

The Service Provider/Joint Marketing Exception To The GLBA Opt-Out Requirement

Section 502(b) of the Gramm-Leach-Bliley Act creates an exception to the opt-out rule for a financial institution's disclosure of information to a nonaffiliated third party for use by the third party to perform services for the institution. Such services include the marketing of the institution's own products or services by an envelope stuffing service or other fulfillment service, or the marketing of financial products or services offered pursuant to a joint agreement between two or more financial institutions. **Independent property and casualty agents that are appointed by a number of insurance companies will in all likelihood want to enter into these joint agreements with each company for which they are appointed.** A joint agreement means a written contract pursuant to which an agency and one or more financial institutions jointly offer, endorse or sponsor a "financial product" or service.¹

The service provider/joint marketing exception permits an institution to disclose consumers' nonpublic information to nonaffiliated third parties for marketing purposes without first having to give consumers the right to opt-out of the information sharing. Significantly, the exception applies only to the opt-out requirement. The privacy notice requirement still applies. This means simply that sharing under the joint marketing exception does not alleviate the ordinary GLBA notice requirements – an agency still must provide notice to all customers and, as well, to consumers if it is going to disclose any non-public personal information about them under the service provider/joint marketing exception.²

Both the NAIC and NCOIL models for state privacy regulation contain this exception, which also is consistent with federal GLBA regulations. Before a financial institution can

1 **Types of products that agencies can market.** The service provider/joint marketing exception covers two different situations – (1) where you are marketing your own products by using service providers (such as envelope stuffers); and (2) where you are jointly marketing financial products with another institution. One important thing to know is that if you are relying on the service provider part of the exception (and selling your own products), you can market *any type* of product. If you are relying on the joint marketing part of the exception (and marketing other institution's products), however, you must be marketing *financial products* in order for the exception to apply. By "financial products," the GLBA means the things you traditionally think of – such as banking and insurance products – as well as any other types of products that the Federal Reserve Board deems to constitute "financial products."

2 Agencies should note, however, that the notice requirement is *eliminated* for disclosures made under other GLBA exceptions. Thus, if an agency discloses a consumer's information as necessary to administer or complete a transaction that a consumer requests or authorizes, it does not owe that consumer notice prior to making such disclosure. For more detail on both the notice and opt-out requirements – including information on how to comply with them – agencies should refer to the Agent Privacy Guide memorandum.

rely on the exception, however, it must make sure certain conditions are met. These conditions are:

- (1) The institution must “fully disclose” to the consumer that it will provide this information to the nonaffiliated third party before the information is shared; and
- (2) The institution must enter into a contract with the third party that requires the third party to maintain the confidentiality of the information provided.

These two requirements are addressed in more detail below (in subsections 1 and 2, respectively). In subsection 3, we discuss the timetable for modifying existing third party contracts. In subsection 4, we address the limitations on sharing account number information for marketing purposes. Finally, in subsection 5, we address the limitations *on an agency's own* redisclosure or reuse of the protected information that it receives from other financial institutions for whom it provides services.

1. Providing “Full Disclosure”

This requirement is met by including a clause in an agency's privacy notice disclosure form stating that it provides nonpublic personal information to nonaffiliated third party service providers for use in marketing its own products or services or to nonaffiliated third parties pursuant to a joint marketing agreement. An example of a disclosure clause satisfying this requirement is the following:

We may disclose the following information to companies that perform marketing services on our behalf or to other financial institutions with which we have joint marketing agreements:

- Information we receive from you on applications or other forms, such as [*provide illustrative examples, such as “your name, address, social security number, assets, income, and beneficiaries”*];
- Information about your transactions with us, our affiliates or others, such as [*provide illustrative examples, such as “your policy coverage, premium, and payment history”*]; and
- Information we receive from a consumer reporting agency, such as [*provide illustrative examples, such as “your creditworthiness and credit history”*].

An agency would use this clause if it shares only some categories of nonpublic personal information with third parties. If it discloses *all* categories of information then, rather than specify each category, it may state simply that it may disclose all of the information it collects, and that the categories of information collected are described elsewhere in the privacy notice. Thus, for example, an agency would include a clause stating:

We may disclose all of the information we collect, as described [*say where it is described, such as "above in this notice"*], to companies that perform marketing services on our behalf or to other financial institutions with whom we have joint marketing agreements.

To qualify for protection under the service provider/joint marketing exception an agency also must disclose in its privacy notice the categories of third parties with whom it shares such information. Thus, for example, it must include a statement such as the following:

We may disclose nonpublic personal information about you, such as we have described [*say where, such as "above"*], to the following types of third parties that perform marketing services on our behalf or with whom we have joint marketing agreements:

- Fulfillment service providers, such as [*provide illustrative examples, such as "envelope stuffing services"*];
- Financial institutions with whom we have joint marketing agreements, such as [*provide illustrative examples, such as the following (include any or all that apply to you):*]
 - *national banks and their subsidiaries;*
 - *Federal branches and Federal agencies of foreign banks, and any subsidiaries of such entities;*
 - *member banks of the Federal Reserve System;*

- *branches and agencies of foreign banks and commercial lending companies owned by foreign banks;*
- *organizations operating under the Federal Reserve Act;*
- *bank holding companies and their non-bank subsidiaries;*
- *banks insured by the FDIC;*
- *insured state branches of foreign banks and any subsidiaries of such entities;*
- *savings associations, the deposits of which are insured by the FDIC, and any subsidiaries of such savings associations;*
- *federally insured credit unions and any subsidiaries thereof;*
- *securities brokers or dealers;*
- *investment companies; and*
- *insurance providers]*

We may also disclose nonpublic personal information about you to nonaffiliated third parties as permitted by law.

