

Introduction to Financial Privacy for Non-Financial Services Companies

The Fair Credit Reporting Act and
Gramm-Leach-Bliley Act Privacy Rule

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Roadmap

- Introduction & Scope
- FCRA
- GLBA
- Resources
- Conclusion



Introduction & Scope: Goal

- Issue spot basic FCRA and GLBA issues for non-financial services entities



Introduction & Scope: Why Should You Care?

- Headline/reputational risk
- Exposure to burdensome obligations – *e.g.* being a credit reporting agency (“CRA”)
- Litigation and enforcement exposure
 - FCRA:
 - Private right of action for willful or negligent non-compliance. Sections 616-17.
 - SOL: 2 years from discovery or 5 years from violation. Section 618.
 - State attorney general enforcement. Section 621(c).
 - Administrative enforcement: FTC in coordination with new Consumer Financial Protection Bureau. Section 621(a)(1).
 - GLBA:
 - No private right of action
 - But FTC focus on privacy and Consumer Financial Protection Bureau could lead to more enforcement



Introduction & Scope: 30,000 Foot View

- Is there an FCRA/GLBA issue?
 - (A) Does the fact pattern involve a consumer reporting agency, consumer report, or privacy notice, or
 - (B) If not, then
 - (1) Does the fact pattern involve information about an identifiable individual?
 - (2) Does the information have, at its source, a prospective, current or former account relationship, or at its destination a decision about the consumer's eligibility for something he/she wants?
 - (3) Does it involve an actual or potential communication of the information?



Introduction & Scope: Typical Fact Patterns

- Entity wants to obtain information
 - Entity has a problem customer or former customer and wants to get a consumer report? Is there a permissible purpose?
 - Entity uses consumer reports now, but it's being offered a product like a consumer report except it's less expensive will there be a risk?
- Entity wants to disclose information
 - Entity gathers consumer data; how does it monetize this data without running risks?
- Obtaining credit reports in connection with employment (*e.g.* Section 606 investigative consumer reports), child-support, anti-terrorism, or health-care are worlds unto themselves – we're not covering today



Introduction & Scope: Many Other Privacy and Data-Security Laws

For Example:

- GLBA Safeguards Rule
- State laws
 - Data breach
 - Financial privacy
 - SB1: California data privacy (opt-in regime)
- Other federal privacy laws, *e.g.*
 - Telemarketing/CAN-SPAM
 - CPNI Rules
 - Cable Act
- Payment Card Industry Data Security Standard
- Self-regulatory regimes
 - Mobile Marketing Association
 - Interactive Advertising Bureau
 - Network Advertising Initiative



FCRA: Major Issues

- Definition of “consumer report”
- Definition of “consumer reporting agency”
- Permissible purposes to obtain a consumer report
- Selected duties of “users”
- Selected duties of “furnishers”



FCRA Section 603(d)(1): Definition of “Consumer Report”

- “Consumer report”:
 - “Any written, oral, or other communication of information”
 - “By a consumer reporting agency”
 - “Bearing on a consumer’s”
 - Characteristics, including:
 - Credit worthiness
 - Credit standing
 - Credit capacity
 - Character
 - General reputation
 - Personal characteristics, or
 - Mode of living
 - That is “used or expected to be used or collected in whole or in part,” to serve “as a factor in establishing”
 - A “consumer’s eligibility” for credit, insurance, employment, or the other “permissible purposes,” including
 - Eligibility for government license/benefit
 - Use by potential investor/servicer, or current insurer to assess credit/prepayment risk of current obligation
 - “Legitimate business need for(1) a business transaction initiated by consumer, or (2) review of whether the consumer still meets account terms



FCRA Section 603(d)(2): Selected Exclusions

- “Transaction or experience information” shared with third party
 - *E.g.*, Creditor describing an account as “slow pay” based on its own experience
- Transaction or experience information shared among affiliated companies
- Other information shared between affiliates, if
 - Notice to consumer, and
 - Opportunity to opt out



FCRA Section 603(f): Definition of “Consumer Reporting Agency”

- Not just the big three “nationwide” CRAs



- Behavioral test – could be any entity!



