



## **Summary of the Gramm-Leach-Bliley Act's Requirements Concerning the Disclosure of Nonpublic Personal Information by Real Estate Appraisers**

### **I. Introduction**

On May 24, 2000, the Federal Trade Commission ("FTC") published a final privacy rule (the "Final Rule") as required by section 504(a) of the Gramm-Leach-Bliley ("GLB") Act. Section 504 of the Act requires the FTC and other agencies to issue regulations as may be necessary to implement notice requirements and restrictions on a financial institution's ability to disclose nonpublic personal information about consumers to nonaffiliated third parties. Full compliance with the GLB Act and Final Rule is required by July 1, 2001. This memorandum provides guidance to Appraisal Institute members concerning the requirements of the GLB Act and the Final Rule and is intended to assist them in complying with those requirements.

At the outset, we acknowledge that in most instances, real estate appraisers perform services directly for lenders, and do not provide financial services to individuals. In such cases, appraisers generally will not be required to make disclosures mandated by the Final Rule because they do not obtain nonpublic personal information from a "consumer" or "customer" as defined by the Final Rule. Moreover, if an appraiser collects information from a consumer but does not disclose or use that data, the appraiser is not obligated to comply with the Final Rule's disclosure requirements. However, an appraiser nonetheless must comply with the Final Rule's reuse and redisclosure requirements (see Section II.D below) where the appraiser does not obtain nonpublic personal information from consumers or customers, or where the appraiser discloses nonpublic personal information solely through the Final Rule's exceptions for joint marketing or for information necessary to effect an exception. In other words, even if an appraiser is not subject to the Final Rule's disclosure requirements, where the appraiser obtains nonpublic personal information from a nonaffiliated financial institution, it may not disclose that information to anyone unless the disclosure would be permitted if made directly by the financial institution.

Next, it appears that the Final Rule will apply only to information disclosed in connection with residential loans, as opposed to commercial loans. The Final Rule defines a consumer as "*an individual who obtains or has obtained a financial product or service from [a financial institution] that is to be used primarily for personal, family or household purposes, or that individual's legal representative.*" 16 C.F.R. § 313.3(e)(1). Therefore, if an appraiser obtains information from a business seeking financial services for commercial purposes, the Final Rule's requirements likely are not implicated.

Finally, please note that the Final Rule sets only minimum standards for the disclosure of nonpublic personal information. Third parties, such as banks, may attempt to supersede these standards and require appraisers to abide by more stringent confidentiality requirements than the Final Rule demands. While third parties are free to request that appraisers abide by tougher standards, any such expansion of confidentiality requirements would be a contractual matter subject to negotiation between the appraiser and the third party.

We outline below the relevant provisions of the Final Rule and their impact on appraisers. However, this memorandum is not intended to serve as determinative guidance for each Appraisal Institute member. Because of the complexity of the Final Rule, and because Appraisal Institute members may not be subject to uniform requirements, each member must make an independent assessment of his or her own risks and responsibilities under the Final Rule. As such, we encourage each member to consult its own attorney to determine its disclosure requirements under the GLB Act and the Final Rule.

## **II. Outline of Gramm-Leach-Bliley and Its Application to Appraisers**

### **A. Real Estate Appraisers Clearly are Financial Institutions Subject to the Requirements of the GLB Act and the Final Rule.**

- The Final Rule states that “[a] personal property or real estate appraiser is a financial institution because real and personal property appraisal is a financial activity.”

