

## PRIVACY RULE

**Gramm Leach Bliley ("GLB")**  
**Financial Privacy Regulations**  
**FINANCIAL PRIVACY**  
**REGULATIONS**  
**Effective Date: July 1, 2001**

*This information provided by Stewart & Irwin P.C.*

Once again Congress has added another stack of documents and regulations to your seemingly endless paper chase. The Gramm Leach Bliley Act ("GLB") requires you to maintain the privacy of consumer and customer financial information, notify the consumer/customer of their rights to have their information kept private and give the consumer/customer the right to restrict your ability to transfer information to third-parties. The regulations take effect on July 1, 2001. You must implement privacy procedures before that date.

The financial privacy regulations apply only to non-public personal information about individuals who obtain financial products or services primarily for personal, family or household purposes from a financial institution. Given the nature of your business it is likely that the Federal Trade Commission will find that motor vehicle dealers fall within the definition for "financial institutions" set forth in the statute and regulations. Thus, your dealership will have to comply with the regulations. This memo is submitted in an effort to provide you with an outline of the requirements of the statute and its regulations.

### **Requirements Of The GLIB Regulations:**

The GLIB regulations set forth three basic requirements:

- The provision of an initial privacy notice to consumers.
- The provision of an annual privacy notice to customers.
- The provision of an opt out notice to consumers and customers when non-public personal information is transferred to a non-affiliate.

Each of these requirements is addressed below:

a. **Initial Privacy Notice**

A financial institution must provide a clear and conspicuous notice that accurately reflects the institution's privacy policies and practices to both customers and consumers:

**i. Timing Of Notice**

1. Consumer "means an individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family or household purposes or that individual's legal representative" - Before you disclose any non-public personal information about the consumer to any non-affiliated third-party, if you make any such disclosure other than as authorized by the regulations.

NOTE: You do not have to provide an initial notice to a consumer if: (1) you do not disclose any non-public personal information about the consumer to any non-affiliated third-party, other than as authorized by the regulatory exemptions listed in section E, and (2) you do not have a customer relationship with the consumer. Remember, a customer relationship is established when you and the consumer enter into a continuing relationship. (i.e., you enter into a contract for a loan or lease). However, if you transfer the servicing rights to the loan or lease to another institution (i.e., bank, finance company or leasing company), the customer relationship transfers with that transfer of rights.

2. Customer - "means a consumer who has a "customer relationship (a continuing relationship between a consumer and you under which you provide one or more financial products or services to the customer) with you" - not later than when you establish a customer relationship. (i.e., when the financing agreement or lease is executed).

**ii. Delivery**

You must provide the initial privacy notice so that each consumer/ customer can reasonably be expected to receive actual notice in writing or if the consumer/customer agrees, electronically. Examples of proper delivery:

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1. Hand delivery of a printed copy to the consumer/customer;
2. Mailing of a printed copy to the last known address of the consumer/customer; or
3. For the consumer/customer who conducts transactions electronically, by clearly and conspicuously posting the notice on the electronic site and requiring the consumer/customer to acknowledge receipt of the notice in order to obtain the financial product or service.

You may not simply post a sign in your office or publish the notice in an advertisement. You also may not send the notice by electronic mail if the customer did not obtain service from you electronically.

### iii. **Form of Notice**

An example of an initial privacy notice is attached hereto as Exhibit "A".

### b. **Annual Privacy Notice to Customers**

An annual privacy notice must be sent to customers during the continuation of the customer relationship. You need not provide an annual notice to a former customer or to consumers that do not become customers. Thus, when a customer makes a pay off of a loan, or you sell the loan without retaining servicing rights, you no longer are required to provide an annual privacy notice. However, if you maintain a buy-here-pay-here lot, you will be required to submit an annual privacy notice to those customers with whom you have a continuing relationship.

#### i. **Timing of Disclosure**

For purposes of the privacy notice, "annually" means at least once in any period of twelve (12) consecutive months that the relationship exists. The twelve (12) consecutive month period must be applied on a consistent basis. For example: A calendar year may define the period, thus, if a customer opens an account in year one and received the initial notice, you must provide an annual notice to that customer on or before December 31 of year two.

#### ii. **Delivery**

As with the initial privacy notice you must

deliver the annual notice to your customers in a way that will reasonably result in receipt of the notice. See section A(2).

#### iii. **Form of Notice**

As with the initial privacy notice, the annual notice must contain disclosures of the same basic information. Attached as Exhibit "B" is a copy of an annual privacy notice.

NOTE: This notice should be modified to fit your specific dealership practices. If you do not disclose customer/consumer information to any non-exempt, non-affiliated third parties you should so state in the notice.

### c. **Opt Out Notice**

If you disclose non-public personal information to a non-exempt, non-affiliated third-party (an affiliate "means any company that controls is controlled by or is under common control with another company), you must provide an opt out notice to the consumer/customer that allows the consumer/customer to opt out of that disclosure and must give the consumer/customer a reasonable opportunity to exercise the opt out right. "Opt Out" means a direction by the consumer that you not disclose non-public personal information to a non-exempt, non-affiliated third-party. You should give the consumer at least thirty (30) days to opt out. However, the customer/consumer may make his/her decision at any time. They could even elect to waive the opt out right and consent to disclosure at the same time as the transaction.

#### i. **Timing of Opt Out Notice**

The opt out notice should be provided at the same time as the privacy notice.

#### ii. **Delivery**

As with the initial and annual privacy notices you must deliver the opt out notice to your consumer/customer in a way that will reasonably result in receipt (e.g., hand delivery, mail e-mail etc) See section A (2) above.