FCRA Section 603(f): Definition of "Consumer Reporting Agency"

- "Any person"
- Using interstate commerce
- For payment or on a cooperative non-profit basis
- Who "regularly engages in whole or in part"
- In "assembling or evaluating"
- Consumer credit information or other information on consumers"
- "For the purpose of furnishing consumer reports"
- "To third parties"



FCRA Section 603(f): Exclusion

- Formerly: non-statutory “joint user” exception
 - Sharing between principal/agent, or two entities dependent on each other for eligibility decision (*e.g.*, loan; lender; insurer)
- Now: assimilated in series of instances that do not involve sharing with a third party, *e.g.*, disclosure of consumer report to consumer



FCRA Section 604(a): Permissible Purposes to Obtain a Consumer Report

- It must be a “consumer report” shared by a “consumer reporting agency” to get this far
- Consumer reporting agencies can share consumer reports only under an exclusive list of permissible purposes
- Plus one other circumstance – to be discussed later.



FCRA Section 604(a): Permissible Purposes to Obtain a Consumer Report

- Consumer's written consent
 - Must be clear and specific
 - Good: "I authorize you to procure a consumer report on me"
 - Bad: "I understand that where appropriate, consumer reports may be obtained"
- Reports "in connection with a credit transaction involving the consumer," and
 - Extension of Credit , or
 - *e.g.*, credit application, real estate transaction
 - Review or collection of the account
 - Creditor: must be existing account
 - Also, debt collection, bad checks



FCRA Section 604(a): Permissible Purposes to Obtain a Consumer Report

- Employment purposes
- Consumer's eligibility for government license or benefit
- Potential investor/servicer, or current insurer to assess credit/prepayment risk of current obligation
- Underwriting insurance for consumer
- Court order or grand jury subpoena



FCRA Section 604(a): Permissible Purposes to Obtain a Consumer Report

- Catch-all: other “legitimate business need”
 - In connection with a business transaction initiated by consumer, or
 - To review an account to determine whether the consumer still meets the account terms
- “Legitimate business need”
 - Transaction not covered by other permissible purposes
 - *e.g.*, applying for a cable TV subscription
 - Litigation not a “legitimate business need”
- “Business transaction” = consumer transaction primarily for personal, family, or household purposes
- “Review” involves non-credit accounts (*e.g.*, billed in advance; savings account)



FCRA Section 604(a): Permissible Purposes to Obtain a Consumer Report

- Not a “permissible purpose” to get reports, *e.g.*,
 - Marketing
 - Except “firm offers” of credit or insurance – next slide
 - Curiosity
 - Newsgathering
 - Acceptance of a free trial



FCRA Section 604(c): Firm Offers or “Prescreening”

- Must be a firm offer of credit or insurance
 - “Firm offer” must be “honored if the consumer” fits the pre-determined eligibility criteria (although limited post-screening permitted)
 - Opt out offered; but not in force
 - Consumer over 21 or consents



FCRA Section 615(a): Selected Duties of “Users”

- Adverse action notices:
 - Credit: Same definition as Reg. B
 - Any adverse action tied to a permissible purpose: 603(k)(2)(B)(iv)
- Must give notice to consumer if business takes adverse action based in part on a consumer report from a CRA
- Federal Reserve (now CFPB) has a model adverse action notice for FCRA/Reg. B



FCRA Section 623(a): Selected Duties of “Furnishers”

- Persons may furnish information to CRAs
 - Without consumer permission
 - Over consumer objections
- But a person cannot furnish information to a CRA if it “knows or has reasonable cause to believe that the information is inaccurate.” Section 623(a)(1)(A), unless it “clearly and conspicuously” provides an address for consumers to send disputes. Section 623(a)(1)(C).



