary of the client creates, by statute, an impermissible conflict of interest, particularly since the attorney's ethical obligations may require otherwise impermissible disclosure in order to advocate the client's interest.

These same principles apply to purchasers of defaulted debt. We support the comments being filed by the Debt Buyers Association, the National Association of Retail Collection Attorneys, and, to a large extent, by the American Collectors Association. To impute the status of "financial institution" on the collector or purchaser of defaulted debt or even to use that to help define "others" stands the whole purpose of the Act on its head. Similarly, declaring that the purchaser of defaulted debt has extended a credit facility to the defaulted debtor ignores reality. Once the customer has terminated the "customer relationship" with the credit grantor, that termination must follow the debt whether it is in the hands of a third party collector retained by the credit grantor or whether it is in the hands of purchaser of that debt from the credit grantor.

Sincerely,

Herbert A. Rosenthal

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