



## THE APPRAISAL FOUNDATION WHITE PAPER: PRIVACY REGULATION AND THE APPRAISER

June 2001

### I. INTRODUCTION

The Gramm-Leach-Bliley Act (G-L-B Act, or the Act, Public Law 106-102) was signed into law on November 12, 1999. Subtitle A of Title V of the Act, captioned “Disclosure of Nonpublic Personal Information” limits the instances in which financial institutions may disseminate certain “non-public personal information” about their customers. The intent of the G-L-B Act is to protect consumers’ personal information obtained by a financial institution from being disclosed or released without notice and without the permission of the consumer. As such, the Act would fall under the broad category of consumer protection and the consumer’s right to privacy initiatives. Compliance with this new law is voluntary until July 1, 2001, after which it is mandatory. The purpose of this paper is to inform appraisers about this new law and its implementing regulations. It also discusses issues and questions that might apply to appraisers and their use and re-use of certain non-public personal information that may be obtained in the course of their appraisal practice. The Appraisal Foundation will continue to provide information on this evolving topic and its application to appraisal practice.

### II. NEW FEDERAL PRIVACY REGULATIONS, GENERALLY

#### A. Applicability

The Federal Trade Commission (FTC) has adopted regulations to implement the G-L-B Act (see Federal Trade Commission, Privacy of Consumer Financial Information; Final Rule, 16 CFR Part 313, hereinafter referred to as “FTC Privacy Rule”). **These regulations apply to appraisers as well as other providers of financial services.** The FTC Privacy Rule states that the “principal type of entity subject to the rule is a ‘financial institution,’” a term section 509 of the G-L-B Act defines very broadly to mean ‘any institution the business of which is engaging in financial activities as described in section 4 (k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1984 (k)). Those “‘financial activities’ include not only a number of traditional financial activities specified in section 4(k) itself, but also those activities that the Federal Reserve Board has found to be . . . *closely related to banking*” (emphasis added, see 16 CFR 313.1). Activities *closely related to banking* listed in 12 CFR 225.28 include “*appraising real or personal property.*” In addition, the G-L-B Act can be enforced “*against ‘other persons’ who are not financial institutions, but receive protected information from a financial institution*” (12 CFR 313.1). Accordingly, an appraiser who receives non-public personal financial information from a financial institution or directly from a consumer who is a client in the course of performing an assignment will be held responsible for compliance with the Act and its implementing regulations.

## **B. Nonpublic Personally Identifiable Information**

The G-L-B Act focuses on “nonpublic personal information.” The FTC Privacy Rule develops the term “personally identifiable financial information” to include (numbers added): (1) information that a consumer provides to a financial institution in order to obtain a financial service; (2) information resulting from any transaction between the consumer and the financial institution involving a financial product or service; and (3) financial information about a consumer a financial institution otherwise obtains in connection with providing a financial service to the consumer. As explained, “financial services” includes the appraisal of real or personal property.

The restrictions in the FTC Privacy Rule apply to “non-public” information (i.e. private information). This excludes information deemed to be “publicly available.” Using the guidelines of the American Bankers Association (ABA), for example, information deemed “publicly available” could be so determined if there was “a ‘reasonable basis’ to believe that the information is lawfully made available to the general public.” Further, the ABA definition of “reasonable basis” includes the provisions that “the information is available to the general public,” and that “an individual could direct that the information not be made available to the general public, whether or not the individual has done so.” This latter requirement would be met by the opt-out provision discussed below. Lastly, the information must be “personally identifiable” (i.e. identifiable to an individual consumer).

## **C. Privacy Notice and Opt-Out Provisions**

A key provision of the FTC Privacy Rule is the requirement to provide the consumer with a “conspicuous” and clear privacy notice that reflects the financial institution’s privacy policies and information sharing practices, as well as the “categories of information” collected and disclosed. Another key provision is that the Privacy Notice disclose the consumer’s right to “opt-out” of any future sharing of their non-public personal financial information, and that such opt-out notice be “clear and conspicuous and accurately explain the right to opt out” (see 16 CFR 313.7). Thus, these rules indicate that there can be reuse of information provided that: (1) the non-public personal information is obtained pursuant to a properly disclosed Privacy Notice that includes an opt-out provision; and (2) the consumer has not exercised his or her opt-out rights. However, in these situations the reuse of the information would be limited to the specific uses disclosed in the Privacy Notice.

## **III. ISSUES FOR APPRAISERS**

As noted, federal regulations identify “appraising real or personal property” as activities closely related to banking and as such are covered by the Act. Moreover, the appraisal community is not likely to be given any more specific regulations, or interpretations thereof, for implementing the requirements of the G-L-B Act in the context of appraisal practice other than what has already been promulgated by the FTC. The applicable sections of the *Uniform Standards of Professional*

*Appraisal Practice* (USPAP) will be updated so they will not conflict with the new federal privacy requirements. The definition of confidentiality in the 2001 version of USPAP will be revised in the 2002 USPAP to reflect the requirement for compliance with G-L-B, which is indirectly referred to as “privacy laws and regulations applicable in an assignment” (see *Exposure Draft of Proposed Changes to the 2001 Edition of USPAP*, dated May 1, 2001). Although many issues have yet to be resolved with respect to G-L-B and its application in appraisal practice, appraisers will still be held accountable for compliance with the FTC and other federal regulations as they apply to each situation and to information received from clients in the course of performing appraisal assignments. Accordingly, the appraiser must proactively inquire as to the status of the information provided by from their lender clients with respect to its privacy status pursuant to the FTC Privacy Rule, and provide the appropriate notices to clients for whom they directly provide appraisals.