FCRA Section 623(a): Selected Other “Furnisher” Duties

- Response to consumer disputes. Section 623(a)(8).
 - Furnishers must investigate good faith consumer disputes
 - Must consider “all relevant information submitted by the consumer”
 - If information inaccurate, furnisher must notify CRAs it reported to and correct the information
- Furnishers must also:
 - Correct and update bad information given to CRAs if it finds on its own. Section 623(a)(2).
 - Notify CRAs of a consumer dispute. Section 623(a)(3).
 - Notify CRAs when a consumer voluntarily closes a credit account. Section 623(a)(4).
 - Notify CRAs of date of delinquency within 90 days after accounts placed in collections, charged to profit or loss, or similar action taken. Section 623(a)(5)(A).
- Good news: No private right of action for violation of furnishers' obligation to provide accurate information to CRAs under Section 623(a). Section 623(c). Administrative enforcement still possible, though.



GLBA: Overview

- If entity is a “financial institution”
- And it collects and/or discloses “non-public personal information” (NPPI)
- Then it must provide certain notices
- And it is barred under most circumstances from sharing the consumer’s account number
- And may be required to permit consumers to opt-out of certain disclosures



GLBA: Are the Company's Actions Covered: Definition of "Financial Institution"

- Two steps under FTC's rule, 16 C.F.R. § 313.3(k)(1):
 - Is the business engaged in "*financial activities*" as described in section 4(k) of the Bank Holding Company Act (12 U.S.C. Section 1843(k)), and
 - Is it "*significantly engaged*" in these activities?



GLBA: Financial Activities

- Financial activities under Section 4(k)(4)(A-E) of Bank Holding Company Act
 - Lending money
 - Transferring money
 - Exchanging money
 - Investing for others
 - Safeguarding money and securities
 - Insurance
 - Providing financial investment or economic advisory services
 - Underwriting or dealing with securities
- Activities that Federal Reserve finds closely related to banking under 4(k)(F); 12 C.F.R. § 225.28
 - Extending credit and servicing loans
 - Collection agency services
 - Property appraisals
 - Check guarantee services
 - Credit bureau services
 - Real estate settlement services
 - Leasing property on a non-operating basis for over 90 days
- Activities a bank may holding company could do outside the U.S.
 - *E.g.*, operating a travel agency in connection with financial services



GLBA: “Significantly Engaged”

- Flexible standard, all facts and circumstances test
- Not “significantly engaged” - examples
 - Retailer that doesn’t issue its own credit card
 - Merchant that allows customers to “run a tab”
 - Retailer that provides occasional lay-away and deferred payment plans



GLBA: “Significantly Engaged”

- “Significantly Engaged” – examples
 - Finance companies
 - Account servicers
 - Check cashers
 - Wire transferors
 - Credit counselors
 - “Pay day” lenders
 - Investment advisors not registered with SEC



GLBA: NPPI

- “NPPI” includes:
 - (1) “Personally identifiable financial information” and
 - (2) “Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.” § 313.3(n)(1)(i-ii).



GLBA: Definition of NPPI

- “Personally identifiable financial information,” includes any information
 - Consumer provides to obtain a financial product or service
 - About a consumer resulting from any transaction involving a financial product or service between you and a consumer,” or
 - information “otherwise obtain[ed] about a consumer in connection with providing a financial product or service to that consumer.” § 313.3(o)(1)(i-iii).



GLBA: Definition of NPPI - Examples

- Account balances, payment/overdraft history, purchase information
- Existence of customer relationship
 - Individual is or has been a customer or received a financial product/service
 - Any information about a consumer if disclosed in a “manner” that “indicates” he/she is or has been your consumer
- Data collected from cookies
- Information from a consumer report



GLBA: Definition of NPPI – Exceptions

- Not NPPI
 - Publicly available data
 - *E.g.*, information lawfully available on a website, even if password and fee required to access
 - List or description derived without using NPPI
 - List of names and addresses from a non-financial institution
 - Aggregate or blind data with no personal identifiers (account numbers, names, addresses)



GLBA: Notices

- Preliminary: Consumer versus customer
 - Consumer: individual who received a financial product/service from the institution used primarily for personal, family, or household purposes
 - Customer: consumer with a continuing relationship with an institution
- Notices must describe the entities' information collection and sharing practices and inform customers of their right to opt out
- Initial. § 313.4.
 - Customer: not later than when relationship established
 - Consumers (someone who applies): prior to sharing NPPI
- Opt-out: to customers/consumers prior to sharing. §§ 313.7, 313.1.
- Short-form: to consumers who are not customers, instead of full initial notice, prior to sharing NPPI about them. § 313.6.
- Annual: to customers for entire relationship. § 313.5.
- Revised: to consumers, customers, former customers. § 313.8.



