

**TAYLOR, PORTER,
BROOKS & PHILLIPS**
L.L.P.

MEMORANDUM

DATE: April 23, 2004
TO: Lisa LeBoeuf
FROM: H. Evans Scobee
RE: Applicability of Gramm-Leach-Bliley to LSU

Introduction

Pursuant to our discussions of last week I am expanding on the opinion letter furnished to LSU by Michael Dufilho on April 13, 2004.

For the reasons that follow, we believe that LSU is subject to the Gramm-Leach-Bliley Act ("GLBA") [15 U.S.C.A. §§ 6802 *et seq.*; 16 C.F.R. Part 313 (Privacy) and 16 C.F.R. Part 314 (Safeguards)] since we conclude that LSU is a "financial institution" within the meaning of the GLBA, and is not subject to any blanket exemption. However, with respect to student financial records only, LSU will be deemed to be in compliance with the privacy provisions of the GLBA to the extent LSU in compliance with the provisions of the Family Educational Rights and Privacy Act ("FERPA") [20 U.S.C. § 1232g; 34 CFR Part 99] .

The GLBA also has certain provisions known as "Safeguards," similar to the Security Rules under HIPAA, designed to protect the security and integrity of financial information. With respect to the Safeguards provisions, LSU must comply with these provisions with respect to all financial records, student and non-student.

Background of the Gramm-Leach-Bliley Act

The GLBA, like HIPAA, was not intended primarily as privacy or security legislation. The original intention was to remove certain restrictions placed on financial, brokerage and insurance institutions.. These restrictions were placed on the financial, brokerage and insurance institutions by the Glass-Steagall Act of 1933 and the Bank Holding Company Act of 1956, as amended in 1982. These provisions restricted banks, brokerages and insurance companies from entering each other's lines of business, and greatly restricted the ability of these institutions to merge and combine. The GLBA removed many of these restrictions in an effort to "modernize" the financial services industry, but the original Senate bill contained none of the privacy protections contained in the final act. Because of concerns regarding the potential misuse of consumer financial information across these traditionally separate industries and institutions, the privacy and security provisions were added to the "modernization" provisions of GLBA in the House, and were enacted into law in the final legislation. Like HIPAA, the scope of the GLBA's privacy protections is quite broad, bringing within its purview many institutions not traditionally considered to be "financial institutions."

Scope of the GLBA

The GLBA applies to "the treatment of nonpublic personal information about consumers by the financial institutions listed in paragraph (b) of this section" (16 C.F.R. § 313.1 (a)).

16 C.F.R. § 313.1 (b) defines a “financial institution” as follows:

An entity is a “financial institution” if its business is engaging in a financial activity as described in Section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(k), which incorporates by reference activities enumerated by the Federal Reserve Board in 12 CFR 211.5(d) and 12 CFR 225.28.

The same section of the GLBA regulations contains the “exemption” for institutions of higher learning:

Any institution of higher education that complies with the Federal Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. 1232g, and its implementing regulations, 34 CFR part 99, and that is also a financial institution subject to the requirements of this part, shall be deemed to be in compliance with this part if it is in compliance with FERPA.

It should be noted that this provision does not “exempt” institutions of higher education from GLBA, but rather merely allows FERPA compliance to be “deemed” compliant with GLBA. Also, the exemption only applies to “this part,” meaning 16 C.F.R. Part 313, containing the Privacy protections. The Safeguards provisions (similar to the HIPAA Security regulations) are in 16 C.F.R. Part 314 and this “exemption” does not apply to those requirements. As a consequence, to the extent GLBA applies to LSU, as we believe it does, the Safeguards rules will have to be followed with respect to all financial information, student and non-student.

A subsequent section of the implementing regulations further refines the definition of “financial institution”:

Financial institution means 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. 1843(k)). An institution that is significantly engaged in financial activities is a financial institution.

