Managing Collateral Information under the Gramm-Leach-Bliley Act

Under Regulations regarding Privacy of Consumer Financial Information

§504 of the Gramm-Leach-Bliley Act

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BACKGROUND ON FNC

FNC, Inc. is a financial services technology firm that provides:

- integrated process and procurement pipelines
- proprietary and open-access databases, including the Appraisal Institute Residential Database (AIRD), a joint venture with the Appraisal Institute, of which FNC is the majority owner
- proprietary models and market analytics

In June, 2000, FNC purchased the assets of the California Market Data Cooperative, which was a non-profit cooperative formed in 1979 by the major savings and loans and banks in California for the purpose of collecting, compiling and disseminating real estate appraisal information on behalf of its members. FNC has upgraded its data management, delivery and analytical capabilities through this purchase, and is increasingly recognized as the best source of comprehensive and accurate real estate information in support of reliable real estate appraisals and other collateral valuations, mortgage portfolio and servicing management and fraud prevention in the arena of the collateral used to secure real estate loans.

FNC currently collects and compiles information, parts of which might arguably fall under the purview of the provisions of Title V of the Gramm-Leach-Bliley Act (“GLB” or “the Act”) and the final regulations issued to implement that Act.
Executive Summary

Title V of GLB, effective since July 1, 2001, has dramatically changed the way financial institutions collect, use and share information about consumers. As the FTC, one of the agencies responsible for enforcing the GLB Act for entities such as non-bank mortgage lenders and appraisers, has described it, the Act limits the instances in which a financial institution may disclose nonpublic personal information about a consumer to nonaffiliated third parties, and requires a financial institution to disclose to all of its customers the institution’s privacy policies and practices with respect to information sharing with both affiliates and nonaffiliated third parties.

This Guide for Mortgage Lenders and Real Estate Appraisers (Guide) will answer some basic questions about the GLB Act and explore how it directly affects mortgage lenders and appraisers. This Guide will discuss what institutions are covered by GLB, what kind of information it covers, the extend to which covered information can be used and shared, and what other duties apply to businesses that receive, collect or use covered information.

We conclude that:

• Lenders’ collection and use of consumer information is clearly covered by the GLB Act. As a result, lenders have substantial duties under the Act.

• Real estate appraisers are also covered by the Act, but the coverage only extends to limits on the reuse of certain information, as they do not have direct relationships with consumers.

• Much of the information about the collateral in a mortgage transaction is not restricted by the Act because it is not considered nonpublic personal information (that is, it consists primarily of publicly available information).

• Some information used in a mortgage transaction, however, such as a customer’s name, loan number, tax identification number, or the fact that customer is applying for a loan from a particular lender, will be nonpublic personal information and subject to restrictions on sharing.

• Even though certain information about collateral may be shared freely, prudence dictates that lenders and appraisers manage collateral information with care and sensitivity and not re-use it outside the purposes for which it was collected, that is real estate valuation, management and analysis.
Management of Collateral Related Information In Mortgage Transactions

Introduction

All consumers have certain expectations and anxieties about privacy, especially the privacy of consumer financial information. Yet consumers also benefit from, among other things, the expanded choices and opportunities that information sharing has made possible in the financial services industry. The GLB Act and its implementing regulations take both sides of the issue into account in addressing the questions of what information should be considered nonpublic personal information, and under what circumstances should that information be used and disclosed.

The Act’s rules governing nonpublic personal information effect the activities of lenders, appraisers and others involved in consumer mortgage transactions. Understanding these new rules is especially important now, because we are just beginning to see the use of collateral related information in rapid valuations of properties for home mortgages. The creation and use of comprehensive databases of collateral information is 20 years behind the creation and application of comprehensive databases of credit information. The credit databases (the credit reporting agencies) have fostered instant loan approvals at very low cost. That in turn has lowered the cost of credit for every borrower. In like fashion, the development of comprehensive real estate collateral databases will reduce the cost of establishing the value of properties for home mortgages.

First, these databases can give the appraisal professional access to more comprehensive, more accurate data in a traditional appraisal process, making traditional appraisals more reliable and quicker to complete. Second, as to those loans where the consumer’s credit profile supports the use of more automated techniques by appraisers and lenders, these databases will allow for those techniques. Either way, this can significantly reduce the time and cost to originate and fund home mortgages. Restricting the free flow of this information will inevitably stall these efforts, and it may at the same time make little contribution to consumer privacy.

Our privacy, as consumers, depends on the nature of the information and how it is used. Collateral information is not about us. It is the information used to help value and evaluate the collateral used to support a particular mortgage transaction.

But if collateral information is not information about us, how does the information concerning the collateral offered as part of a secured loan transaction, especially a mortgage, fit into the regulations that now govern the use of information about us?

This Guide is intended to help mortgage lenders, real estate appraisers, other participants in the mortgage process, and other real estate professionals understand how to treat collateral information.

The basic rule of Gramm-Leach-Bliley

The GLB Act can be boiled down to a general rule:

A financial institution, to the extent that it offers financial products or services to consumers and customers, can only distribute nonpublic personal information about its consumers and customers to nonaffiliated third parties if it provides its consumers and customers with a notice and the opportunity to opt-out of such distribution.
There are exceptions to this general rule, and even if a financial institution does not have to provide a notice and an opt-out right, there are rules about the reuse and redisclosure of nonpublic personal information.

In order to understand the ways this rule affects how financial institutions and others may use, reuse and redistribute collateral related information within the mortgage process and mortgage market, we must first understand the terms used in the general rule.

