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March 30, 2000

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

Re: Gramm-Leach-Bliley Act
Privacy Rule, 16 CFR Part 313 -- Comment

Dear Sir/Madam:

The Debt Buyers' Association ("DBA") hereby submits its comments on the Federal Trade Commission's (the "Commission") Proposed Rule regarding Title V, Subtitle A -- Disclosure of Nonpublic Personal Information (the "Privacy Act") passed as a part of the Gramm-Leach-Bliley Act of 1999 (the "G-L-B Act").

I. Introduction.

The DBA is a non-profit corporation comprised of a network of industry professionals dedicated to building a reliable and credible market for delinquent receivables. The association was founded in March of 1997 and incorporated as a California non-profit corporation in March of 1999. The DBA has a membership of 153 firms. These members include collection agencies, collection attorneys and investors, all of whom apply standard collection techniques in an effort to collect the purchased debt. These efforts are no different than those that are applied by contingency fee collection agencies.

The debt that is sold has almost always been "charged-off." Depending on the credit grantor, charge-off typically occurs about six months after the consumer has made

his/her last payment on account. By that time, the debtor is no longer a customer of the credit grantor. The debtor typically no longer keeps the credit grantor updated on his/her address and telephone numbers. In fact, at this stage, the debtor is often ignoring or avoiding the credit grantor because the debtor has elected, for whatever reason, not to pay the debt. By the time the debt is sold to a debt buyer, one to thirty-six or more months may have elapsed since charge-off. The debt may have been "worked" by one or more collection agencies. The accuracy of the locational information supplied by the credit grantor to the debt buyer may be obsolete because the customer relationship between the credit grantor and the debtor has long since terminated.

Debt buyers may also resell all or portions of charged-off portfolios to other debt buyers. The practices and characteristics of the resale market do not materially differ from the market for debt sold by the original creditor.

The sellers of delinquent debt include American Express, Bank of America, Chase Manhattan Bank, First USA, Fleet Bank, GE Capital, MBNA, Providian, BankBoston, and many other major credit grantors. This marketplace has, increasingly, been recognized by credit grantors as a valuable resource that permits them to realize a return on what would otherwise be non-performing assets. As a result, the debt buying marketplace has enjoyed remarkable growth in recent years. It is estimated that there were five sellers of delinquent debt in 1992. By 1998 that number had grown to 225 and it is projected that there will be 300 sellers of delinquent debt by 2005. The face value of all charged-off debt sold in 1993 was $1.3 billion. By 1997, that number had grown to $15 billion and sales are expected to reach $25 billion in 2000. In addition to an increase in volume, the delinquent debt marketplace has attracted substantial interest from Wall Street, including a developing securitization marketplace.

All of this activity indicates a vital market that is playing an increasingly important role in the consumer credit marketplace. The stability of this market is important both to the major credit grantors who have been provided with an alternative to outsourcing defaulted debt for collection to collection agencies and/or collection law firms, as well as to debt buyers.

II. The Statutory Definition of "Financial Institution" Does Not Include Debt Buyers.

The Proposed Rule takes the position that independent collection agencies should be included within the definition of "financial institution" for purposes of the Privacy Act, thereby suggesting that independent debt buyers that collect debts they have purchased

would also be included within that definition. In fact, there is no justification in either the Privacy Act or the G-L-B Act for such an expansive reading of "financial institution." While a "financial institution" may permissibly expand its operations to include debt collection or debt buying and will be subject to the Privacy Act, the converse is not true; that is, independent debt buyers do not become "financial institutions" as a result of this statute.

The G-L-B Act states that "financial institution" means "any institution the business of which is engaging in financial activities as described in Section 4(K) of the Bank Holding Company Act of 1956." Section 4(K) does not purport to create a listing of types of "financial institutions." Rather, it states that the enforcement agencies charged with interpreting and implementing Section 4(K) will develop a listing of financial activities in which a financial holding company may engage. In that context, the definition of a "financial institution" would include a bank which has, as an ancillary business, a collection agency or a debt buyer. However, the statute does not say that debt buyers which stand independent of banks or financial holding companies should be swept within the definition of "financial institution" and the coverage of the G-L-B Act and the Privacy Act.

Indeed, the regulatory provision cited by the Commission to support its broad reading of "financial institution," 12 CFR 225.28, is entitled "List of permissible nonbanking activities," and states:

> (a) Closely related nonbanking activities. The activities listed in paragraph (b) of this section are so closely related to banking or managing or controlling banks as to be a proper incident thereto, and may be engaged in by a bank holding company or its subsidiary in accordance with the requirements of this regulation.
>
> . . . .
>
> (b)(iv) Collection agency services. Collecting overdue accounts receivable, either retail or commercial.