### **B. Real Estate Appraisers May Fall Within Various Exceptions in the Final Rule, Thereby Exempting Them from the Final Rule’s Requirements.**

1. If appraisers do not have “consumers” or “customers” as defined by the Final Rule, they are not subject to the Final Rule’s initial notice and opt out requirements.
  - The Final Rule provides that a consumer is “an individual who obtains or has obtained a financial product or service from [a real estate appraiser] that is to be used primarily for personal, family, or household purposes, or that individual’s legal representative.”
  - A customer is a consumer who has a continuing relationship with a real estate appraiser under which the appraiser provides one or more financial products or services.
  - The Final Rule makes clear that a consumer does not have a continuing relationship if the consumer obtains one-time personal or real property appraisal services from a real estate appraiser.
  - The comments to the Final Rule note that “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.”
2. Real estate appraisers will not be subject to the Final Rule’s initial notice and opt out requirements if they do not disclose “nonpublic personal information.”
  - Information is deemed “publicly available” and therefore excluded from the definition of “nonpublic personal information” if a real estate appraiser has a reasonable basis to believe that the information is lawfully made available to the general public from one of the three following categories:
    - (i) Information that is lawfully made available to the public from official public records (such as real estate recordations or security interest filings);
    - (ii) Information from widely distributed media (such as a telephone book, television or radio program, or newspaper);
    - (iii) Information that is required to be disclosed to the general public by Federal, State, or local law (such as securities disclosure documents).
  - A real estate appraiser has a reasonable basis to believe that information is lawfully made available to the general public if he or she has taken steps to determine:
    - (i) That the information is of the type that is available to the general public; and

- (ii) Whether an individual can direct that the information not be made available to the general public and, if so, whether a consumer has done so.
- “Personally identifiable financial information” includes:
  - (i) Information that a consumer or customer provides to a real estate appraiser in order to obtain a financial product or service;
  - (ii) Information resulting from any transaction between a consumer or customer and a real estate appraiser involving a financial product or service; and
  - (iii) Information about a consumer that a real estate appraiser otherwise obtains in connection with providing a financial product or service to the consumer.
- Personally identifiable financial information does *not* include:
  - (i) A list of names and addresses of customers of an entity that is not a financial institution; and
  - (ii) 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.
- Nonpublic personal information includes any “list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any nonpublic personal information other than publicly available information.”

**3. Real estate appraisers are not required to provide an opt out notice to consumers if the appraiser’s disclosures of nonpublic personal information are made pursuant to a contract for Service Providers or Joint Marketing.**

- The Final Rule provides an exception to the opt out rule for the disclosure of information to a nonaffiliated third party for use by the third party to perform services for, or functions on behalf of, a real estate appraiser, including the marketing of a real estate appraiser.
- A consumer will not have the right to opt out of disclosing nonpublic personal information about the consumer to nonaffiliated third parties under these circumstances, if the real estate appraiser “fully discloses” to the consumer that it will provide this information to the nonaffiliated third party before the information is shared and enters into a contract with the third party that requires the third party to maintain the confidentiality of the information.

**4. Real estate appraisers are not required to provide an initial privacy notice or opt out notice to a consumer who is not a customer if the appraiser only discloses nonpublic personal information that is “necessary to effect a transaction.”**

- The requirements for initial notice and opt out do not apply if a real estate appraiser discloses nonpublic personal information as necessary to effect, administer, or enforce a transaction that a consumer requests or authorizes, or in connection with “[s]ervicing or processing a financial product or service that a consumer requests or authorizes.”
- Necessary to effect, administer, or enforce a transaction means that the disclosure is “[r]equired, or is one of the lawful or appropriate methods, to enforce [the real estate appraiser’s] rights or the rights of other persons engaged in carrying out the financial transaction or providing the product or service . . . .”
- The comments to the Final Rule note that several commenters requested that the Final Rule specifically state that certain services, including those provided by real estate appraisers, are “necessary” to effect, administer, or enforce a transaction. The FTC chose not to provide such a statement because it feared that a general statement could be applied inappropriately. However, the FTC noted that it believed “that disclosures to these types of professionals and under the circumstances posited by the commenters may be necessary to effect, administer, or enforce a

transaction in a given situation.”