**WHO IS A FINANCIAL INSTITUTION COVERED BY THE ACT? (WHO IS COVERED?)**

Residential **mortgage lenders** and residential **real estate appraisers** are considered “financial institutions” and therefore are covered under the Act.

The GLB Act governs the disclosure of nonpublic personal information by “financial institutions.”

The Act defines a financial institution as “an institution that is significantly engaged in financial activities … as described in section 4(k) of the Bank Holding Company Act of 1956.”

The Bank Holding Company Act’s description of financial activities is quite extensive and is intended to encompass nearly every activity that a financial institution might engage in, many of which are not traditionally associated with financial activities, such as check printing, travel related services when offered in addition to other financial services, data processing services and so on. Also included in the definition of financial services are **real estate appraising activities.**

Considering that lenders and appraisers must make and evaluate real estate appraisals as a core aspect of their business, they will also pass the second part of the test as to whether they are financial institutions. That is, they are clearly institutions that are “significantly engaged” in the financial activity of real estate appraising.

**WHAT IF YOU DON’T PROVIDE FINANCIAL SERVICES TO INDIVIDUALS, OR YOU ONLY PROVIDE SERVICES FOR COMMERCIAL PURPOSES?**

All “financial institutions” are regulated under GLB, even if they do not provide financial products and services to individual consumers or customers, and even if they only provide services for commercial purposes.

The GLB Act recognizes that many “financial activities” are not performed for individuals for personal, family or household purposes at all, but rather are performed for other financial institutions. This might mean that the provider of services is exempt from the notice obligations of the Act (although real estate appraisers should be aware that **even a single transaction directly with a consumer may be enough to trigger the requirement to give certain notices**). Even if the business does not perform financial activities for individuals, however, it is still a financial institution. Real estate appraisers generally fit this description.

In any case, if financial institutions have nonpublic personal information in their possession, their use, reuse and redistribution of that information will be limited by the GLB Act regardless of whether they provide services to individuals for personal, family or household purposes.
Are there any categories besides “Financial Institutions” that are important to know about?

The Act categorizes individuals and organizations in other important ways, using the labels “affiliates,” “nonaffiliated third parties,” “agents” and “service providers.”

A financial institution may have “affiliates.” An affiliate is any company that controls, is controlled by, or is under common control with the financial institution. Control means actual control over day-to-day activities, ability to elect a majority of the board of directors, or ownership of 25% of the outstanding stock. Determining who is your affiliate is important because under the GLB Act a financial institution can continue to share information with its affiliate.

Of course “nonaffiliated third parties” are those persons and entities that are not “affiliates.” “Agents” and “service providers” provide certain services either on behalf of the financial institution (for example, print and mail out statements) or to the financial institution (for example, real estate appraisal services). The term “agent” anticipates a more personal (“agency”) relationship with the financial institution, with greater fiduciary responsibilities than a “service provider” although the regulations tend to blend these two terms together when dealing with services.

Of greater importance for agents, the relationship between a consumer and a financial institution’s agent is actually treated as between the consumer and the financial institution that the agent represents. That means the financial institution becomes responsible for certain disclosure and other purposes, relieving the agent from fulfilling those disclosure requirements directly. The financial institution clearly accepts greater responsibility for the agent than for a service provider.

An agent or service provider can be either an “affiliate” or a “non-affiliated third party,” although the likelihood is that they are “non-affiliated third parties.” In addition, an agent or a service provider can be (and often is) another financial institution. For example, a real estate appraiser is likely a “financial institution,” a “non-affiliated third party” and a “service provider” all at the same time.

These terms are important because they refer to organizations outside of the financial institution that may provide certain services to the financial institution involving information that is governed by the GLB Act. As a result, the rights, duties and obligations of agents and service providers can only be understood by understanding how they are treated in the regulations.

“Consumers” and “Customers”

“Consumers” and “customers” are the people whose privacy the GLB Act is intended to protect. A “consumer” is an individual who obtains a financial product or service from a financial institution. Consumers include:

• Individuals who want to establish a continuing “customer relationship” but haven’t yet done so, such as a person who wants his or her credit evaluated but not yet taken out a loan; and

• Individuals who are only seeking one-time services or incidental services. Examples of this last type of consumer include the consumer who “obtains a financial product or service from you only in isolated transactions, such as using your ATM to withdraw cash from an account at another financial institution; purchasing a money order from you; cashing a check with you; or making a wire transfer through you; or…obtains one-time personal or real property appraisal services from you.”
Of course a “customer” means “a consumer who has a customer relationship with you”.

Sharing nonpublic personal information about consumers and customers is what triggers the notice and opt-out obligations under the Act.

**WHAT IS “NONPUBLIC PERSONAL INFORMATION”?**

Under the basic GLB rule, a financial institution, to the extent that it offers financial products or services to consumers and customers, can only distribute nonpublic personal information about its consumers and customers to nonaffiliated third parties if it provides its consumers and customers with a notice and the opportunity to opt-out of such distribution.

Nonpublic personal information is personally identifiable financial information that is not publicly available information. **Personally identifiable financial information** includes:

- Any information a consumer provides to a financial institution to obtain a financial product or service from the financial institution;
- Any information about a consumer resulting from any transaction involving a financial product or service between a financial institution and a consumer; or
- Any information a financial institution otherwise obtains about a consumer in connection with providing a financial product or service to that consumer.

As you can see, “personally identifiable financial information” includes a lot of information. Still, it does not cover all the information connected with a financial product or service. “Personally identifiable financial information” is defined in terms of what information a consumer provides to a financial institution, or information about a consumer. This may not include any of the information that is part of the transaction but that does not identify or relate to the consumer (we’ll talk about this information when we talk about collateral information).