16 C.F.R. § 313.3(k)(1); emphasis supplied

The “financial activities” enumerated in 12 U.S.C. 1843(k) include:

- lending, exchanging, transferring, investing for others, or safeguarding money or securities
- insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death
- Engaging in an activity that the Federal Reserve Board has determined to be closely related to banking. [12 U.S.C.A. §1843(k)(4); 12 C.F.R. § 225.28]. For example:
 - Extending credit and servicing loans
 - Collection agency services
 - Real estate and personal property appraising
 - Check guaranty services
 - Credit bureau services
 - Real estate settlement services
 - Leasing real or personal property (on a nonoperating basis for an initial lease term of at least 90 days)

If LSU is “significantly engaged” in any of these activities, then, under the applicable provisions of GLBA and its implementing regulations, LSU is a financial institution, and is subject to the

requirements of the Privacy rules and the Safeguards rules promulgated on the authority of the GLBA.

Colleges and Universities as “financial institutions” under GLBA

The first inquiry, then, is whether LSU is “significantly engaged” in activities that would bring it within the above quoted definition of a “financial institution.” From the standpoint of the Federal Trade Commission (“FTC”), the answer to that inquiry is “yes.”

The FTC’s Position

Before publication of the final GLBA privacy rule in May of 2000, a number of commenters to the proposed rule urged the FTC to specifically exempt institutions of higher education from GLBA because they are not “financial institutions,” and because the privacy concerns addressed by GLBA are already addressed by the provisions of FERPA applicable to institutions of higher education. The FTC responded to these comments in the preamble to the final rule.

The FTC agreed that FERPA offered sufficient privacy protections with respect to students’ records, but flatly rejected the suggestion that colleges and universities are not “financial institutions”:

The Commission also received several comments from colleges and universities and their representatives requesting that institutions of higher education be excluded from the definition of financial institution. The Commission disagrees with those

commenters who suggested that colleges and universities are not financial institutions. Many, if not all, such institutions appear to be significantly engaged in lending funds to consumers. However, such entities are subject to the stringent privacy provisions in the Federal Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. 1232g, and its implementing regulations, 34 CFR part 99, which govern the privacy of educational records, including student financial aid records. The Commission has noted in its final rule, therefore, that institutions of higher education that are complying with FERPA to protect the privacy of their student financial aid records will be deemed to be in compliance with the Commission's rule.

65 Fed. Reg. 33646 at 33648; emphasis supplied

Analysis of the FTC's Position

The FTC's position is based upon the premise that almost all institutions of higher education are involved, in some manner, in making or servicing loans to students or their parents to cover the costs of higher education. Under the provisions of 12 U.S.C.A. § 1843(k)(4)(A), lending money is an activity that is "financial in nature," and under 16 C.F.R. § 313.1 (b) and 16 C.F.R. § 313.3(k)(1), if LSU is "significantly engaged" in making such student loans, LSU would meet the statutory and regulatory definition of a "financial institution" under GLBA.

Under the GLBA's implementing regulations [16 C.F.R. §313.3], the following businesses are also deemed to be "significantly engaged in financial activities":

- A retailer that extends credit by issuing its own credit card directly to consumers

- A career counselor that specializes in providing career counseling services to individuals who are seeking employment with a financial organization
- A business that prints and sells checks for consumers, either as its sole business or as one of its product lines
- A business that regularly wires money to and from consumers
- A check cashing business

As you can see, the regulations include within the definition of “financial institution” many businesses and activities that one would not ordinarily associate with the financial services industry.

The final rule does not define “significantly engaged,” despite several comments to the proposed rule that the lack of a more precise definition left businesses uncertain whether GLBA would govern their activities. The FTC provides some guidance in the rules in the forms of “examples” of conduct that does or does not meet the “significantly engaged” test, some of which are contained in the bulleted list above. As you can see, the examples are not particularly useful when analyzing a university’s conduct., but I have included those examples that might have applicability to LSU.

One exception, however, relates to the issuance of a credit card by a retailer, which renders the retailer “significantly engaged” in financial activity, versus a retailer which merely accepts cards issued by others, which does not. I am given to understand that LSU issues a “Tiger Card,” but for what purpose, I do not know. If the card is proprietary to LSU and has a

credit, debit or other financial or monetary function, it is likely this alone would be sufficient for LSU to be deemed a “financial institution.”