### C. Required Privacy Notices to Consumers

- It is likely that most real estate appraisers deal with consumers rather than customers. If an appraiser has a continuing relationship with an individual, however, thereby making that individual a customer, then the appraiser will be required to provide an annual privacy notice in addition to an initial privacy notice and opt out notice.
- If a real estate appraiser’s disclosure of information does not fall within one of the exceptions noted above in Section II.B, the appraiser may not, directly or through any affiliate, disclose any nonpublic personal information about a consumer unless:
  - (i) The appraiser has provided to the consumer an initial privacy notice;
  - (ii) The appraiser has provided to the consumer an opt out notice;
  - (iii) The appraiser has given the consumer a reasonable opportunity, before the appraiser discloses the information to a nonaffiliated third party, to opt out.

#### 1. Initial Privacy Notice Requirement

- The initial privacy notice must provide a clear and conspicuous notice that accurately reflects the real estate appraiser’s privacy policies and practices to:
- A consumer, before the appraiser discloses any nonpublic personal information about the consumer to any nonaffiliated third party, if the appraiser makes such a disclosure other than as authorized under one of the exceptions noted above in Section II.B.
- The Final Rule provides as an example of one way to comply with the initial notice requirement, the posting of a notice on a web site and requiring a consumer to acknowledge receipt of the notice as a step in the process of obtaining a financial product or service. However, the mere posting on the web site would not necessarily be sufficient in all cases for the real estate appraiser to reasonably expect its consumers to receive the notice.
- A real estate appraiser is *not* required to provide an initial notice to a consumer if:
  - (i) The appraiser does not disclose any nonpublic personal information about the consumer to any nonaffiliated third party, other than as authorized by one of the exceptions noted above in Section II.B; and
  - (ii) The appraiser does not have a customer relationship with the consumer.

#### 2. Opt-out Notice

- If a real estate appraiser is required to provide an opt-out notice (that is, he or she is providing nonpublic personal information that does not fall within one of the exceptions noted above in Section II.B), he or she must provide a clear and conspicuous notice to each of his or her consumers that accurately explains the right to opt out under that section. The notice must state:
  - (i) That the appraiser discloses or reserves the right to disclose nonpublic personal information about his or her consumer to a nonaffiliated third party;
  - (ii) That the consumer has the right to opt out of that disclosure; and
  - (iii) A reasonable means by which the consumer may exercise the opt-out right.
- Reasonable means of opting out include:
  - (i) Designating check-off boxes in a prominent position on a form containing the opt out notice;
  - (ii) Including a reply form that includes the address to which that form should be mailed; or

- (iii) Providing an electronic means to opt out, such as a form that can be sent via electronic mail or a process at the real estate appraiser's web site, if the consumer agrees to the electronic delivery of information; or
- (iv) Providing a toll-free telephone number that consumers may call to opt out.

### 3. *Delivering initial privacy and opt out notices*

- Examples of reasonable expectation of actual notice:
  - (i) Hand-deliver a printed copy of the notice to the consumer;
  - (ii) Mail a printed copy of the notice to the last known address of the consumer;
  - (iii) For the consumer who conducts transactions electronically, clearly and conspicuously post the notice on the electronic site and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular financial product or service.

### 4. *Short Form Initial Privacy Notices*

- The Final Rule permits financial institutions, including real estate appraisers, to satisfy the initial notice requirements by providing a "short-form" initial privacy policy notice along with an opt out notice to a consumer with whom the institution does not have a customer relationship.
- The short form notice, along with the opt-out notice, must:
  - (i) Be clear and conspicuous;
  - (ii) State that the real estate appraiser's privacy notice is available upon request; and
  - (iii) Explain a reasonable means by which the consumer may obtain that notice.
- A short form notice must be delivered in the same manner as an initial privacy notice (as described in Section II.C.3 above). A real estate appraiser is not required, however, to deliver a privacy notice with a short-form initial notice. The appraiser may simply provide the consumer a reasonable means to obtain the real estate appraiser's privacy notice.
- A real estate appraiser provides a reasonable means by which a consumer may obtain a copy of his or her privacy notice if the appraiser:
  - (i) Provides a toll-free telephone number that the consumer may call to request the notice; or
  - (ii) For a consumer who conducts business in person at the appraiser's office, maintains copies of the notice on hand that the appraiser provides to the consumer immediately upon request.