**IF A CONSUMER PROVIDES THE INFORMATION, IS IT AUTOMATICALLY “NONPUBLIC PERSONAL INFORMATION”?**

No. Remember that nonpublic personal information is personally identifiable financial information **that is not publicly available information**. Publicly available information does not become nonpublic personal information just because the consumer supplies it in connection with a financial product or service.

In other words, if you have satisfied yourself that you have a reasonable basis to believe that certain information is publicly available, then the fact that the information may have been included in information provided by a consumer seeking or obtaining a financial service is irrelevant.

**WHAT IS PUBLICLY AVAILABLE INFORMATION?**

“Publicly available information” is any information that you have a reasonable basis for believing has lawfully been made available to the general public from:

(i) Federal, State, or local government records;
(ii) Widely distributed media; or

(iii) Disclosures to the general public that are required to be made by Federal, State, or local law.”

As you can imagine, this definition covers a lot of information. Let’s take some guidance from the regulations about each of these categories.

**Federal, State or local government records** cover all facets of public records, including the federal, state and local records that contain information about residential and other real estate. Examples include:

- Federal and state surveys and ownership records;
- FEMA data and census data (including geographic data);
- Recorded documents in county Recorder’s Offices, Clerk’s Offices or Court Houses;
- Lien and other documents filed in Secretary of State’s Offices, Departments of Motor Vehicles, and so on;
- Building/planning department records, including building plans and specifications, subdivision information, etc.; and
- Tax assessment records for the county or township

Practically everything about a residential property and the improvements on it can be found either in the tax assessment records, the recorder’s office or the building records in the local planning/building and zoning departments. This includes the size and shape of the lot itself, the size and configuration of the house and any outbuildings including garages, its number of bedrooms and bathrooms, its age, the number of garage spaces, interior and exterior finishes and so on. Information about transactions concerning residential property, including the sales price (in most but not all cases) and date, the amount of financing and lender as well as the buyer and seller, is found in the documents recording that transaction. Much of this information may not be electronically accessible. In fact, it may only be found in a dusty basement of a governmental facility. Electronic or not, because it comes from governmental records it is publicly available information.

**Widely distributed media.** The regulations provide some helpful examples: “publicly available information from widely distributed media includes information from a telephone book, a television or radio program, a newspaper, or a web site that is available to the general public on an unrestricted basis.”

Whether something is “widely distributed” needs to be read in context. It is an overly restrictive reading to require that a publication or broadcast be extremely popular or have a very large number of recipients or subscribers. Wide distribution in the right circles, even if those circles are specialized, may be enough. A newspaper with a circulation of 500 that services a town of 500 inhabitants is certainly widely distributed.

It appears that the phrase “widely distributed media” is intended to convey the expectation that the information in question is sufficiently well distributed that there is no longer a reasonable expectation of privacy concerning it. Conversely, at some point the media is not well enough distributed for it to be considered to be generally available. Then its contents are unlikely to be considered publicly available information.

Information included in advertisements in widely distributed media is publicly available information. With respect to real estate collateral, the information about individual properties has always
been widely distributed through advertising (at the time a property is offered for sale). Today, sub-
stantially every property for sale is advertised through widely visited Web sites, such as Realtor.com,
Homeadvisor.com, Homestore.com, Homeseekers.com and others. More and more real estate
agents maintain their own web sites, displaying not only their own listings, but all other listings
within their Multiple Listing Service area. Consumers and others can not only glean significant
details about the properties they are interested in, but in many cases see interior videos of the prop-
erty. All of this information is, of course, publicly available.

**Disclosures to the public required by law.** While the illustration commonly used by the regulators
is that of a securities disclosure filing, there are many public disclosure laws affecting real property
that are also significant. Many required public disclosures and reports arise from land subdivision
and development, including, for example, environmental impact reports, public reports and disclo-
sures regarding new housing and other developments. These disclosures and reports often contain
substantial descriptions of individual parcels.

**IS THE ADDRESS PUBLICLY AVAILABLE INFORMATION?**

Yes, unless it is connected with nonpublic personal information.

The Federal Trade Commission has made clear that any information, including a consumer’s
address, “should be considered financial information if it is requested by a financial institution for
the purpose of providing a financial product or service.”17 But at the same time, the FTC notes that:

Names, addresses, and telephone numbers, if publicly available, will not be subject to the
opt-out provisions of the statute unless that information is “derivative information” (i.e.,
information that is part of a list, description, or other grouping of consumers that is
derived from personally identifiable financial information that is not publicly available).
Thus, in instances involving specific requests about individuals, a financial institution still
may disclose information about the individual that the institution has a reasonable basis to
believe is publicly available, provided that in so doing the institution does not disclose
[nonpublic personal information].18

It is clear that a street address by itself is publicly available information. The United States Postal
Service routinely makes available a listing of every known address (approximately 113 million) in
the United States to assist mailers. The owner and/or resident’s name is not included in this listing
(although the “Firm” name is indicated for commercial properties). But the FTC’s discussion of the
issue means that the context in which a street address is disclosed is what matters for GLB Act pur-
poses. In a context where the address is tied to personally identifiable financial information about a
consumer, then there is a greater expectation of privacy and the address is subject to greater restric-
tions. In the context of information about the collateral unconnected to a consumer, the address is
publicly available information.