This regulatory provision describes debt collection as an activity ancillary to banking. However, just because the banking regulators have concluded that collecting debt may be an ancillary and allowable activity of a "financial institution" does not mean that an independent debt collector suddenly becomes a "financial institution." The definition flows in only one direction. Neither the statute, nor the regulations cited by the Commission, support a definition of "financial institution" that is broad enough to include independent debt buyers.

The independent operation of a free-standing debt buying business is not a "financial activity" ancillary to a bank's business, as described in Section 4(K), and as the Privacy Act requires. The DBA believes that it is inappropriate, and exceeds the Commission's rulemaking authority, to include within the definition of "financial institution" debt buyers who are not owned or controlled as an ancillary business by banks or other financial holding companies.

III. The Exceptions to the Notice Requirements of the Privacy Act Excuse Any Obligation to Provide Notice to Consumers or Customers.

Section 502(e) of the Privacy Act provides that the notice requirements of Sections 502(a) and (b) are excused if any of the statute's exceptions apply. Section 502(a) refers to the notice required pursuant to the terms of Section 503, and Section 503, in turn, refers to notice to both consumers and customers. Therefore, by the terms of the statute, if an exception under Section 502(e) applies, the exception applies to notice to consumers and customers.

However, in the Commission's analysis, Section 313.10, the Commission states that the statutory exceptions of Section 502(e) "do not affect a financial institution's obligation to provide initial notices of its privacy policies and practices prior to the time it establishes a customer relationship and annual notices thereafter. Those notices must be provided to all customers, regardless of whether the institution intends to disclose the nonpublic personal information."

The DBA believes that this statement in the Commission's analysis is in error and should be deleted. Where the statutory exceptions apply, the statute provides that notices to both consumers and customers are excepted. There is no basis in the language of the statute to discriminate between consumers and customers in this regard.

IV. Various of the Exceptions to the Privacy Act's Notice Requirements Apply to Debt Buyers.

A. Section 313.10(a)(1), (2) and (3).

Pursuant to Sections 313.10(a)(1), (2) and (3), the statute's notice requirements do not apply if nonpublic personal information is disclosed:

> (1) As necessary to effect, administer or enforce a transaction requested or authorized by the consumer.
>
> * * *
>
> Necessary to effect, administer, or enforce a transaction means that the disclosure is: (1) Required, or is one of the lawful or appropriate methods to enforce your right or the rights of other persons engaged in carrying out the financial transaction or providing the product or service; or (2) Required, or is a usual, appropriate or acceptable method: (i) To carry out the transaction or the product or service business of which the transaction is a part, and record, service or maintain the consumer's account in the ordinary course of providing the financial service or financial product; (ii) To administer or service benefits or claims relating to the transactions or the product or service business of which it is a part.
>
> * * *
>
> (2) To service or process a financial product or service requested or authorized by the consumer.
>
> (3) To maintain or service the consumer's account with you, or with another entity as part of a private label credit card program or other extension of credit on behalf of such entity.

The "transaction" to be examined in order to evaluate the applicability of these exceptions is (in the case of the consumer debts that are the subject of the DBA's members' activities) the purchase by the consumer of some good or service for which the consumer has allegedly failed to pay. Such transactions by the consumer are entirely voluntary, of course, and are certainly "requested or authorized" by the consumer.

Having entered into the transaction with the consumer, collection efforts by the creditor, including the sale of delinquent debt in order to realize some value on the consumer's outstanding obligation, falls within these exceptions. Such sales are a method of "enforcing" the transaction with the consumer. They are also a part of "servicing or processing" a financial product or service -- the extension of credit. Further, as described in the introduction above, the sale of debt is a "lawful," "appropriate" and "acceptable" method available to the creditor to "enforce its rights" against the consumer. The Proposed Rule and

accompanying analysis should reflect that each of these exceptions applies to sales and resales of delinquent consumer debt.

B. Section 313.10(a)(4).

Pursuant to Section 313.10(a)(4), the statute's notice requirements do not apply if nonpublic personal information is disclosed:

> (4) In connection with a . . . secondary market sale (including sales of servicing rights). . . .

The sale of debt portfolios to debt buyers is a secondary market sale. The Proposed Rule and accompanying analysis should reflect that such sales fall within this exception and are excused from the statute's notice requirements.

C. Section 313.11(a)(2)(iv).

Section 313.11(a)(2)(iv) is drawn from Section 502(e)(3)(D) of the statute which states that the notice requirements of the statute are not applicable "to persons holding a legal or beneficial interest relating to the consumer."

