

March 30, 2000

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Proposed Privacy Regulations Under Title V of the Gramm-Leach-Bliley Act

Ladies and Gentlemen:

Cendant Corporation welcomes the opportunity to provide the following comments on the proposed regulations to implement Title V of the Gramm-Leach-Bliley Act (the "GLB Act"). Cendant Corporation is a global provider of consumer services, including direct marketing. Cendant provides access to insurance, travel, shopping, automobile and other services primarily to customers of affinity partners, including financial institutions. Accordingly, Cendant has a strong interest in the proposed privacy regulations and how they will affect our operations and relationships with financial institutions with which we do business.

Definition of "Financial Institution"

Under the proposed regulations, a financial institution is an institution the business of which is engaging in activities which are financial in nature as described in § 4(k) of the Bank Holding Company Act of 1956. The Supplementary Information provides that an institution is a financial institution if it is "significantly" engaged in a financial activity. Because of the potentially broad reach of the term "financial activity" in the Bank Holding Company Act, Cendant believes that the term "significantly engaged" should be defined with greater specificity in the proposed regulations. We suggest that the additional definition provide that the proposed regulations do not cover companies whose financial product offerings constitute only a small portion of their overall operations, e.g., perhaps less than 25 per cent of total revenue. This would ensure that the proposed regulations do not extend to companies that are not truly engaged in any material way in the offering of financial products.

Definition of “Non-public Personal Information”

The Commission seeks comment on two alternative definitions of the term “nonpublic personal information”. Cendant strongly supports Alternative B. Under Alternative B information that is publicly available, including the existence of the customer’s relationship with the financial institution, does not become nonpublic personal information merely because a financial institution collects and at a later date generates the information from its own records.

Alternative B is more consistent with the language of Title V of the GLB Act than is Alternative A. Under section 509(4), the term “nonpublic personal information” means “personally identifiable financial information,” and does not include “publicly available information.” §§ 509(4)(A), (B). The definition goes on to state that nonpublic personal information includes a list or other grouping of consumers (and publicly available information pertaining to them) if the list or other grouping is derived using any nonpublic personal information other than publicly available information. We believe that this language confirms that a list derived using only publicly available information is not regarded as nonpublic personal information. This makes good sense, because a list which is comprised only of publicly available information about a consumer poses no threat to consumer privacy since the information is already available to anyone. To require a financial institution to incur additional expenses in order to actually obtain such information from the public source makes little sense and serves little purpose, particularly in view of the language of the GLB Act.

Alternative A should also be rejected since it would only add to the confusion that consumers will experience trying to reconcile the variety of notices that they will be receiving from the financial institutions that they use. If, for example, a mortgage customer exercises his/her opt out right with the mortgage company, the customer could still receive solicitations from third parties who obtained the information on the customer, including the relationship with the mortgage bank, from public land records. The customer may mistakenly conclude that the mortgage bank i) failed to honor the customer’s opt out request in violation of the GLB Act and ii) was not adhering to its own disclosed privacy policy. Cendant does not believe that consumers expect that publicly available information that may be provided to or collected by a financial institution suddenly becomes transformed into nonpublic information when included in the records of the financial institution. There is no indication that Congress intended this result when it adopted the GLB Act. In addition, the requirement that such information be obtained from public sources before it can be used does not provide any additional privacy protections for consumers, but merely adds to the costs incurred in obtaining such information.

Before leaving this point, it is noted that both the Board of Governors of the Federal Reserve System and the Securities and Exchange Commission did not propose Alternative A. If these two agencies adopt Alternative B, while the Commission and the other regulatory agencies adopt Alternative A, such a result would be inconsistent with

Congress' mandate that the agencies issue regulations that are "... consistent and comparable...." Cendant believes that uniformly defining the underlying private consumer financial information that the GLB Act is intended to protect is critical. We urge the Commission to adopt Alternative B.