**WHY DOES IT MATTER THAT THE ADDRESS IS PUBLICLY AVAILABLE INFOR-
MATION IN THE CONTEXT OF INFORMATION ABOUT THE COLLATERAL?**

If the address is publicly available information, it makes the analysis of other information about the
collateral much simpler. The address of a property is the basic building block for all collateral infor-
mation. Public availability of the address allows for the continued organization, storage, manage-
ment and sharing of collateral information about residential real estate and fosters higher quality, more accurate collateral valuations.

**How is information about collateral different from nonpublic personal information about the consumer?**

**Collateral information is not about the consumer.**

Information related to the collateral is different in nature from personally identifiable financial information (although they do intersect as we will see). This is true for several reasons:

- Collateral information describes and evaluates information about the collateral, not about the consumer.

- Collateral information, especially regarding real estate and real estate transactions, is generally (though not always) publicly available.

With respect to collateral, there are four important questions:

- What is the collateral?

- What are its attributes?

- Does the collateral have value, or at least adequate value to support the transaction?

- Is the state of the ownership/title such that the lender can use it as collateral? Is the collateral marketable?

All of these questions are objective ones, looking at the physical, legal and market aspects of the collateral. With these questions, it does not matter who the owner or possessor is and information about the owner or possessor, such as their names, can be disassociated from the collateral information.

**In the context of residential real estate appraisals,** the information gathered and reported on most appraisal forms is collateral information, with a few minor exceptions, such as name of the property owner or appraisal requester. Substantially all of that information is publicly available from tax assessment records, federal records (such as FEMA flood records), building/planning department records, web sites that specialize in home listings, newspapers, and advertising materials included in widely distributed media. This is especially true of the objective facts about a house, such as its year built, size, number of bedrooms and other objective attributes.

**Collateral information can be treated differently than personal information.**

Because of its different focus, information about collateral travels in different, more circumscribed circles. It is used to establish and in some cases stabilize the market for the collateral. (For example, consider the dissemination of publicly traded stock quotations.)
more widely the information about collateral is disseminated, the more clearly its value is understood by both consumers and lenders, and the more potential for fraud and deception is minimized.

In the mortgage transaction, for example, the due diligence surrounding collateral is managed through several different providers, such as: the title abstracting and title insurance community, the real estate appraisal community, hazard insurance companies, flood and other national hazard information organizations. Each of these entities contributes to the knowledge and understanding of the collateral with little reference to the specific consumer.

Much of this due diligence is mandated by law and is conducted mostly with publicly available information. In our case, the information is obtained in part by a common sharing of the objective aspects of the collateral (the publicly available attributes) involved in various mortgage transactions. That allows a common understanding of the physical attributes of properties and their likely sales prices. Within that context, we exercise substantial discretion about the nature of the information we collect and disseminate. Neither the borrower nor the lender is included in the information we make available as such identifying information is not relevant to the objective issue of understanding the collateral within its market.

**Treating collateral information differently is consistent with public demands for privacy.**

There is a tendency to ignore the differences between collateral information and customer information, lumping all of it together as nonpublic personal information subject to GLB Act restrictions. This approach ignores the fact that individuals have little expectation of privacy in collateral information, even if the information refers to collateral they own. They know that collateral information has already been compiled by governments, and that businesses have access to this compiled information. What people want is not greater restrictions on collateral information — that just makes it harder to have financial services delivered efficiently. Instead, what people want is for information that really is personal information to be safeguarded.

**We should make sure that personal information is not linked to collateral information.**

In order to comply with the GLB Act and preserve individual expectations of privacy, there are certain problem areas to watch out for.

- **The borrower, lender and borrower/lender relationship.** The fact that an individual is a consumer of a particular financial institution is by itself nonpublic personal information (unless that fact is publicly available through the public recording of a security instrument such as a mortgage that ties the two parties together). Therefore, identifying the mortgage borrower/mortgage lender relationship by name (at least until a transaction is recorded and that relationship becomes publicly available) discloses nonpublic personal information.

- **Personal identifiers.** Unique personal identifiers, such as loan numbers and social security numbers, may be nonpublic personal information and should not be linked to collateral information.
• **The address.** As noted above, the address is only collateral information if it is not linked to nonpublic personal information, and it may also under certain circumstances be publicly available information.

• **Interior details.** The details regarding the interior of residential properties is information about the collateral and not about the consumer. However, there is no requirement that this information be publicly available, and there may be some expectation of privacy about information of this kind. Unless there is some reason to believe that this information has been made public, for example in advertisements that have appeared on public multiple listing web sites, information about the interior of a dwelling, especially the finishes such as floor treatments and wall treatments, may be considered nonpublic personal information subject to GLB Act restrictions.

• **Sales prices in non-disclosure states present an especially difficult problem.** While in most states the sales price of real estate must be disclosed – and therefore is a matter of public record, in a few states there is no such requirement. In these non-disclosure states, we cannot assume the sales price is publicly available information, unless we know that it has been voluntarily placed in the public record. If an individual does not want to divulge the sales price of property he has purchased, he will have an expectation of privacy in that number, and that expectation should not be violated.

Thus, the sales price of property X in a non-disclosure state should be treated carefully, and it may have to be treated as nonpublic personal information, rather than collateral information.

• **The appraiser’s opinion of value.** The value conclusion contained in an appraisal is nonpublic personal information. Moreover, under the Uniform Standards of Professional Appraisal Practice (USPAP) it is considered to be "confidential information" and should not be shared in order to protect the confidential nature of the appraiser-client relationship.

**Where does MLS information fit into all this?**

Multiple Listing Service (MLS) information is the information maintained by real estate agents and brokers concerning the properties for sale (or properties recently sold) in their geographic area.