Our understanding of the situation is that LSU is involved in the business of extending financial aid to students and their families on a regular basis, and is, therefore lending or extending credit on a regular basis. This activity, without more, would bring LSU within the definition of a “financial institution,” and subject the university to the requirements of GLBA. If LSU engages in any of the other activities enumerated in the regulations as substantial engagement in financial activities, it will be subject to GLBA without regard to the provision of financial aid to students and their families.

Therefore, unless some judicial modification of the FTC’s position is available, LSU, like virtually every other institution of higher education, will be subject to GLBA.

Judicial Challenges to FTC Positions under GLBA

No reported case deals with a challenge to the FTC’s determination that “most, if not all” colleges and universities are “financial institutions” under GLBA. One case deals with a challenge to the FTC’s informal ruling that certain attorneys were “financial institutions” under GLBA. While the court in that case allowed the challenge to go forward, in the course of the discussion of the applicability of GLBA to lawyers, it reviewed the process by which the FTC included, and then partially “exempted” colleges and universities from the GLBA.

In *New York State Bar Ass'n v. F.T.C.*, 276 F.Supp.2d 110 (D.D.C., 2003), the District Court for the District of Columbia considered a challenge by the New York State Bar Association and the American Bar Association to a letter ruling by the FTC stating that attorneys engaged in certain tax planning and advising activities were “financial institutions” under GLBA, and declining to grant attorneys a *de minimus* exemption despite the fact that confidentiality of clients’ information was already regulated by Bar Association rules. In holding that the FTC had not properly considered the NYSBA and ABA’s position in the matter, the court contrasted the unreasoned action of the FTC with respect to the NYSBA’s and ABA’s requests with the reasoned decision to grant an “exemption” to GLBA-governed universities that comply with FERPA. Although the propriety of the FTC’s actions with respect to universities was not before the court, the deferential language with which the court discusses the manner in which the FTC dealt with institutions of higher learning leaves little doubt that, at least in that court, a *Chevron*¹ challenge to the FTC’s action with respect to universities would be unlikely to succeed.

In light of the deference afforded to agencies’ rulemaking authority, especially when done after public notice and an opportunity to comment, we do not believe a challenge to the

¹ A *Chevron* challenge is an attack on an agency’s rulemaking, based upon the factors set out by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The test is two-fold. First, a court considers whether Congress spoke directly to the question at issue: if so, “that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43, 104 S.Ct. 2778. If, however, the statute is unclear, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843, 104 S.Ct. 2778. In answering that question, “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.” *Id.* at 844, 104 S.Ct. 2778.

FTC's position with respect to applicability of GLBA to colleges and universities would be successful.

Conclusion

The preamble to the final privacy rule makes it abundantly clear that the FTC intends that virtually every university that makes, sponsors or services student loans or other financial aid to students or their families will be subject to the GLBA. This position was taken by the agency after consideration of numerous public comments suggesting that colleges and universities should be specifically exempt from GLBA. In light of the requirements of FERPA with respect to students' educational records, including financial records, FERPA compliance will be "deemed" to be GLBA compliance. Additionally, a number of examples of activities in which LSU may be engaged have been specifically ruled by the commission to render the university "substantially engaged in financial activities," and therefore subject to GLBA, irrespective of any participation in financial aid to students or their families. None of the exceptions in the statute or the rules are applicable to LSU. For the reasons stated above, we do not believe that the agency's rulemaking could be challenged successfully.

As a consequence of this, it is our opinion that LSU is subject to the provisions of GLBA and its implementing Privacy and Safeguards regulations, with the sole exception that LSU's compliance with FERPA will be "deemed" to comply with the GLBA's privacy requirements. This exception, however, would only apply to records that are subject to FERPA. All records and information, whether or not subject to FERPA, would have to comply with the Safeguards rule.

Our opinion is based in large measure upon our understanding that LSU is, in fact, involved in the provision of financial aid to its students and their families, or in the servicing or administration of financial aid provided by State and Federal programs. If our understanding is incorrect, then whether LSU is subject to GLBA will depend on whether it is engaged in the other activities enumerated in the regulation which would render LSU “significantly engaged in financial activities.”

If you have any questions or comments, please do not hesitate to contact me..