Limitations on sharing of account number information for marketing purposes

Section 502(d) of the GLB Act provides as follows:

LIMITATIONS ON THE SHARING OF ACCOUNT NUMBER INFORMATION FOR MARKETING PURPOSES.—A financial institution shall not disclose, other than to a consumer reporting agency, an account number or similar form of access number or access code for a credit card account, deposit account, or transaction account of a consumer to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer.

The proposed rule essentially follows the language of the GLB Act.

Section 502(d) Does Not Apply to Encrypted, Reference or Truncated Numbers Used for Marketing Purposes

We believe that the language of § 502(d) does not prohibit the disclosure of encrypted, reference or truncated account numbers by financial institutions to nonaffiliated third parties for marketing purposes if the financial institution does not provide the nonaffiliated third party with the key to decrypt the number. The prohibition in § 502(d) is intended to prevent potential abuse by limiting the ability of nonaffiliated third parties to make direct use of a consumer's account numbers. The use of an encrypted, reference number or truncated account number to identify the consumer satisfactorily responds to the concerns which § 502(d) was intended to address. It is important for marketing purposes that nonaffiliated third parties be able to accurately identify potential customers by unique numerical identifiers. Encrypted account numbers, reference numbers and truncated account numbers serve the purpose of providing third parties with a means of associating the consumer with a particular account without compromising the security and integrity of the consumer's account. Accordingly, we urge that the final rule state that the term "account number or similar form of access number or access code" does not include an encrypted account number, a reference number or a truncated account number which is provided to a nonaffiliated third party for use in marketing under conditions whereby the financial institution retains the key to decrypt the numbers.

Section 502(d) Does Not Apply When Marketing Terminates

Cendant believes that § 502(d), by its terms, applies only when the account number or similar form of access number or access code for an account is provided “for use in telemarketing, direct mail marketing, or other marketing through electronic mail”. When a consumer agrees to purchase a product or service, the “marketing” has ended and the product and service fulfillment portion of the transaction begins. We do not see any restriction in § 502(d) which limits the ability of the financial institution to provide the nonaffiliated third party information that is not being provided in connection with marketing the product or service, but rather for use in delivering the product or service to the customer. Accordingly, we believe that the agency could, as a legal matter, permit the sharing of such information without the need for an express exception. As explained in greater detail below, we believe that such an interpretation is consistent with the purpose and legislative history of the GLB Act.

Providing an Exception Is Consistent With the Purpose of § 502(d) and With Congressional Intent

In the preamble to the proposed regulations, the agency recognizes that the legislative history of § 502(d) strongly suggests that the agency should take action such that current arrangements between financial institutions and companies that market products and services are not disrupted.

The legislative history of section 502(d) indicates that Congress believed it would be consistent with Title V to permit the disclosure of account numbers or similar forms of access numbers or access codes where the disclosure is expressly authorized by the customer and is necessary to service or process a transaction expressly requested or authorized by the customer. See Conference Report at 173. In this regard, during the Senate’s consideration of the Conference Report on S. 900, Senator Gramm engaged in a colloquy with Senator Hagel and Senator Bennett concerning section 502(d).

Mr. HAGEL. Mr. President, I inquire of the chairman with respect to the provision in section 502(d) that prohibits the sharing of customer account numbers with non-affiliated third parties for marketing purposes, is it the intent that the third party be able to receive customer account number upon approval by the customer?

Mr. GRAMM. Mr. President, yes, that is correct.

Mr. HAGEL. Mr. President, I also inquire of the chairman whether, in fact, it is his expectation that the regulators will use their broad exemptive authority given in the legislation to allow for sharing encrypted account numbers if the customer has given his or her authorization.

Mr. GRAMM. Mr. President, yes, that is true.

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Mr. BENNETT. Mr. President, I inquire of the distinguished chairman of the Banking Committee whether the managers felt so strongly that they chose to highlight this exemption for encrypted account numbers in report language. We would hope the regulators would use this exemptive authority. Isn't that true?