MLS information is not information presented in “widely distributed media” so long as it is available only to members of that MLS (and sometimes the affiliated Association of Realtors). Increasingly, this information is displayed on publicly available web sites that present information about residential properties for sale, especially the national web sites from Homestore.com, home-seekers.com, homeadvisor.com, Realtor.com, and so on. Once this MLS information has been made public in this way, it is publicly available information. But unless we know that MLS information has been made public, we cannot assume that it is.

Nevertheless, most MLS information is not subject to GLB Act restrictions because real estate agents and brokers are not subject to GLB.
What about “aggregated information”?

Aggregated information or summary data is specifically excluded from the definition of personally identifiable financial information, because by its very nature it is not personally identifiable.

In the collateral world, information about residences in a neighborhood, neighborhood trends, price trends and so on that are not specifically tied to individually identifiable properties are clearly outside the realm of personally identifiable financial information. Aggregated information can be freely shared without concern for the GLB limitations. 21

What about the “privacy notice”?

Financial institutions that have direct relationships with consumers and customers have to provide notices describing their information sharing practices. As our basic rule states, unless an exception applies, a financial institution can only distribute nonpublic personal information about its consumer or customer to nonaffiliated third parties if it provides its consumer or customer with a notice and the opportunity to opt-out of such distribution.

The timing of this notice varies:

- **Consumers.** With respect to non-customer consumers, the privacy notice must be given “before you disclose any nonpublic personal information about the consumer to any nonaffiliated third party.” 22 No follow up annual privacy notice is required for such consumers.

- **Customers.** With respect to customers, the initial privacy notice must be given “not later than when you establish a customer relationship.” 23 The regulations also require annual privacy notices for as long as the individual remains a customer.

- **Former Customers.** Former customers are treated like consumers. A customer becomes a former customer when the customer relationship definitively ends (for example, when a loan is paid off or a one-time tax preparation service has been paid for) or one year after the last communication with the customer other than privacy notices and promotional materials. 24

When does a real estate appraiser need to provide a privacy notice?

The real estate appraiser needs to provide a privacy notice to a consumer if:

- The appraiser has performed an appraisal directly for that consumer, and
- The appraiser wants to disclose nonpublic personal information about the consumer to nonaffiliated third parties without benefit of one of the exceptions to the basic rule (see below).

The notice must be provided before the nonpublic personal information is disclosed. After the notice is provided, the appraiser (if intending to share public personal information not subject to an exception) will need to wait 30 days before sharing. This time gives the consumer or customer reasonable time to exercise his/her opt-out right.

This requirement is not likely to occur, because an appraiser usually performs his assignments for financial institutions, not consumers. In these cases, the appraiser has no relationship with the consumer and does not have a disclosure duty. In addition, the appraiser has no duty to provide the consumer with his or her privacy policy if he or she is only disclosing publicly available information, even if he is performing an assignment directly for a consumer.
In the unlikely event that an appraiser routinely performs appraisals for an individual, then the appraiser may be considered to have a continuing relationship with the individual. In that case, the relationship will be considered a “customer” relationship and the privacy notice requirements will be greater.

The FTC regulations provide sample privacy notice language, in the event it is necessary for an appraiser to comply with this requirement. 25

**What are the exceptions to the basic GLB Act rule?**

Our basic rule says that a **financial institution**, to the extent that it offers **financial products or services** to **consumers** and **customers**, can only distribute **nonpublic personal information** about its consumers and customers to unaffiliated third parties if it provides its consumers and customers with a notice and the opportunity to opt-out of such distribution. The GLB Act provides for exceptions to this rule, however.

**Exception from opt-out**

A limited exception allows a financial institution to provide “nonpublic personal information to a nonaffiliated third party to perform services for or functions on behalf of the financial institution” without permitting the consumer to opt-out of that information-sharing.26 The functions that the third party can perform using the consumer information can include marketing of the financial institution’s products or services, or those offered jointly with other financial institutions.

To qualify for this exception, the financial institution must:

- **Disclose in its privacy notice that it is sharing the information with an nonaffiliated third party for these functions; and**

- **Enter into a confidentiality agreement between the financial institution and the third party.**

**Exception from notice and opt-out.**

A broader exception permits a financial institution to share information without providing specific notice to the consumer or permitting the consumer to opt-out of the information sharing, under certain circumstances. A financial institution may disclose nonpublic personal information “as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer.” A financial institution can also disclose information under this exception with the consumer’s explicit consent. Finally, under this exception, the financial institution can disclose information to various organizations that do not market products and services to consumers, such as financial rating agencies, credit reporting agencies and law enforcement agencies.27

The consumer has neither the right to receive a disclosure nor the right to opt-out of this exception.

Because this exception is broad, the regulations restrict the nonaffiliated third party from re-disclosing or reusing the nonpublic personal information received under this exception, except as necessary to “effect, administer or enforce a transaction.”
Limits on Redisclosure and Reuse of Information

Nonpublic personal information can be distributed to third parties if the consumer has received notice, has had an opportunity to opt-out, and has not opted out. If the nonpublic personal information is distributed to third parties after notice and the opportunity to opt-out, it can be re-disclosed and re-used unless and until the consumer decides later to opt-out.

Nonpublic personal information can also be distributed to third parties under the exceptions to notice or opt-out. If so, there are limited rights to re-disclose or re-use the information regardless of what the consumer does. In general, under the exceptions, you may re-disclose the information only as it fits under the same exception by which you received the information.

- If you received the information under the service provider exception from opt-out, you may only use or redisclose the information in the course of providing the service you have contracted to perform.

