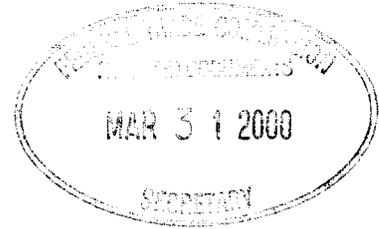


**American Express Company**  
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March 31, 2000



Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Attention: Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313 - Comment

Robert E. Feldman  
Executive Secretary  
Attention: Comments/OES  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street, NW  
Washington, DC 20429

Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> and C Streets, NW  
Washington, DC 20551  
Attention: Docket No. R-1058

Communications Division  
Office of the Comptroller of the Currency  
250 E Street, SW  
Washington, DC 20219  
Attention: Docket No. 00-05

Manager, Dissemination Branch  
Information Management & Services Division  
Office of Thrift Supervision  
1700 G Street, NW  
Washington, DC 20552  
Attention: Docket No. 2000-13

Subject: Proposed Privacy Regulations

Dear Sirs and Madams:

American Express Travel Related Services Company, Inc. (“American Express”) is pleased to take this opportunity to provide comments on the proposed privacy rules (the “Proposed Rule”) published under section 504 (a) of the Gramm-Leach-Bliley Act (the “Act”) by the Federal Trade Commission (“FTC”), the Federal Deposit Insurance Corporation (“FDIC”), the Board of Governors of the Federal Reserve System (“FRB”), the Office of the Comptroller of the Currency (“OCC”), and the Office of Thrift Supervision (“OTS”) (collectively referred to herein as the “Agencies”).

American Express directly and indirectly issues American Express® charge cards and credit cards in the United States, serves individuals with Travelers Cheques and other stored value products, helps companies manage their travel, entertainment and purchasing expenses through its family of Corporate Card services, offers accounting and tax preparation services to small businesses, and offers travel and related consulting services to individuals and corporations.

American Express has been a leader in being attentive to consumer privacy issues and has been a strong proponent of fair information practices, including providing customers with clear and accurate disclosures on information use and marketing practices and opt out choices. Towards that end, American Express offers the following comments and suggestions concerning the Proposed Rule for your consideration.

**1. General**

Throughout the various arenas in which legal notices are provided to consumers, experience has shown that concise, straightforward, and not overly technical explanations provide the most value to consumers. Requiring a high level of detail, excessive length or formulaic language results in notices that contain “more” information but are, in our experience, less helpful to consumers. In seeking to strike a balance between readability and completeness, we suggest that the most relevant perspective is that of the consumer. A notice that is concise, clear, and written in plain language will help consumers to make informed decisions. A lengthy notice filled with detail and minutiae will not be meaningful to consumers. We suggest that Section .6 of the Proposed Rule, and the examples therein, be revised to avoid requiring excessive detail and length that would make notices difficult to understand and hinder consumers’ ability to make informed decisions.

The inclusion of examples in final rules should be retained. Examples will provide significant value in facilitating the application and implementation of final rules. However, the final rules and commentary should underscore that the examples are not

intended to be restrictive or the exclusive means of compliance. And, as noted further herein, in those instances where the examples may indicate a different degree of specificity or potentially lead to a different conclusion from the substantive rule provision, revisions should be made to align the examples with the corresponding substantive provisions.

## **2. Uniformity of Privacy Rules**

The degree to which the Agencies have coordinated the drafting and publication of their respective Proposed Rules is apparent and appreciated. We encourage the Agencies to ensure that the final rules are “consistent and comparable” as required by the Act.

Even apparently minor differences in final rules adopted by the Agencies will be confusing to consumers. Consumers cannot readily ascertain which Agency or Agencies regulate the various financial institutions with which they interact. The reasonable expectation and presumption of consumers will be that all financial institutions will be subject to a uniform set of rules. If the obligations of financial institutions vary depending upon which of several differing versions of final rules apply to different consumer and customer relationships, the resulting confusion would diminish the benefits of the Act for consumers and customers.