Basic Overview of Notices, Model Notice

- Safe harbor: Use model privacy form, published Dec. 1, 2009
- Select form, based on (1) whether you provide an opt out, (2) if so, how you provide and opt-out (phone/online or mail)



GLBA: Model Form 1 with No Opt-Out

Version 1: Model Form With No Opt-Out.

Rev. [insert date]

| FACTS WHAT DOES [NAME OF FINANCIAL INSTITUTION] DO WITH YOUR PERSONAL INFORMATION? | | |
|---|--|--|
| Why? | Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do. | |
| What? | <p>The types of personal information we collect and share depend on the product or service you have with us. This information can include:</p> <ul style="list-style-type: none"> ■ Social Security number and [income] ■ [account balances] and [payment history] ■ [credit history] and [credit scores] <p>When you are <i>no longer</i> our customer, we continue to share your information as described in this notice.</p> | |
| How? | All financial companies need to share customers' personal information to run their everyday business. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons [name of financial institution] chooses to share; and whether you can limit this sharing. | |
| | Reasons we can share your personal information | Does [name of financial institution] share? |
| | Can you limit this sharing? | |
| | For our everyday business purposes—such as to process your transactions, maintain your account(s), respond to court orders and legal investigations, or report to credit bureaus | |
| | For our marketing purposes—to offer our products and services to you | |
| | For joint marketing with other financial companies | |
| | For our affiliates' everyday business purposes—information about your transactions and experiences | |
| | For our affiliates' everyday business purposes—information about your creditworthiness | |
| | For our affiliates to market to you | |
| | For nonaffiliates to market to you | |
| Questions? | Call [phone number] or go to [website] | |



GLBA: Model Form 1 with No Opt-Out

| | |
|---|---|
| Page 2 | |
| Who we are | |
| Who is providing this notice? | [insert] |
| What we do | |
| How does [name of financial institution] protect my personal information? | To protect your personal information from unauthorized access and use, we use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings. [insert] |
| How does [name of financial institution] collect my personal information? | We collect your personal information, for example, when you <ul style="list-style-type: none">■ [open an account] or [deposit money]■ [pay your bills] or [apply for a loan]■ [use your credit or debit card] [We also collect your personal information from other companies.] OR [We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.] |
| Why can't I limit all sharing? | Federal law gives you the right to limit only <ul style="list-style-type: none">■ sharing for affiliates' everyday business purposes—information about your creditworthiness■ affiliates from using your information to market to you■ sharing for nonaffiliates to market to you State laws and individual companies may give you additional rights to limit sharing. [See below for more on your rights under state law.] |
| Definitions | |
| Affiliates | Companies related by common ownership or control. They can be financial and nonfinancial companies. <ul style="list-style-type: none">■ [affiliate information] |
| Nonaffiliates | Companies not related by common ownership or control. They can be financial and nonfinancial companies. <ul style="list-style-type: none">■ [nonaffiliate information] |
| Joint marketing | A formal agreement between nonaffiliated financial companies that together market financial products or services to you. <ul style="list-style-type: none">■ [joint marketing information] |
| Other important information | |
| [insert other important information] | |



GLBA: Model Form 2 with Opt-Out by Telephone and/or Online

Version 2: Model Form with Opt-Out by Telephone and/or Online.