2. Contracting With a Third Party

The second requirement for complying with the service provider/joint marketing exception is a contracting requirement. The federal and NAIC GLBA rules only clearly mandate a contract when information is shared pursuant to a joint marketing agreement or with service providers for marketing purposes. If an agency is sharing information with service providers for other purposes – for example, for the purpose of servicing or processing an insurance product that a consumer requests – the rules are slightly more ambiguous and do not clearly mandate that such a contract be in place. That said, the guidelines issued by the federal banking agencies regarding the GLBA data security and integrity obligations require con-

tracts to be in place with *all* service providers (see Appendix 10 to this Guide). Thus, the most prudent course of conduct is to have contracts in place with any third party to whom you disclose protected information.

Such contracts (whether they are newly-created contracts or amendments of existing contracts) must include a clause requiring the third party to maintain the confidentiality of the information that the agency discloses. The contract or contract clause should be designed to ensure that the third party will maintain the confidentiality of the information at least to the same extent as the agency is required to maintain it.

A contract clause meets this requirement if it prohibits the third party from disclosing or using the nonpublic personal information other than to carry out the purposes for which the agency disclosed the information, including use under another exception to the privacy opt-out requirement (such as processing or servicing transactions or as otherwise required by law) in the ordinary course of business in order to carry out those purposes. These limitations are designed to preclude recipients of information under this exception from sharing a consumer's nonpublic personal information pursuant to a chain of third party joint marketing agreements.

For example, if an agency discloses nonpublic personal information under this exception to a financial institution with which you perform joint marketing, the agency's contractual agreement with that institution would meet the requirements of the exception if it included a clause such as the following:

[Name of financial institution with which you perform joint marketing] agrees that it will not disclose or use the nonpublic personal information provided to it under this Joint Marketing Agreement to any person or entity except as necessary to carry out the joint marketing of [specify product or service] under this Agreement, or under another expressly recognized exception to the Gramm-Leach-Bliley Act's opt-out requirement in the ordinary course of business to carry out such joint marketing.

3. Timetable For Modifying Existing Contracts

As a final matter, agencies should know what the federal regulations and proposed state regulations say about when existing third party contracts should be modified to comply with the requirements of the service provider/joint marketing exception.

The Federal Trade Commission (FTC) stated specifically in its privacy regulations its belief that a balance should be struck that minimizes interference with existing third party contracts but that prevents evasion of the regulations.³ To achieve both of these goals, the FTC's final rule states that contracts that are in effect as of July 1, 2000 must be brought into compliance with the requirements of the service provider/joint marketing exception by July 1, 2002.⁴ Similarly, the NAIC and NCOIL models for the states have provisions for two-year grandfathering of service agreements. Like the federal regulations, both models state that third party agreements entered into on or before July 1, 2000 must be brought into compliance by July 1, 2002.

4. Limits on Sharing Account Number Information for Marketing Purposes

Under the federal GLBA regulations, a financial institution generally may not disclose (other than to consumer reporting agencies) account numbers or access codes for credit card, deposit or transaction accounts to non-affiliated third parties for marketing purposes. This rule does not apply, however, for disclosures to service providers to perform marketing solely for that financial institution's own products or services, as long as the service provider is not authorized to initiate charges to the account.

The NAIC GLBA regulations incorporate the account number limitation and make it clear that it applies to policy numbers as well as account numbers. The NAIC GLBA regulations adopt the same exception for service providers and, significantly, create an additional exception for a licensee to disclose policy or account number information **to a licensee who is a producer** in order to perform marketing for the licensee's own products or services. This exception reflects the unique relationship between carriers and producers and their unique need for a heightened ability to share customer information to service their mutual customers.⁵

3 See 65 Fed. Reg. 33,646, 33,670 (discussing exception to opt-out requirements for service providers and joint marketing, which is codified at 16 C.F.R. § 313.13).

4 The FTC's privacy regulations became effective November 13, 2000, but it extended the date for compliance with the regulations to July 1, 2001. The exception for service provider and joint marketing agreements – and extension of the deadline for compliance – is known as the two-year grandfathering of service agreements. See 16 C.F.R. § 313.18(c).

5 One other exception exists under both the federal and NAIC GLBA regulations, which covers disclosures to participants in affinity or similar programs where the participants in the program are identified to the customer when the customer enters into the program.

5. Limits on Redisclosure or Reuse of Information

If you receive nonpublic personal information from another nonaffiliated financial institution under a GLBA exception other than the joint marketing exception – *e.g.*, for processing/servicing transactions at a consumer's request – your disclosure and use of that information for marketing purposes is prohibited. Specifically, you may:

- (1) Disclose such information to the affiliates of a financial institution from which you received the information.
- (2) Disclose such information to your own affiliates, but your affiliates may use and disclose such information only to the extent that you would be able to.
- (3) Disclose such information pursuant to an exception other than the exception permitting disclosures for marketing purposes.

For example, if you receive a customer list from another financial institution for claims settlement purposes or in order to provide account processing services, you may disclose such information for fraud prevention or in response to a properly authorized subpoena. **You may not disclose such information, however, to a third party for marketing purposes or use that information for your own marketing purposes.** The same rule applies, of course, to any third parties to whom you disclose protected information under an exception (other than for joint marketing).

This reuse/redisclosure limitation does not apply to information that you receive from a nonaffiliated financial institution outside of an exception. For information that you receive outside of an exception, any further disclosure of such information is governed by the same rules that would govern the disclosure of that information by the financial institution from which you received the information. Thus, you could disclose such information to affiliates (the financial institution's or your own) or to any other person if the disclosure would be lawful if made by the financial institution from which you received the information.