- If you receive the information under the exception from notice for disclosures necessary to effect, administer, or enforce a transaction, then you may only use or redisclose the information for that purpose.

Publicly available information

The rules regarding publicly available information are quite different. In general, you may redisclose or reuse any publicly available information outside of the restrictions set out in the regulations.

It is on this basis that you may redisclose your information to an appraisal data sharing organization, and in fact reuse the information in a different transaction for a different client.

Can I still use my own appraisal data from one assignment in the valuation of a subject property for another client?

Yes, but only the publicly available information and data obtained from third party sources unrelated to a consumer (such as most MLS information).

This is one of those real odd circumstances. If an appraiser gathers nonpublic personal information in the performance of an appraisal for one client, then the appraiser cannot re-use that same information in another assignment in the same neighborhood for another lender. The exceptions that allow the appraiser to receive and use personal nonpublic information do not allow for its reuse for another purpose. This suggests that the GLB Act requires the appraiser to ignore the freshest and most relevant information.

However, this oddity only applies to nonpublic personal information. As it is our view that substantially all of the information in an appraisal is publicly available information, the appraiser can use information obtained from an earlier assignment in performing a later assignment so long as he excludes information that appears to be nonpublic personal information from consideration (or disclosure) in the new assignment. This suggests that certain pieces of information should be excluded from the appraiser’s database of information available for use in unrelated transactions, such as:

- Name of borrower (“consumer” or “customer”);
- Loan/case/application number (but not necessarily the appraiser’s own file number);
• Lender (at least until the transaction is recorded and the lender identified);
• Sales price in non-disclosure states (unless the appraiser knows the information has been made public voluntarily);
• Interior details.
• Opinion of value.

With respect to this list, it is the latter three that may have the greatest possible influence on the appraisal process. The sales price is a key element (in fact it is the key element) for any comparable sale. The interior details influence the assumptions about the property’s current condition and quality of construction.

This information may have been disclosed to the MLS by the seller of property, in which case it is not nonpublic personal information about a consumer, but rather is information about a prior transaction that has value as a comparable sale. In that manner, the information gleaned from the first transaction may be refreshed and available by virtue of its availability through a third party source separate from the one by which the appraiser originally obtained the information.

**Can I re-disclose nonpublic personal information to my employees, contractors and others in the course of performing an assignment?**

Yes, but only for the purposes of performing that assignment.

A financial institution (such as a real estate appraiser) may receive nonpublic personal information about the consumer from another financial institution to effect, administer, or enforce a transaction – in the case of a real estate appraiser, to provide an appraisal that will be part of the data analyzed in the underwriting of a mortgage loan.

The real estate appraiser may use others to assist in the preparation of this appraisal, including employees or contractors. The appraiser may disclose nonpublic personal information (for example, loan numbers) to his or her employees and contractors in order to complete the assignment, but only under the same exception by which it was received in the first place.  

**Can I re-use nonpublic personal information obtained from former customers?**

Yes, you may use it internally. However, you may not redisclose nonpublic personal information to others without giving notice and an opportunity to opt-out.  

Based on our position that substantially all of the information in an appraisal is publicly available information, however, it should be possible for a financial institution to retrieve the files of former customers and use that information (and in fact redisclose that information) without triggering the requirement to provide notice and opt-out.
Can I still provide my appraisal data to my favorite appraisal data sharing organizations?

Yes, subject to certain edits (or restrictions on use).

Your favorite appraisal data sharing organization is an nonaffiliated third party. You can share information with your favorite appraisal data sharing organization subject to the general rules discussed above about sharing nonpublic personal information and publicly available information. As we explained, you may share information that is publicly available. You should also be able to share information that is derived from other sources unrelated to the original borrower.

Most of the information in an appraisal is derived from publicly available information. It can be used and shared with third parties if personally identifiable information is removed, including:

- Name of borrower (“consumer” or “customer”);
- Loan/case/application number (but not necessarily the appraiser’s own file number);
- Lender (at least until the transaction is recorded and the lender identified);
- Sales price in non-disclosure states (with respect to the subject property only, where the information is obtained from the borrower or lender and is not known to have been made public); and
- Interior details.
- Appraiser’s final conclusion of value.30

You do not have to do this work yourself, your appraisal data sharing organization can do it. As a matter of course, you may ask your favorite appraisal data sharing organization to perform those edits on your behalf under a service provider/confidentiality agreement. In other words, once you have entered into such an agreement you may provide all the information you have traditionally provided without the burden of separating out potentially nonpublic personal information.

A word of caution. This discussion suggests that the sharing of appraisal data with unrelated third parties is generally limitless. In the most straightforward analysis, there is no difference between sharing appraisal data derived from publicly available information with an appraisal data sharing organization or a telemarketing organization. On a practical level, the differences are vast.

It is the unexpected use of data, especially reapplied to a marketing circumstance that creates the greatest sense of loss of privacy. When appraisal information is shared to foster higher quality, more accurate valuation conclusions, then people are hesitant to complain. The use of the data is appropriate to the task, with very little apparent repercussions to people’s sense of privacy.

But when that same data is carelessly and indiscriminately disseminated, it fosters an atmosphere of anxiety and loss of privacy.

We would admonish appraisers and others involved in the valuation and analysis of real property to restrict the circle within which data is shared.

Who enforces the GLB Act?

Financial institutions that are not regulated by the banking agencies (the Federal Reserve Board,
OCC, FDIC, OTS and NCUA), by the SEC, or by state insurance regulators, are subject to the rule-making and enforcement powers of the Federal Trade Commission. This means that, for privacy purposes, the FTC regulates real estate appraisers and other non-bank, non-securities, non-insurance financial institutions.