## **D. Limits on Redisclosure and Reuse of Information**

- A nonaffiliated third party that receives nonpublic personal information from a real estate appraiser, may not, directly or indirectly through an affiliate (defined as "any company that controls, is controlled by, or is under common control with another company"), disclose that information to any person that is not affiliated with both the real estate appraiser and the third party, unless the disclosures would be lawful if made directly by the real estate appraiser.
- In cases where an entity receives information outside of one of the exceptions (and where a customer or consumer has not opted out), that entity will in essence "step into the shoes" of the real estate appraiser that made the initial disclosures. Thus, if the appraiser made the initial disclosures after representing to its consumers that it had carefully screened the entities to whom it intended to disclose the information, the receiving entity must be able to comply with those representations.

- The Final Rule does not impose a general duty on real estate appraisers to monitor third parties' use of nonpublic personal information provided by the appraisers.
- Also note that an appraiser must comply with the Final Rule's reuse and redisclosure requirements where the appraiser does not have consumers or customers, or where the appraiser discloses nonpublic personal information solely through the Final Rule's exceptions for joint marketing or for information necessary to effect an exception. In other words, where the appraiser obtains nonpublic personal information from a nonaffiliated financial institution, it may not disclose that information to anyone unless the disclosure would be lawful if made directly by the financial institution.

### III. Sample Privacy Notice Clauses:

Where an initial privacy notice is required, that notice should generally address the following questions:

- What types of nonpublic personal information do appraisers collect?
- How is the information used?
- What types of nonpublic personal information do appraisers disclose?
- To what types of companies or entities do appraisers disclose nonpublic personal information?
- What are individuals' rights to opt-out of disclosure and how can they exercise them?
- How do appraisers protect the confidentiality and security of nonpublic personal information?

The following represent sample clauses that may be used by appraisers in satisfying the privacy notice requirements of the GLB Act and Final Rule. Note, however, that each appraiser's obligations may differ depending on the type of information that they disclose, the purpose for which that information is disclosed and the entities to which the information may be disclosed.

#### A. Examples of language that may be used by a real estate appraiser in providing notice of the categories of information that the appraiser collects:

(Note: The following language is written as if it were being sent from an appraiser to a consumer.)

We collect nonpublic personal information about you from the following sources:

- Information we receive from you on applications or other forms;
- Information about your transactions with us, you affiliates, or others; and
- Information we receive from a consumer reporting agency.

#### B. Examples of language that may be used by a real estate appraiser in providing notice of the categories of information that the appraiser may disclose:

(Note: The following language is written as if it were being sent from an appraiser to a consumer.)

We may disclose the following kinds of nonpublic personal information about you:

- Information we receive from you on applications or other forms;
- Information about your transactions with us, you affiliates, or others; and
- Information we receive from a consumer reporting agency.

#### C. Examples of language that may be used by a real estate appraiser in disclosing categories of information that the appraiser may disclose and parties to whom the appraiser may disclose such information in instances where an appraiser is *not* required to provide initial notice or opt out notices to a consumer (because the appraiser only discloses nonpublic personal information pursuant to one of the exceptions noted above in Section II.B):

(Note: The following language is written as if it were being sent from an appraiser to a consumer.)

- We do not disclose any nonpublic personal information about our customers or former customers to anyone, except as permitted by law.