Rev. [insert date]

| FACTS | WHAT DOES [NAME OF FINANCIAL INSTITUTION] DO WITH YOUR PERSONAL INFORMATION? | |
|----------------------|--|---|
| Why? | Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do. | |
| What? | The types of personal information we collect and share depend on the product or service you have with us. This information can include: <ul style="list-style-type: none"> ■ Social Security number and [income] ■ [account balances] and [payment history] ■ [credit history] and [credit scores] | |
| How? | All financial companies need to share customers' personal information to run their everyday business. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons [name of financial institution] chooses to share; and whether you can limit this sharing. | |
| | Reasons we can share your personal information | Does [name of financial institution] share? |
| | Can you limit this sharing? | |
| | For our everyday business purposes —such as to process your transactions, maintain your account(s), respond to court orders and legal investigations, or report to credit bureaus | |
| | For our marketing purposes —to offer our products and services to you | |
| | For joint marketing with other financial companies | |
| | For our affiliates' everyday business purposes —information about your transactions and experiences | |
| | For our affiliates' everyday business purposes —information about your creditworthiness | |
| | For our affiliates to market to you | |
| | For nonaffiliates to market to you | |
| To limit our sharing | <ul style="list-style-type: none"> ■ Call [phone number]—our menu will prompt you through your choice(s) or ■ Visit us online: [website] Please note: If you are a <i>new</i> customer, we can begin sharing your information [30] days from the date we sent this notice. When you are <i>no longer</i> our customer, we continue to share your information as described in this notice. However, you can contact us at any time to limit our sharing. | |
| Questions? | Call [phone number] or go to [website] | |



GLBA: Model Form 2 with Opt-Out by Telephone and/or Online

| Page 2 | |
|--|---|
| Who we are | |
| Who is providing this notice? | [insert] |
| What we do | |
| How does [name of financial institution] protect my personal information? | To protect your personal information from unauthorized access and use, we use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings. [insert] |
| How does [name of financial institution] collect my personal information? | We collect your personal information, for example, when you <ul style="list-style-type: none"> ■ [open an account] or [deposit money] ■ [pay your bills] or [apply for a loan] ■ [use your credit or debit card] [We also collect your personal information from other companies.] OR [We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.] |
| Why can't I limit all sharing? | Federal law gives you the right to limit only <ul style="list-style-type: none"> ■ sharing for affiliates' everyday business purposes—information about your creditworthiness ■ affiliates from using your information to market to you ■ sharing for nonaffiliates to market to you State laws and individual companies may give you additional rights to limit sharing. [See below for more on your rights under state law.] |
| What happens when I limit sharing for an account I hold jointly with someone else? | [Your choices will apply to everyone on your account.] OR [Your choices will apply to everyone on your account—unless you tell us otherwise.] |
| Definitions | |
| Affiliates | Companies related by common ownership or control. They can be financial and nonfinancial companies. <ul style="list-style-type: none"> ■ [affiliate information] |
| Nonaffiliates | Companies not related by common ownership or control. They can be financial and nonfinancial companies. <ul style="list-style-type: none"> ■ [nonaffiliate information] |
| Joint marketing | A formal agreement between nonaffiliated financial companies that together market financial products or services to you. <ul style="list-style-type: none"> ■ [joint marketing information] |
| Other important information | |
| [insert other important information] | |



GLBA: Model Form 3 with Mail-In Opt-Out Form

Version 3: Model Form with Mail-In Opt-Out Form.

Rev. [insert date]