**Enforcement powers**

Only the designated regulators may enforce the regulations. For real estate appraisers, only the FTC may enforce the regulations, using its specific powers.

There are no specific penalties for non-compliance provided for in the GLB Act or regulations, although the different regulatory agencies have their general powers of enforcement, including cease and desist orders and other administrative remedies.

In general, the Federal Trade Commission’s enforcement power is based on the prosecution of unfair trade practices. That is, if you represent (or advertise) that you act or conduct business in one way, but in fact act in a different way, that conduct could be an unfair trade practice subject to FTC action.

It is not clear what effect (if any) a regulatory action by the FTC will have on the license status of licensed professionals such as real estate appraisers. This may vary from state to state.

**There is no “private right of action.”**

Neither the GLB Act nor regulations provide a private right of action. That is, if a consumer or customer believes his or her nonpublic personal information was improperly disclosed, that consumer or customer does not have any right under the GLB Act to sue the person they believe made that improper disclosure. There may be a private right of action under certain state laws.

**Summary and where do we go from here?**

Some information is nonpublic personal information. For all of us, this is the information that evokes a concern about our privacy. We all tend to consider this information highly sensitive.

These are certain types of information that require the greatest vigilance and attention and are identified as so in the regulations:

- **identifying information**, especially that information which “unlocks” the access to information about the individual consumer, such as the social security number and different account numbers;
- **credit information** especially about individual consumer’s credit usage, history and other characteristics;
- **financial information** such as income, assets, liabilities and “financial relationships” such as with whom the consumer has relationships and transactions;
- **transactional information** including such as credit and debit card transactions (with whom and for what amounts), checking account payments and credits (which one panelist at the FDIC public forum on privacy described as the “index to your whole life”)
Some information is not nonpublic personal information. The categories of information above do not begin to cover all information involved in a financial transaction. It is clear that there is a substantial body of information that is not as sensitive and about which consumers do not have a deep seated expectation of privacy. That is the objective information about the collateral.

As we have seen, much if not all information about residential properties is publicly available. It is publicly available to anyone walking down the street, or anyone who reviews tax assessment records, building records and other governmental records. The details are intentionally public in the ever present advertising of details about houses for sale (whether circulars in the front yard or posting on the Internet in widely visited home listing sites).

It is this distinction that is important. There is no “rebuttable presumption” that all information is somehow nonpublic personal information. In fact, there is just as likely a rebuttable presumption that most information is not nonpublic personal information, especially if the areas of sensitivity are removed--the customer identifiable specific information such as name, social security number and account number.

There is strong public policy behind protecting nonpublic personal information because this is the information about which all of us as consumers have a reasonable expectation of privacy.

There is also a very strong public policy in favor of ensuring access to mortgage credit for all. By applying common sense to the definition of publicly available information the use of collateral related information can continue to contribute to the ever widening circle of consumers with access to home mortgages, at lower and lower costs over time.

It is our belief that substantially all of the collateral related information is publicly available. Associating collateral related information to specific addresses (absent the identification of the consumer) does not change that fact. As such this information may be used, reused and shared within the context of real estate mortgage lending, especially valuation and analysis.

As they have since time immemorial, lenders and appraisers may reuse the information in their own files to assist in the valuation and analysis of other properties for other consumers, and may share the same information (absent any specific identification of the consumer, including his or her loan number, social security number or other similar number that uniquely identifies that consumer) with others to compile more complete databases of collateral related information.

It will take time to see how the regulations themselves are implemented. We do expect some lenders to take an over-cautious approach to how they define nonpublic personal information thereby unintentionally drawing in collateral information. But these lenders should be in the minority.

In the meantime, we will continue to gather, manage and disseminate high quality collateral information to serve the residential mortgage lending and appraisal communities, to the ultimate benefit of all consumers.

Where can I find more information about GLB and the regulations?

All of the official information about Gramm-Leach-Bliley privacy issues can be found on the Internet. The most important sources are shown below.

Federal Trade Commission website, index to Gramm-Leach-Bliley privacy materials.

http://www.ftc.gov/privacy/glbact/index.html
Copy of the GLB Act, PL 106-102, Title V, Subtitle A (15 U.S.C. § 6801-6810)

http://www.ftc.gov/privacy/glba/glbsub1.htm

Federal Trade Commission final regulations, 16 C.F.R Part 313


Federal Banking Regulators final regulations (Privacy of Consumer Financial Information) [The federal banking regulators issued the final regulations jointly]

• Federal Reserve Board, 12 C.F.R 216
• Federal Deposit Insurance Corporation, 12 C.F.R Part 332
• Office of Thrift Supervision, 12 C.F.R Part 573
• Office of the Comptroller of the Currency, 12 C.F.R Part 40

http://www.fdic.gov/regulations/laws/federal/00consumpriv.pdf

Recent material from the regulators

http://www.ftc.gov/privacy/glba/glboutline.pdf

Appraisal Foundation/Appraisal Standards Board

https://www.appraisalfoundation.org/asb.htm

Appraisal Institute

http://www.appraisalinstitute.org/govrmnt/prvcy.htm

National Association of Realtors [You will need to be a member of the National Association of Realtors to use this location.]

http://www.onerealtorplace.com/letterlw.nsf/pages/glbprivacy
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ENDNOTES

1 The federal banking agencies have comparable regulations for institutions in their jurisdictions. See 12 C.F.R. Part 40 (national banks), Part 216 (Federal Reserve Board member banks), Part 313 (FDIC insured, FRB non-member banks), and Part 573 (OTS regarding federal thrifts).

