

March 31, 2000

Donald S. Clark, 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 Mr. Clark:

The Community Financial Services Association of America (“CFSA”) represents a majority of the estimated 9,000 payday advance locations currently operating in the United States. CFSA promulgates and enforces its Best Practices, a self-policed code of conduct designed to ensure responsible industry practices; endorses efforts by state legislatures to enact its Model Legislation which codifies its Best Practices and balances the interests of the industry with those of consumers; and educates the public about the important role of payday advance services in the broader spectrum of consumer financial services.

We appreciate the opportunity to submit our views concerning the proposed Gramm-Leach-Bliley Act Privacy Rule (the “Proposed Rule”), 16 CFR Part 313, issued by the Federal Trade Commission (“FTC”) on March 1, 2000. (65 Fed Reg 11174-11195) The Proposed Rule would implement the privacy provisions of the Gramm-Leach-Bliley Act (the “Act”), Subtitle A of Title V of Pub. L. 106-102, with respect to all institutions under the jurisdiction of the FTC. Because the FTC has jurisdiction over all “financial institutions” not otherwise regulated under the Act, and because our members are companies which are subject to the FTC jurisdiction to the degree they are subject to the Act at all, we believe we can provide the FTC with a perspective on the impact of the regulations on our members.

General Comments

We urge the FTC to clarify that companies which are engaged both in financial activities covered by the Act and other activities not covered by the Act be subject to the Act only with respect to their financial activities. In other words, affiliates that are engaged in activities outside the scope of the Act will not be required to provide notices of privacy programs and policies, or be restricted to sharing information of any kind concerning any persons, other than what might be required under another law.

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Specific Comments

Denial of application

Section 313.3 defines consumer for purposes of the regulation as an individual who obtains a financial product or service. A financial product or service is defined as any product or service that a financial holding company could offer as a financial activity under Section 4(k) of the Bank Holding Company Act of 1956.

As an example of what kind of an individual would be a consumer, Section 313.3(e)(2)(i) says that:

An individual who applies to you for credit for personal, family or household purposes is a consumer of a financial service, regardless of whether the credit is extended.

We submit that this example is wrong because it extends the definition of providing a financial service beyond reasonable limits.

Under the list of financial activities published by the Board of Governors on March 7, 2000, receiving an application for financial services is not specifically listed as a financial activity. While a category labeled "Activities related to extending credit" is included in that list, accepting an application for a loan or other financial service is not included in the list under that category. It appears, therefore, that merely accepting an application has not been determined by the Board of Governors to be a financial activity, so receiving an application would not be within the definition of a financial product or service.

That, of course, makes sense. While receiving an application often precedes the offering of a financial product or service, that is not always the case. Similarly, if an applicant submits an application and then withdraws it prior to any action by the company, it is difficult to see how the company has provided any service to the applicant, financial or otherwise.

Assuming that the application is submitted and not withdrawn, however, the question still remains -- What service is provided when the applicant is denied? It is not the business of a company to deny applications, nor could a company charge the rejected applicant for that service if it wished. While one may charge a reasonable price for a reasonable service, absent an agreement by which the company is evaluating the creditworthiness of the applicant for a fee, any reasonable judge would toss a company out of court if it tried to collect on a charge based on the value to the consumer of the denial of an application.

Denying an applicant simply tells the applicant that his or her application has been denied. It does not provide an evaluation of the creditworthiness of the applicant other than that he or she couldn't get this particular service from this particular institution. We urge the FTC to clarify its examples so that our members will not be obliged to consider that one whose application has been denied will be considered a consumer within the meaning of the Act.

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Establishment of customer relationship

In many cases, our members simply act as an agent for a third party, determine whether or not the consumer is employed or has a bank account, then pass that information to a third party who makes or refuses to make the payday advance.

Section 313.4 describes when notices must be given to consumers and customers. The initial notice is required to be given to a customer prior to the time that a customer relationship is established. Similarly, the notice to a consumer with a right to opt-out must be given prior to the time that one discloses any nonpublic personal information about the consumer to any nonaffiliated third party.

When one of our members acts as an agent and collects information from a prospective customer, it would apparently be obliged to provide the applicant a privacy notice and an opportunity to opt-out prior to passing the information to the third party lender, notwithstanding that all it plans to do is pass the information along to a nonaffiliated third party that will decide whether or not to approve the application. At the same time, once it receives the information, the third party must also pass along a privacy notice to the consumer.

We believe that this may prove confusing to consumers, and that if a company is only acting as an agent in gathering information which it will then forward to a third party who will make the lending decision, it should not be obliged to notify the consumer or provide an opportunity to opt-out to that consumer. Opting out is inconsistent with the basic interests of the consumer who will not have an opportunity to receive the loan if the information is not forwarded.

While there are exceptions from the notice and opt-out requirements in Section 313.10 (exceptions for processing at consumer's request) and in Section 313.11 (exceptions for actions taken with consent of the consumer), the decision to pass the information to a third party for its decision may not be taken until the information has been received from the consumer, the consumer no longer is in contact with the company, and a tentative decision has been made by the company not to lend the funds itself to the consumer. At that point, the application would be shared with a third party lender, but in order to do so the company that gathered the information would apparently be obliged to contact the consumer again to confirm that it could pass on the information.

The confusion inherent in that procedure could be clarified if one acting as an agent would not be required to provide notice and a right to opt-out before sharing the information with a third party lender.

Timing of establishment of customer relationship

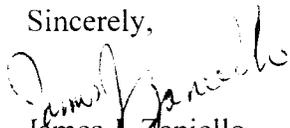
Assuming that passing on the information collected to a third party who will make the lending decision is not the establishment of a customer relationship, the question then becomes at what time must the customer be provided with a privacy notice under the Act. Section 313.4 says that an initial notice must be provided prior to the time that you establish a customer relationship with a consumer unless the customer orally consents to receive a notice later or a third party purchases a loan from another financial institution.

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In our case, our member would collect the information about the consumer, pass it on to a third party lender, and that lender would then make the lending decision. To require that lender to contact the consumer and notify him or her of its privacy policy prior to making the lending decision is unreasonable.

We respectfully recommend that the notice may be provided in a reasonable period after the customer relationship is established if the consumer is aware at the time he or she provides the information that it will be shared with a third party solely for purposes of the determination of whether or not the application of the consumer will be approved.

Sincerely,



James J. Zaniello
Executive Director

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