Correspondingly, differences between or among versions of final rules will impose a substantial burden on financial institutions. Diversified financial institutions and their affiliates may fall within the purview of several Agencies. To the extent financial institutions and their affiliates work closely to provide products and services and to manage customer relationships, variance in the final rules would impose an unnecessary burden upon financial institutions. As a practical matter, diversified financial institutions and affiliated financial institutions would be prevented from utilizing combined notices, resulting in an inordinate increase in the number of privacy notices customers will receive. Implementing different versions of final rules across various lines of business would consume substantial resources and invite possible confusion and errors in proportion to the increased complexity of the compliance effort, while providing little or no benefit to consumers. Consistent final rules will also provide a level playing field for competition between and among financial institutions and avoid any inadvertent competitive advantage or disadvantage that might result from differences in final rules. We therefore urge the Agencies to ensure that final rules are consistent in substance and wording.

### **3. Personally Identifiable Financial Information**

The Proposed Rule's definition of "personally identifiable financial information" does not incorporate the concept, as required by the Act, that information be "financial" to come within the statutory definition. The practical effect of this omission is to require financial institutions to treat any information, regardless of whether it is financial in nature, as "personally identifiable financial information." The Act, however, clearly contemplates that only information which is financial in nature falls within its purview. (Act Section 509(4)(A)). A final rule encompassing information that is not "financial" would extend the rule beyond the clear meaning of the statutory language and beyond the underlying Congressional intent.

### **4. Nonpublic Personal Information**

Of the two alternative definitions of "nonpublic personal information," "personally identifiable financial information" and "publicly available information," Alternative B is preferable. The level of protection afforded information should be based upon its nature rather than its source. Information that is readily available to the public is not in any meaningful sense "nonpublic information." Alternative A sets up an artificial distinction based upon the source of information. This approach could very well contribute to consumers' confusion by affording differing levels of protection to the same information. The resulting lack of uniformity in how financial institutions treat information such as name, address, and telephone number would impede consumers' ability to comprehend their rights under the Act and to make informed decisions.

Comment is invited on the efficacy of a variation of Alternative A and B requiring financial institutions to verify that information is actually publicly available prior to treating it as "publicly available information." In practical effect, such a definition would be the same as Alternative A. The notion of a financial institution "re-obtaining" already-public information from a public source does not make practical sense and illustrates the flaw inherent in Alternative A.

### **5. Isolated Transactions**

The Proposed Rule indicates that engaging in isolated transactions does not establish a customer relationship. The final rules and commentary should retain and clarify this principle to avoid uncertainty as to what characteristics of an "isolated transaction" or series of isolated transactions might be deemed to give rise to a customer relationship. For example, Section 3(i)(2)(ii)(C) of the Proposed Rule recognizes that certain isolated transactions with a travel agent do not give rise to a customer relationship. The Federal Trade Commission Supplementary Information ("FTC Supplementary Information") however, indicates that providing trip planning services, even in an isolated transaction, would create a customer relationship. We suggest that this section and the accompanying commentary or supplementary information be revised to

recognize other travel-related transactions, such as trip planning and reservation services, that can be and often are as isolated as those specified in the Proposed Rule. These services, in isolated transactions, do not appreciably increase the duration or complexity of the relationship or the information exchanged relative to the sale of an airline ticket. Truly isolated transactions, regardless of the service provided, should not trigger the initial privacy notice requirement.

## **6. Customer Relationships**

The distinction between “consumers” and “customers” should be retained and clearly spelled out in the final rules and commentary. The Proposed Rule should be revised as necessary to clarify the types of interactions which may be deemed to establish a customer relationship. For example, Section 3(i)(2)(i)(D) of the Proposed Rule specifies that entering into an agreement or understanding to arrange or broker a home mortgage or automobile financing will establish a customer relationship. The FTC Supplementary Information indicates that merely “assisting” a consumer would establish a customer relationship. Providing assistance by way of offering quotes on a web site or other activities that facilitate the consumer’s ability to “shop around” for financing of this type does not, in and of itself, establish a customer relationship.

It is clearly in the interest of consumers to have easy access to financial information and tools to help facilitate informed decisions. Blanketing consumers with a deluge of privacy notices as they interact with various financial institutions to obtain financing information would quickly become “unnecessary clutter” from the consumer’s perspective. A more helpful approach would be to require financial institutions to provide the notice when a formal understanding to arrange or broker a loan is established. The Proposed Rule appropriately reflects this approach. The FTC Supplementary Information, by introducing the notion of “undertaking to assist” the consumer, implies that the notice should be provided at a point in the process where it would be of little benefit to a consumer shopping for a home or car loan. We suggest that the final rule and accompanying commentary or supplementary information clarify that mere “assistance” does not establish a customer relationship.