| FACTS WHAT DOES [NAME OF FINANCIAL INSTITUTION] DO WITH YOUR PERSONAL INFORMATION? | | |
|--|--|------------------------------------|
| Why? | Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do. | |
| What? | The types of personal information we collect and share depend on the product or service you have with us. This information can include: <ul style="list-style-type: none"> ■ Social Security number and [income] ■ [account balances] and [payment history] ■ [credit history] and [credit scores] | |
| How? | All financial companies need to share customers' personal information to run their everyday business. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons [name of financial institution] chooses to share; and whether you can limit this sharing. | |
| Reasons we can share your personal information | Does [name of financial institution] share? | Can you limit this sharing? |
| For our everyday business purposes—such as to process your transactions, maintain your account(s), respond to court orders and legal investigations, or report to credit bureaus | | |
| For our marketing purposes—to offer our products and services to you | | |
| For joint marketing with other financial companies | | |
| For our affiliates' everyday business purposes—information about your transactions and experiences | | |
| For our affiliates' everyday business purposes—information about your creditworthiness | | |
| For our affiliates to market to you | | |
| For nonaffiliates to market to you | | |
| To limit our sharing | <ul style="list-style-type: none"> ■ Call [phone number]—our menu will prompt you through your choice(s) ■ Visit us online: [website] or ■ Mail the form below Please note: If you are a <i>new</i> customer, we can begin sharing your information [30] days from the date we sent this notice. When you are <i>no longer</i> our customer, we continue to share your information as described in this notice. However, you can contact us at any time to limit our sharing. | |
| Questions? | Call [phone number] or go to [website] | |

| Mail-in Form | | |
|---|--|----------|
| Leave Blank OR (If you have a joint account, your choice(s) will apply to everyone on your account unless you mark below.) <input type="checkbox"/> Apply my choices only to me] | Mark any/all you want to limit: | |
| | <input type="checkbox"/> Do not share information about my creditworthiness with your affiliates for their everyday business purposes. | |
| | <input type="checkbox"/> Do not allow your affiliates to use my personal information to market to me. | |
| | <input type="checkbox"/> Do not share my personal information with nonaffiliates to market their products and services to me. | |
| | Name | Mail to: |
| Address | [Name of Financial Institution] | |
| City, State, Zip | [Address 1] | |
| [Account #] | [Address 2] | |
| | [City], [ST] [ZIP] | |



GLBA: Limits on Account Number Sharing Section 313.12

- May not disclose an account number for specified “marketing” – interpreted broadly
- Exceptions:
 - Agent or service provider to market you own products/services, if agent/service provider not allowed initiate charges
 - Private label credit card or affinity program, where participants identified to customer
- Not an account number if encrypted



GLBA: Exceptions to Opt-Out Requirement, Section 313.13

- Service provider and joint marketing exceptions
 - Third-party service provider for financial institution, or
 - Joint marketing agreement with another financial institution
- Contract must limit reuse or disclosure



GLBA: Exceptions to Opt-Out Requirements, Section 313.14

- Sharing NPPI “in connection with”
 - Servicing or processing a financial product or service that a consumer requests or authorizes
 - Maintaining, servicing customer’s account under a private label card program
 - Proposed or actual securitization
- NPPI that you *receive* under a Section .14 or .15 exception is subject to strict limits regarding reuse and redisclosure. § 313.11— to be discussed separately.



GLBA: Selected Other Exceptions to Opt-Out Requirement, Section 313.14

- “Necessary to effect, administer, or enforce a transaction,”
 - Carry out transaction, record, service, or maintain customer’s account
 - Administer or service benefits or claims relating to the transaction
 - Provide confirmation, statement, record of transaction, status, value to the consumer
 - Accrue or recognize incentives or bonuses you or another party provides



GLBA: Exceptions to Notice and Opt-out, Section 313.15

- Consent Exception
 - Initial notice and opt-out inapplicable if disclosed “with the consent or at the direction of the consumer, provided that the consumer has not revoked the consent or direction.” § 313.15(a)(1).
- Consent bounded by Section 5 of the FTC Act, prohibiting unfair or deceptive acts or practices
- Consumer may revoke consent later by opt-out. § 313.15(b)(2).
- Rarely used exception
- Other Section .15 exceptions



Resources

- People include
 - James Mann
 - Andrew Lorentz
 - Peter Mucklestone
 - Bob Birnbaum
 - Micah Ratner
- DWT Payment Law Advisor:
www.paymentlawadvisor.com
- [*FTC Staff Report 40 Years of Experience with the FCRA*](#)
- [*FTC GLBA Outline*](#)



Conclusion

- Thank you
- Questions/Other Follow up