As discussed above in section III, the statute itself does not distinguish between the application of this exception to consumers and customers; it simply creates an exception from the notice requirements of the statute. However, Section 313.11(a)(2)(iv) of the Proposed Rule suggests that this particular exception should apply to consumers, impliedly excluding the application of this exception to customers. There is no basis in the language of the statute for this distinction. This exception should be applied equally to the notice requirements for consumers and customers alike. Because debt buyers hold a legal interest relating to the consumer, the Proposed Rule and accompanying analysis should reflect that, as such, debt sales are exempt from the notice requirements of the statute.

V. An Exception Should be Added To the Proposed Rule for Debt Buyers Who Submit Signed Representations To The Commission.

As a general matter, the DBA is of the view that the Privacy Act was never intended to apply to debt buyers because of the nature of the debt buyers' interaction with consumers. The legislative history of the Privacy Act is replete with references to the fact that the purpose of the statute is to create and encourage a competitive environment in all respects. One aspect of that overall approach is to require financial institutions to disclose

their privacy policies, whatever they may be, so that consumers will know before creating a business relationship how the financial institution intends to treat the consumer's private information. If the consumer finds the financial institution's privacy policy to be contrary to the consumer's preferences, the consumer is free to make a choice to go elsewhere. A competitive market will, presumably, give the consumer the opportunity to find the best privacy policy, from the consumer's perspective.

None of these considerations or market forces are at work with regard to debt buyers. The consumer has no contact with the debt buyer before the debt sale, nor does the consumer have any choice with regard to which debt buyer will purchase his/her debt. The purposes intended to be served by the Privacy Act are simply not served by applying the Privacy Act to independent debt buyers.

To the extent that the statute's various exceptions to its notice requirements, Section 313.10 and Section 313.11, address this point, the operation of these exceptions is consistent with the legislative intent. However, the DBA believes that an additional exception would further the purposes of the statute.

If the Commission is concerned that debt buyers are engaged in selling or otherwise transmitting consumer information to marketers, then the DBA proposes that the Commission create an exception from the statute's notice requirements for those debt buyers who submit a representation to the Commission, in writing, that they will not transmit consumer information to any third party to be used for marketing purposes, and that prior to any transmittal of consumer information, the debt buyer will obtain a written representation from the recipient that the information will not be used for marketing purposes. Such a submission would be filed with the Commission annually, excepting the debt buyer from the statute's coverage for a one-year period.

VI. A Debt Buyer Does Not Have a Customer Relationship with a Consumer.

The Commission's analysis of the Proposed Rule at Section 313.3(i) states:

> A consumer has a 'customer relationship' with a debt collector that purchases an account from the original creditor (because he or she would have a credit account with the collector) . . . .

The DBA believes that the Commission is in error in this regard.

First, we suggest that the Commission is factually in error. With very limited exceptions, the debt buyer is not creating a credit account with a consumer.[1] In fact, no new credit is being extended by the debt buyer. Rather, the debt buyer is trying to collect a defaulted debt from a consumer for whom the customer relationship with the credit grantor terminated before the debt was sold. Indeed, some credit grantors sell uncollected judgments that they have obtained. There is no basis to suggest that the purchaser of such a defaulted debt has created a "credit account" with the debtor.

Similarly, the typical debt buyer who simply seeks to collect on the defaulted debt is not extending credit or creating a credit account with the debtor; the debtor has not been given a credit facility or an extension of credit by the debt buyer. In those cases where the debt buyer provides a cooperative debtor with a new credit facility, then, of course, that consumer is most likely a customer; but that happens rarely. As the banking agencies suggest in their proposal to implement the Privacy Act, the "customer relationship" terminates when the debt is in default and charged off by the credit grantor. Nothing in the sale of the debt magically creates a "customer relationship" where it had previously terminated.

Further, the courts have already determined that buyers of charged-off debt do not have a "customer relationship" with the debtor. The courts have established that debt buyers that acquire debts already in default are not entitled to the "creditor exemption" that the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq., ("FDCPA") offers. The creditor exemption under the FDCPA exists because Congress was of the view that a creditor has an ongoing customer relationship with the consumer and has an incentive to treat the consumer well in the collection process to preserve and foster good will for its business. The courts have held that debt buyers, even though they stand in the shoes of the creditor, are not considered to have an ongoing relationship with the debtor and are, therefore, not entitled to the FDCPA's creditor exemption. Kimber v. Federal Financial Corp., 668 F. Supp. 1480 (M.D. Ala. 1987).

It is inconsistent and inappropriate to deprive the debt buyer of an FDCPA exemption which is based upon the presence, or absence, of a customer relationship, but then sweep debt buyers' relationships with consumers into the "customer" category of the Privacy Act precisely because, for Privacy Act purposes only, such a "customer relationship" is found to exist.

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[1] Rarely, debt buyers offer a debtor an opportunity to re-establish credit through a new financing instrument. The comments in this section would not apply to those activities of debt buyers.