## **A. Privacy and Confidentiality**

USPAP has long defined “confidential information” as “information received from a client, not available from any other source, which the client identifies as confidential when providing it to an appraiser” (2001 USPAP). Accordingly, the burden of determining confidentiality has traditionally resided with the client who must then inform the appraiser. There are no independent standards for determining confidentiality by either the appraiser or the client. Applying this to the related concept of privacy would suggest that the appraiser could rely on their financial institution clients to initially comply with the FTC Privacy Rule and the G-L-B Act and then inform the appraiser as to which, if any, information provided as part of an assignment should be considered confidential (private) and thereby not available for dissemination or re-use. In many situations, this procedure may be sufficient. However, since the G-L-B framework includes the appraiser as well as the lender, the appraiser should confirm compliance with these regulations and laws by asking their lender clients which information, if any, is deemed non-public personal information and, additionally, has not been limited due to the consumer’s exercise of his or her opt-out rights, as explained.

In situations where the consumer is the lender’s client and the appraiser uses information obtained from the lender, the principal concern is with the appraiser’s subsequent re-use or re-disclosure of this information. On the other hand, contracting directly with a consumer/client places additional responsibilities on the appraiser with respect to Privacy Rule compliance. In these situations, the appraiser would be solely responsible for determining which, if any, information was non-public personal information and could not be disclosed. This should be accomplished by the provision of a Privacy Notice, with the appropriate opt-out language, to the consumer/client. This direct relationship and privacy compliance situation could be encountered in commercial real estate appraisals when the appraiser is provided with income data that might be personally identifiable to an individual, and the appraisal is for “personal, family or household purposes.” Thus, care should be taken in handling such data and in the provision of the necessary Privacy Notice (s) and related disclosures.

## **B. What appraisal information is likely to be considered non-public personal information?**

This question appears to have two parts: (1) whether the information is *non-public* (i.e. private); and (2) whether the information is *personally identifiable*.

Determining whether the information is non-public could be approached by asking the corollary - what information could be considered *public*? Again using the ABA guidelines as an example, this would include information for which the financial institution, or appraiser, has “a ‘reasonable basis’ to believe is lawfully made available to the general public.” As noted, the ABA definition of “reasonable basis” includes provisions that “the information is available to the general public,” and that “an individual could direct that the information not be made available to the general public, whether or not the individual has done so.” All information not so determined to be public should be considered private, or at least should be investigated with the client (consumer or lender, depending on the circumstances of the assignment). For appraisal practice, publicly available information could include publicly recorded deeds and mortgage notes, dates of sale as publicly recorded, parties to a sale as publicly recorded, and sales price in jurisdictions that publicly disclose such information.

Secondly, such non-public information must be “personally identifiable,” or identifiable to an individual. For example, non-public sales price data that has been “aggregated,” and therefore not identifiable to an individual, would appear not to be “personally identifiable.” This also leaves open the possibility of “redaction” of personal identifiers from sales and income data in order to render it potentially re-usable, although the amount of redaction necessary might leave the information less useful to appraisers. In addition, for commercial property and business valuations, the disclosure of financial statements that include personally identifiable information may also be limited by the new privacy regulations. Ultimately, though, any disclosure of non-public personally identifiable information will be dependent upon the provision of an appropriate Privacy Notice and the consumer’s opt-out decision.

## **C. How Does “Opt-Out” Apply to Appraisers?**

When the lender is the appraiser’s client, the lender will be required to provide an appropriate Privacy Notice with an opt-out provision to the consumer, and should inform the appraiser as to any privacy related restrictions on information provided to the appraiser relative to the FTC Privacy Rule and the G-L-B Act, and specify any information for which the consumer has exercised their opt-out rights as well as information for which the consumer has not yet indicated their opt-out decision. Thus, in order to comply with the re-use and disclosure provisions of the FTC Privacy Rule, the appraiser should take steps necessary to ensure that information received from a lender client has been obtained in conformance with the Rule and ascertain the status of such information as public, non-public/private and if and under what conditions opt-out provisions apply, including specific re-use restrictions.

On the other hand, when the consumer directly contracts with the appraiser, the appraiser is responsible for providing a Privacy Notice with an opt-out provision. The notice should

clearly specify which re-uses of the non-public personal information are contemplated. In this situation, the appraiser should develop forms containing a Privacy Notice with an opt-out provision per the FTC Privacy Rule, and provide it to his or her client.

#### **IV. THE FUTURE OF PRIVACY AND CONFIDENTIALITY**

Implementation of the FTC Privacy Rule and G-L-B Act by federal agencies and federal financial institutions will continue to offer challenges and complications for appraisers and other financial service providers. Further, additional privacy laws and regulations may be in the offing. This issue appears here to stay. As the financial institutions and regulators begin to deal with these new requirements on a daily basis, many new or revised procedures will be developed and refined. As this occurs, appraisers are advised to be aware of both the general requirements that are being implemented and the ways their clients are complying with the FTC Privacy Rule and G-L-B Act. The appraiser should ask their lender clients as to what information provided in the context of an appraisal assignment is protected by the FTC Privacy Rule and G-L-B Act and of that information, what has been released or waived pursuant to the provisions of the Rule and Act. Likewise, when an appraiser contracts directly with a consumer, the appraiser should take steps to ensure that the consumers' non-public personal information is protected and that the consumer is provided with the necessary notices and disclosures. The Appraisal Foundation will continue to provide information on this topic.