Section 3(i)(2)(i)(I) of the Federal Trade Commission’s Proposed Rule (the “FTC Proposed Rule”) includes career counseling among the activities that establish a customer relationship. Many financial institutions provide career counseling to community residents as part of community-based programs, some of which may highlight career opportunities at that financial institution or in the financial services industry generally. Requiring privacy notices as part of these programs is unlikely to provide any real benefit to participants. In the unlikely event that a financial institution were to disclose any nonpublic personal information obtained as part of a community-based program, an opt out opportunity would be provided prior to disclosure in accordance with sections 7 and 8 of the Proposed Rule. However, the distribution of initial privacy notices at each such program would not serve any practical purpose and may even have a stifling effect on the worthy goals of these programs.

Accordingly, we suggest revision to section 3(i)(2)(i)(I) of the FTC Proposed Rule to clarify that providing these services as part of community-based programs does not by itself give rise to a customer relationship.

## **7. Delivery of Initial Notices**

Proposed Rule Sections 4(c)(1) and (2) describe the point at which a “customer relationship” commences for purposes of determining when the initial notice must be delivered. Even with the number of examples set forth in the Proposed Rule and commentary, the specific point at which the initial notice must be provided can be difficult to ascertain with an appropriate level of certainty. In order to lend simplicity, clarity, and consistency to this determination, we suggest that the Proposed Rule be revised to incorporate the notion that the initial notice requirement is satisfied if it is given at the same time as other legally mandated initial disclosures. The Supplementary Information published jointly by the FDIC, FRB, OCC, and OTS (the “Joint Supplementary Information”) indicates that the initial notice may be provided simultaneously with other legally mandated initial notices, such as those required under the Truth in Lending Act. This approach strikes an appropriate balance between ensuring that consumers receive the notice at a meaningful point while avoiding unnecessarily burdensome requirements on financial institutions. Accordingly, this concept should be incorporated into the final rules and commentary.

## **8. Joint Accounts**

Financial institutions should be permitted to develop their own procedures and processes for providing privacy and opt out notices to holders of joint accounts. This approach will enable alignment with the financial institution’s methods for providing other notices required under applicable regulations (such as Regulation Z under the Truth in Lending Act). Alignment with other notices will benefit holders of joint accounts by adhering to the established course of communicating with respect to the joint account. Applicable regulations generally require the delivery of one notice to a designated address or “primary obligor” on a joint account. The efficacy of this approach should be reflected in the final rules.

Likewise, financial institutions are permitted to take direction with respect to joint accounts from the designated decision maker or primary obligor. This avoids the confusion that would arise if different and perhaps conflicting directions were to be given by several individuals. Again, alignment with established practices will be the most helpful approach to consumers. Accordingly, financial institutions should be permitted to provide the opt out notice to a designated individual or primary obligor and to take direction regarding the opt out from that individual. To the extent, however, that financial institutions have the resources and capability of providing individualized opt out opportunities to each holder on a joint account, they should be permitted to do so. This would permit, but not require, those financial institutions

which have implemented the necessary systems and procedures to offer additional choices to holders of joint accounts.

#### **9. Forwarding Correspondence to the Designated Address for the Account Relationship**

In certain instances, customers request that statements, notices and other correspondence be forwarded to a third party designated by the customer. In such cases, financial institutions should be permitted to provide the privacy notice to the address established by the customer for account correspondence. The customer, in arranging for correspondence to be sent to a third party, has presumably done so for the sake of administrative efficiency and to ensure that the correspondence receives appropriate attention. Deviating from the course of communication established in accordance with the customer's directions would be extremely costly and difficult for financial institutions to administer. Moreover, it would likely result in the notices not receiving the attention they deserve since customers will presume that the correspondence was sent in error or that their designee is handling the matter.