Mr. GRAMM. Mr. President, Yes.

Mr. HAGEL. This commonsense approach is consistent with consumer choice and with the customer privacy. We expect the regulators to use their exemptive authority to allow legitimate business practices that safeguard customer financial information to continue to operate and provide customers with greater choices of products and services.

Cendant urges that the agencies give effect to Congressional intent by permitting financial institutions to disclose account numbers or similar form of access number or access code with a nonaffiliated third party after the consumer has expressly authorized the disclosure and agreed to purchase the product or service. We believe that this exception is consistent with the language of § 502(d) and its legislative history. It must also be recognized that when a consumer expressly authorizes a financial institution to release his/her account number to a nonaffiliated third party, it is an affirmation by the consumer that he/she is totally comfortable with the business practices of the financial institution and nonaffiliated third party. Congress certainly never intended to eliminate a consumer's right to make such a determination.

In enacting § 502(d), Congress was concerned with the risks associated with third parties' direct access to a consumer's account. The language of § 502(d) fully addresses this concern by prohibiting the disclosure of account numbers, access numbers or access codes to a nonaffiliated third party when a third party is engaged in marketing activities. When the consumer agrees to purchase the product or service, the risks associated with providing the third party with the account number, access number or access code is essentially eliminated because the consumer has granted his or her consent. Financial institutions and nonaffiliated parties marketing to customers of financial institutions have established policies and procedures to ensure that customers' accounts are not charged for products and services they have not agreed to.

We suggest that the policies and procedures described above are more protective of a consumer's account number information than are generally employed in a typical retail purchase. In a typical retail transaction a consumer provides a credit card to a salesperson and multiple paper copies of the transaction (including account number) are made and distributed to multiple users. It is further noted that nothing in the GLB Act or the proposed regulations in any way diminishes a consumer's rights under existing law to simply not be responsible for any unauthorized charges to his/her account.

It would also prove disruptive to established relationships and confusing to consumers to prohibit financial institutions from providing such information to third parties after the consumer has agreed to purchase the product or service. If third parties cannot obtain this information, programs that are based upon existing customer relationships with the financial institutions will be severely disrupted. It is often impossible for third parties to obtain correct information from consumers about their account. Many consumers have multiple credit or deposit accounts, and may not have ready access to the account number that is associated with the program being marketed. Unless financial institutions are permitted to provide such information to third parties after the consumer has agreed to the transaction, these programs will be irreparably harmed. This clearly is not what was intended by Congress.

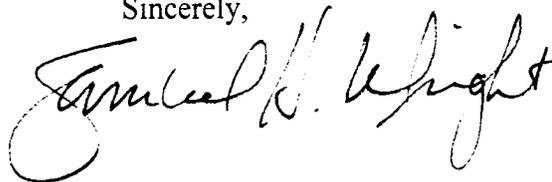
Accordingly, Cendant urges you to clarify §313.13 in a way that permits financial institutions to provide account numbers, access codes or access numbers to third parties in connection with processing a transaction for a product or service the consumer has agreed to purchase.

Definition of "Transaction Account"

We also ask that you clarify the meaning of the term "transaction account" as used in §313.13. It is our understanding that the term transaction account means a "checking account," that is, an account that permits the consumer to make transfers or withdrawals by negotiable instrument or other device in order to make payments to third parties. However, the term transaction account is not generally used outside of the banking sphere, and will undoubtedly be confusing to financial institutions that are not banking institutions. We therefore believe it would be highly desirable for you to clarify the meaning of this term by referring to the term "transaction account" as used in § 204.2(e) of Federal Reserve Regulation D, 12 C.F.R. § 204.2(e).

Cendant appreciates the opportunity to provide its comments on the Commission's proposed regulations to implement Title V of the GLB Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Samuel H. Wright". The signature is written in a cursive style with a large, looping initial "S".