2 To the extent appraisers provided services directly to consumers, they would have the same responsibilities as lenders.

3 “A personal property or real estate appraiser is a financial institution because real and personal property appraisal is a financial activity listed in 12 C.F.R. 225.28(b)(2)(i) and referenced in section 4(k)(4)(F) of the Bank Holding Company Act.” 16 C.F.R. 313.3(k)(2)(ii).

4 “Scope. This part applies only to nonpublic personal information about individuals who obtain financial products or services primarily for personal, family, or household purposes from the institutions listed below. This part does not apply to information about companies or about individuals who obtain financial products or services for business, commercial, or agricultural purposes.” 16 C.F.R. 313.1(b).

5 The disclosure requirement is very limited unless the appraiser intends to disclose nonpublic personal information. See 65 Fed. Reg. 33655 (May 24, 2000).

6 Likewise, courier services, data processors, and real estate appraisers who perform services for a financial institution, but do not provide financial products or services to individuals, will not be required to make the disclosures mandated by the rule because they do not have “consumers” or “customers” as defined by the rule. See 65 Fed. Reg. 33656 (May 24, 2000).

7 “Affiliate means any company that controls, is controlled by, or is under common control with another company….16 C.F.R. 313.3(a)

“Company means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization….16 C.F.R. 313.3(d)

“Control of a company means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company.” 16 C.F.R. 313.3(g).

8 The Fair Credit Reporting Act, 15 U.S.C. 1681 et seq., and certain state laws, such as Vermont and New Hampshire address whether and how a financial institution can share information with its affiliates.

9 An individual is not a consumer of an entity that is acting as agent for another financial institution in connection with that financial institution’s providing a financial product or service to the consumer. See 65 Fed. Reg. 33671 (May 24, 2000).

10 16 C.F.R. 313.3(i)(2)(ii)(A), (D).
11 C.F.R. 313.3 (h). A customer relationship “means a continuing relationship between a consumer and you under which you provide one or more financial products or services to the consumer that are to be used primarily for personal, family, or household purposes” 16 C.F.R. 313.3 (i)(1)

12 (n)(1) Nonpublic personal information means:
(i) Personally identifiable financial information; and
(ii) 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.

(2) Nonpublic personal information does not include:
(i) Publicly available information, except as included on a list described in paragraph (n)(1)(ii) of this section; or
(ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any personally identifiable financial information that is not publicly available. 16 C.F.R 313.3(n)

13 16 C.F.R. 313.3(o).

14 16 C.F.R. 313.3(p)(1).

15 Note that information contained in publicly available records remains publicly available information even if the records are subsequently lost or destroyed through one means or other.

16 Information may be widely distributed in a permanent or “ephemeral” manner (as for example television and radio broadcasts). Popular web sites are known for the fact that information is generally in a state of change. This reinforces the idea that for purposes of these regulations, once information is generally available, it does not revert back into personal nonpublic information simply by the passage of time. This concept is especially important in the context of real estate collateral information. Much information about individual real estate is widely distributed through advertising when that property is offered for sale. The fact that a sale occurred last year does alter the fact that the information is publicly available.


18 Id.

19 Note again, that publicly available information does not become nonpublic personal information by virtue of the consumer supplying that same information to the financial institution. Thus, the fact that a particular house has three bedrooms (a fact that can be found from public records) does not become nonpublic personal information simply because the consumer provides that fact to the financial institution.

20 “Non-disclosure” states are those states where the sales price is not “disclosed” in the process of the public recording of the transaction itself. That disclosure may but does not necessarily occur on the deed recorded, through a tax filing or other means. The states traditionally considered in this non-disclosure state category by gatherers of this type of information are: Alaska, Missouri, Montana, New Mexico, Texas and Utah

21 “Personally identifiable financial information does not include: (A) A list of names and
addresses of customers of an entity that is not a financial institution; and (B) Information that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers such as account numbers, names, or addresses.” 16 C.F.R. 313.3(o)(2)(ii).

22 16 C.F.R. 313.4(a)(2).
23 16 C.F.R. 313.4(a)(1).
24 16 C.F.R. 313.5(b)(2)(i) – (vii)
25 16 C.F.R. 313, Appendix A.

26 15 U.S.C. 6802(b)(2). Implementing regulations can be found at 16 C.F.R. 313.13. This exception is sometimes called the “502(b)(2) exception” after its original section number in the G-L-B Act. Section 502 became section 6802 when codified into the United States Code.

27 15 U.S.C. 6802(e). Implementing regulations can be found at 16 C.F.R. 313.14, 313.15. This exception is sometimes called the “502(e) exception” after its original section number in the G-L-B Act. Section 502 became section 6802 when codified into the United States Code.

28 “You may disclose and use the information pursuant to an exception in § 313.14 or 313.15 in the ordinary course of business to carry out the activity covered by the exception under which you received the information.” 16 C.F.R. 313.11(a)(1)(iii).

29 However, because these former customers would remain consumers, a financial institution would have to provide a privacy and opt-out notice to them if the financial institution intended to disclose their nonpublic personal information to nonaffiliated third parties beyond the exceptions set forth in §§ 313.14 and 313.15. See 65 Fed. Reg. 33673 (May 24, 2000).

30 This is considered to be an assignment result under the Uniform Standards of Professional Appraisal Practice (USPAP). As provided in the Confidentiality Section of the Ethics Rule “An appraiser must not disclose confidential information or assignment results prepared for a client to anyone other than the client and persons specifically authorized by the client…”