Where the customer has clearly directed that correspondence regarding his or her relationship with a financial institution be sent to the customer's designee, financial institutions should be permitted to accommodate customers' preferences on these matters and should not be required to do otherwise for notices required by the Act. The Proposed Rule should be revised to expressly provide that delivery of notices to, and acceptance of direction from, a customer's authorized designee are acceptable means of providing the notice and opt out opportunity to the customer.

#### **10. Electronic Delivery**

Section 4(d)(5) provides examples of acceptable types of delivery of the privacy notice. As a general matter, the method used by the financial institution to deliver legally required statements and other correspondence to the customer should constitute a "safe harbor" as a method of delivering privacy and opt out notices. For example, for those customers who receive account statements via a secure web site page, delivery of notices in a like manner should be deemed an acceptable means of compliance with Proposed Rule sections 4(d) and 8(b)(1). We suggest that the Proposed Rule be revised to explicitly recognize established methods of corresponding with customers as satisfying these provisions. Further, the final rules should reflect that as the state of the law regarding electronic delivery of required disclosures develops, any means of delivery recognized under other consumer protection regulations would constitute a permissible method of delivering privacy and opt out notices.

#### **11. Termination of Customer Relationship**

The Proposed Rule provides examples of when an annual privacy notice need not be provided, such as in the case of dormant deposit accounts or accounts that have been

paid in full, written off or sold or where there has been no communication with the customer in the past 12 months. The key determinant of whether an annual notice is required should be whether any decision is requested or required of the customer to facilitate the continuation of the business relationship. The concept that the annual notice need not be sent if there has been no communication with the customer in the past 12 months should be retained. But the final rules and commentary should specify that the 12-month period constitutes a “safe harbor” for financial institutions rather than a minimum requirement. The final rules should recognize that there will be circumstances under which contact within the prior 12 months does not justify the delivery of an annual privacy notice. For example, collection and risk-management activities which might include intermittent contacts with the former customer in the prior 12 months should not trigger the annual notice requirement. Additionally, distribution of annual notices to accounts that are deemed dormant or inactive under a financial institution’s general account maintenance policies and procedures should not be required. Imposing this requirement on financial institutions in situations where no customer decision is called for would constitute an unnecessary expense and burden upon financial institutions.

## **12. Initial and Annual Privacy Notices**

The Proposed Rule and supplementary information would require financial institutions to provide exhaustive detail that would make initial and annual privacy notices lengthy and difficult for customers to read. Final rules and commentary should reflect broader levels of categorization that will be more likely to fulfill the Act’s purpose of ensuring “clear and conspicuous” notice of the financial institution’s privacy practices and policies.

In particular, the examples in Section 6(d) call for a level of specificity that would not be meaningful to customers. The examples and accompanying supplementary information regarding nonaffiliated third parties illustrates this point. Financial institutions work with ever-changing groups of nonaffiliated third parties to provide value-added products and services to their customers, and the level of detail required by the Proposed Rule would become increasingly onerous over time. This trend is fostered by customer demand and results in financial institutions partnering with an increasing array of newer and “non-traditional” businesses to provide innovative products and services to customers. Overly detailed privacy notice requirements, combined with the “change in terms” requirement, would result in a continuous stream of notices that provide no clearer or improved disclosure to customers. Section 6(d) and accompanying supplementary information should be revised to address this issue.

As an overarching matter, the disclosure requirements should be crafted at a level where the privacy notices will add value for a customer who is seeking to make an informed decision based upon the information provided. Clearly, an overly detailed and excessively lengthy notice which may be the subject of constant refinement would be counterproductive to a customer seeking to make an informed decision.

### **13. Confidentiality, Security, and Integrity**

A clear and conspicuous description of information security practices will be helpful to customers. However, the examples should be revised to avoid requiring an excessive level of detail. The area of information security is quite complex, and a description above and beyond a general description quickly becomes meaningless to all but information technology professionals. The point at which further detail adds unnecessary and confusing clutter is reached particularly quickly when discussing technical security practices. For this reason, we suggest the examples provided be revised to reflect an appropriate level of description.