If an appraiser chooses to elaborate on this clause, he or she may use the following sample clauses as general guidelines:

- Except as described below, we do not share nonpublic personal information. We will not rent, sell, trade, or otherwise release or disclose any personal information about you.
- We will not disclose consumer information to any nonaffiliated third party for use in telemarketing, direct mail or other marketing purposes.
- We limit the sharing of nonpublic personal information about you with financial or non-financial companies or other entities, including companies affiliated with us, and other, non-affiliated third parties to:
  - (i) We may share information when it is necessary and required to process a transaction or to service a customer relationship. For example, [describe the type of transactions or customer relationships for which it may be necessary to share information].
  - (ii) We may share information when it is required or permitted by law. For example, information may be shared to protect you against fraud or in response to a subpoena.
  - (iii) We may disclose some or all of the information described above with:
    - (a) Companies that perform marketing services on our behalf; or
    - (b) Other financial institutions for the limited purpose of jointly offering, endorsing or sponsoring a financial product or service.

**D. Examples of language that may be used by a real estate appraiser in identifying parties to whom the appraiser may disclose nonpublic personal information where an appraiser *is* required to provide initial notice or opt out notices to a consumer.**

(Note: The following language is written as if it were being sent from an appraiser to a consumer.)

We may disclose nonpublic personal information about you to the following types of third parties:

- Financial service providers, such as [provide illustrative examples];
- Non-financial companies, such as [provide illustrative examples];
- Others, such as [provide illustrative examples].
- We may also disclose nonpublic personal information about you to nonaffiliated third parties as permitted by law.

**E. Example of language that a real estate appraiser may use in providing to a consumer notice of their right to opt out of disclosures of nonpublic personal information (where the appraiser's disclosure of nonpublic personal information does not fall within one of the exceptions discussed in Section II.B):**

(Note: The following language is written as if it were being sent from an appraiser to a consumer.)

- If you prefer that we not disclose nonpublic personal information about you to nonaffiliated third parties, you may opt out of those disclosures, that is, you may direct us not to make those disclosures (other than disclosures permitted by law). If you wish to opt out of disclosures to nonaffiliated third parties, you may [describe a reasonable means of opting out, such as “call the following toll-free number: (insert number)”].

**F. Example of language that a real estate appraiser may use in notifying a consumer that the appraiser may disclose nonpublic personal information pursuant to the Service Provider/Joint Marketing Exception discussed above in Section II.B.3:**

(Note: The following language is written as if it were being sent from an appraiser to a consumer.)

- [Provide description of information that may be disclosed pursuant to the service provider/joint marketing exception]. We may disclose all of the information we collect, as described above, to companies that perform marketing services on our behalf or to other financial institutions with whom we have joint marketing agreements.

**G. Sample Confidentiality and Security Guidelines:**

(Note: The following language is written as if it were being sent from an appraiser to a consumer.)

- We consider privacy to be fundamental to our relationship with clients. Throughout our history, we have committed to maintaining the confidentiality, integrity and security of clients' personal information. It is therefore our policy to respect the privacy of current and former clients and to protect personal information entrusted to us. Internal policies have been developed to protect this confidentiality, while allowing client needs to be served.
- In the course of providing products and services, we collect nonpublic personal information about clients. We collect this information from sources such as applications, other accounts forms, information captured on our Web sites (including any information captured through our use of "cookies") and client transactions with us, our affiliates or other parties.
- We restrict access to the information to authorized individuals who need to know this information to provide service and products to you. We maintain physical, electronic, and procedural safeguards that comply with federal standards to protect your nonpublic personal information. We do not disclose this information about you or any former consumers or customers to anyone, except as permitted by law. Employees share this information outside the company only as authorized by you or for a specific business purpose. The law permits us to share this information with our affiliates. The law also permits us to share this information with companies that perform marketing services for us, or other financial institutions that have joint marketing agreements with us.
- When we share nonpublic information referred to above, the information is made available for limited purposes and under controlled circumstances designed to protect our consumers/customer's privacy. We require third parties to comply with our standards for security and confidentiality. We do not permit use of consumer/customer information for any other purpose nor do we permit third parties to rent, sell, trade or otherwise release or disclose information to any other party. These requirements are included in written agreements between us and third party service providers.