Also, at Sections 313.5(c)(1) and (2), the Proposed Rule states that, where credit has been advanced, the customer relationship terminates once a loan is charged off. Virtually all of the accounts purchased by debt buyers have been charged off by the original creditor and, by definition, no customer relationship exists, as defined by the Proposed Rule. As such, the sale of charged-off debt does not require the customer notice under the statute.

Moreover, the purchase by a debt buyer of a charged-off account does not somehow resurrect the consumer's terminated "customer" status. The debt buyer may not have a current address or phone number for the debtor; that is hardly an indicia of having a "customer relationship." As discussed above, the consumer has no contact with the debt buyer prior to the purchase, has no opportunity to evaluate information and then decide whether to do business with a debt buyer, and has no meaningful ongoing relationship with the debt buyer, other than as an adversary in the debt collection process. The debt collection process is governed by the FDCPA and the rich body of law and commentary that has developed thereunder. There is no reason or factual justification for the proposition that there is a "customer relationship" between the debt buyer and the consumer solely because of the purchase of the debt by the debt buyer.

The Proposed Rule and accompanying analysis should reflect that debt buyers do not have "customer relationships" with consumers whose accounts have been purchased for collection.[2]

VII. If Debt Buyers Are Required to Give Notice to Customers, When Must That Notice Be Given?

The Proposed Rule recognizes that there will be circumstances when it will not be possible to provide the required notice to customers prior to the time that the customer relationship is created, as the Proposed Rule generally requires. In the event that debt buyers are required to give notice to customers, theirs is one circumstance when notice prior to the formation of the customer relationship will not be possible. Unlike the circumstance that the Commission would likely characterize as more common, debt buyers have no contact with their "customers" until after a debt portfolio has been purchased and an initial contact is made by the debt buyer to collect on amounts claimed to be owed. In fact, it is almost

[2] It is also worth noting that there are other inconsistencies between the requirements of the Privacy Act and the FDCPA. For example, if annual notices are required, should those notices be sent if the consumer has sent a "cease and desist" letter to the debt buyer/collector under the FDCPA which prohibits any further contact with the consumer? In order to address the possibility of inconsistencies, anticipated or unanticipated, the DBA proposes that the Commission include a statement in the Proposed Rule and the accompanying analysis that compliance with the Privacy Act will not constitute a violation of the FDCPA.

always the case that the portfolio of delinquent debt has been acquired by the debt buyer before the debt buyer knows the identity of these "customers." Certainly, the debt buyer and the customer do not have any initial contact that would permit the consumer to review information and make a choice as to whether he/she will or will not do business with the debt buyer.

Therefore, the DBA proposes that debt buyers, to the extent required, provide notice to customers upon the debt buyer's first contact with the customer if that contact is in writing, and within five days of the first contact if that contact is oral.

VIII. The Form of Notice Required.

The Proposed Rule suggests that the form of the notices required conform to general guidelines of clarity and reasonableness. However, the DBA proposes that it assemble a working group of certain members of its Board of Directors and perhaps others from the debt buying industry to meet and work with the Commission to develop guidelines that have greater specificity. The DBA is of the view that greater certainty regarding what the statutory notices will require, in the Commission's view, will be beneficial. Further, the DBA is of the view that input from the industry regarding the type and form of notices that will be workable will be valuable in the process of developing these standards.

IX. The Comments of the American Collectors Association.

We have reviewed a preliminary draft of the comments of the American Collectors Association. Many of their members' concerns mirror those of our members. Without attempting to provide an exhaustive list of all points of agreement between the DBA and the ACA, we note the following.

ACA articulates the restrictions that the FDCPA imposes on the transmittal of consumer information. Those restrictions apply to collection agencies collecting debt for the original credit grantor, to debt buyers, and to attorneys collecting debt for the original credit grantor or for a buyer of bad debt. We agree with ACA that there are already substantial restrictions on a debt buyer's (or any other entity subject to the FDCPA meeting the definition of "debt collector") ability to transmit non-public (and indeed even public) information about a consumer to third parties.

ACA supports our argument that the debtor after the sale of a defaulted debt does not have a "customer relationship" with the new owner of the debt.

Further, in its preliminary draft, ACA suggests that the Commission's proposed definition of "nonpublic consumer information" is too broad. We concur in that assessment.

Finally, ACA urges the Commission not to create consumer confusion among and between the notices required by the FDCPA and the G-L-B Act and the Commission's regulations. No debt buyer or collector of debt should be creating an actual or alleged violation of the FDCPA by any notices required by the Commission's rules. The Commission must make sure that purchasers of debt are not required to comply with one Act and its regulations under the Commission's purview thereby causing them to be charged in private civil litigation with violating another Act under the Commission's regulatory umbrella.

The DBA would be pleased to respond to any questions that the Commission may have.

Sincerely,

Daniel P. Shapiro

DPS/ng