### **14. Notice of Change in Terms**

Section \_\_8(c) requires that a revised opt out opportunity (a revised notice and reasonable time to exercise the opt out) be provided to customers prior to disclosing any nonpublic personal information to nonaffiliates other than as described in the initial notice. This requirement should be modified so as to apply to circumstances under which the prior notice is rendered materially deficient. It should not turn on minor, technical or immaterial developments or changes in practices. Whether the change actually reflects a meaningful departure from prior disclosures from the perspective of the customer should be the standard. Strict requirements to re-notify all customers of a change in terms regardless of the materiality or significance of the change will result in financial institutions reserving very broad rights under the “future disclosure” provision. The resulting litany of hypothetical disclosures that may occur at some point in the future would not be helpful in assisting consumers to make informed decisions.

### **15. Opt Out Methodology**

The proposed rule and commentary regarding the methodology for accepting opt outs and for offering “partial” opt outs should be sufficiently flexible to permit any method of opt out that is practical for both the customer and the financial institution. As technology and methods of communications develop, innovations for providing customers with choices should be allowed to develop correspondingly, so long as the “clear and conspicuous” standard is met. The rules regarding the methodology for accepting opt outs and providing partial opt out opportunities should require reasonably easy access without being prescriptive as to format or communications channel. Also, the operational complexity of implementing opt out choices should be taken into account. Financial institutions, as a practical matter, must be permitted to direct customers to particular telephone numbers, addresses, or web site addresses to communicate opt out choices. Customers and financial institutions alike have an interest in the efficient and accurate implementation of opt out choices. Care should be taken to avoid encumbering financial institutions with required methods of accepting opt outs that would frustrate these interests.

Likewise, the standards for revoking opt outs should be consistent with requirements for accepting opt outs. A revocation should be required to be “clear and conspicuous.” Consumers and customers should not be limited in the methods by which they may exercise their rights to revoke an opt out. Accordingly, Section \_\_.8(e) of the Proposed Rule should be revised to permit revocations to be made in any manner in which the financial institution accepts opt outs.

#### **16. Prohibition on Disclosing Account Numbers for Marketing Purposes**

Section \_\_.13 prohibits the disclosure of an account number or similar account access number for marketing purposes. The Agencies correctly anticipate that the flat prohibition would pose undue interference with the ordinary course activities of financial institutions. There are numerous circumstances where disclosing account numbers in conjunction with marketing efforts serves the interests of both customers and financial institutions. Disclosures to a financial institution’s outsourcing vendors or agents (such as disclosures in connection with a special promotion enclosed with account statements printed by a nonaffiliated third party) should not be prohibited. This is underscored by Sections \_\_.9 and \_\_.10 of the Proposed Rule, which clearly contemplate the disclosure of account numbers to the financial institution’s service providers and joint marketing partners. Accordingly, the final rule should reflect that disclosure of account numbers to third party service providers and outsourcing vendors, including those that perform marketing functions on behalf of the financial institution, is not prohibited.

Also, the disclosure of encrypted account numbers or other identifier codes which do not permit access to the account should not be prohibited. Use of these types of numbers actually serves to limit the actual account number from introduction into broader circulation. This enhances the purpose of the provision, which is to curtail the circumstances in which disclosure of account numbers to nonaffiliated third parties may result in unauthorized account transactions. This purpose can be achieved by a more precisely drafted final rule which recognizes that a blanket prohibition would have a counterproductive impact on customers and financial institutions alike.

## **17. Effective Date**

Implementing the notice requirements and operational changes necessary to accept and effectuate customer opt outs by the currently proposed effective date of November 13, 2000 will pose a significant challenge, even for those financial institutions which will be able to build upon current notice and opt out processes. For those financial institutions, particularly smaller businesses, that must create new notice and opt out processes, the rush to comply by November poses a serious resource and financial challenge. Moreover, the resulting deluge of privacy notices mailed in December 2000 – in the midst of the normal holiday mail crush – would overburden consumers at a time of year when this type of notice is likely to get little attention. We suggest that the deadline for providing privacy notices, at a minimum to existing customers, be extended a reasonable time to avoid this scenario and to permit financial institutions to coordinate the distribution of privacy notices with other customer mailings the financial institution may undertake during that period.

Thank you for the opportunity to provide these comments. Should you have any questions or comments or if we can be of any further assistance, please do not hesitate to call me at (212) 640-5418.

Sincerely,

/s/ Thomas J. Ryan

Thomas J. Ryan  
Group Counsel