#### iii. **Form of Opt Out Notice**

The Opt Out Notice must state:

1. That you disclose or reserve the right to disclose non-public personal information to a non-exempt, non-affiliated third-party.

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2. That the consumer has the right to opt out of that disclosure.
3. Must provide a reasonable means by which the consumer may exercise the opt out right.

The notice should include identification of all categories of non-public personal information that you disclose or reserve the right to disclose and all the categories of non-affiliated third-parties to which you disclose the information. Exhibits "A" and "B" contain all of the required information. However, if your dealership does not have a toll free phone number that can be called to opt out, then you must provide an alternative method to the customer. Attached hereto as Exhibit "C" is an example of an opt out notice that could be used in lieu of the toll free phone number.

You also may provide the opt out notice within the same form as the initial and annual privacy notice. Thus, you can include Exhibit "C" as part of Exhibits "A" and/or "B".

NOTE: Although you are allowed to disclose non-public personal information if the consumer does not exercise the opt out right within a reasonable time (i.e. thirty (30) days), the consumer may elect to opt out at any time thereafter. If the consumer does not elect to opt out until several months after the provision of the notice, your disclosure in the interim period after thirty (30) days and before the exercise of the right does not violate the statute. However, disclosure after the consumer has opted out does violate the act.

### d. Simplified Or Short Form Notices

#### i. Simplified Notice

If your dealership does not disclose customer information to third-parties, except those that are categorized as exempt, an opt out notice is not required and you can use a simplified notice. Attached as Exhibit "D" is an example of a Simplified Notice.

#### ii. Short Form Notice

If your dealership is involved with a consumer who has not been a customer, you

can give a short form notice combined with any required opt-out notice. However, it must state that the full privacy notice is available upon your request and must identify how the consumer can obtain a copy. We do not recommend use of a short form notice.

### e. Exemptions to Notice and Opt Out Provisions

The regulations set forth exemptions to the notice and opt-out rules. There are three(3) that may apply to your dealership. They are set forth below:

- i. Service Providers Exemption - You do not have to provide an opt out notice when you provided non-public personal information to a service provider, i.e. a non-affiliated third-party, who performs services for you or on your behalf. However, you must provide the initial privacy notice and have a contract with the service provider prohibiting the service provider from disclosing or using your information other than to carry out the purposes for which you disclose the information. Examples of the service provider exemption include: Your disclosure of information to a non-affiliated third-party with which you perform joint marketing, so long as your contractual joint marketing agreement prohibits the non-affiliated third-party from disclosing or using the non-public personal information except as necessary to carry out the joint marketing of a financial product or service. An example of this would be an agreement between the dealership and a bank or credit company such as GMAC or FMCC to market to your consumers/customers. Attached as Exhibit "E" is an example of an addendum that could be added to your service provider contracts.
- ii. Processing and Servicing Exemption - You may disclose non-public financial information if the consumer has requested or authorized a transaction in connection with the financial product or service. An example of this exemption would be your disclosure of information to a bank when the consumer has submitted a credit application to you. Under such circumstances you are not required to provide the initial notice and/or opt out notice. Other examples include disclosures that are required or that are usual and appropriate to carry out the transaction or the product or service of which the transaction is apart. Thus,

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providing information to the manufacturer in order to obtain warranty coverage and/or to obtain a rebate would fall within this exemption.

- iii. **Consumer/Customer Consent Exemption-** You are not required to provide the opt out notice if the consumer/customer has consented to the disclosure of non-public personal information and has not revoked that consent. You are also not required to provide the initial privacy notice to a consumer if the consumer has consented, and has not revoked consent. A customer, however, must be provided with an initial privacy notice, and consent by a customer cannot remove that requirement. Attached hereto as Exhibit "F" is an example of a consent to the disclosure of non-public personal information that you could obtain from the consumer/customer which would obviate the need for the initial privacy and opt out notices.

### **f. Financial Privacy Policies And Procedures.**

In addition to notices, GLIB also requires you to adapt and implement privacy policies and procedures designed to prohibit dissemination of and access to a consumer/customer's financial information. At present, the FTC has not yet adopted regulations concerning this section of the statute. However, the statute provides that all financial institutes have an affirmative duty to respect and protect the privacy of its consumers/customers' non-public personal information. The statute also provides that administrative, technical and physical safeguards must be adopted to (1) insure the security and confidentiality of consumer/customer records and information; (2) to protect against any anticipated threats or hazards to the security or integrity of such records; and (3) to protect against any unauthorized access to or use of such information. Thus, you need to assess the ways in which your consumer/customer information is maintained and determine what risks of disclosure are present. Then, you should adopt security measures designed to protect the information from disclosure. Finally, you should draft a privacy policy for your dealership and make sure your employees adhere to the policy. Attached as Exhibit "G" is an example of such a policy.

### **2. CONCLUSION**

As with many federal statutes and regulations, the

underlying reason for the law is laudatory, i.e. the limitation of access to, and the dissemination of an individual's personal financial information. Given the recent increase in identity theft and the use by criminals of non-public personal information to illegally obtain credit, one can understand why privacy and confidentiality is needed. However, the statute and regulations do not provide clear guidance to the small business operator on how to comply with the law. Instead, the law provides convoluted definitions and exemptions that require the small business owner to seek clarification and professional assistance. We hope that this bulletin helps you comply with the law. If you have any additional questions, do not hesitate to contact Bill Ivers, Donn Wray, or Dave Rubin at (317) 639-5454, or fax any questions to (317) 632-1319.

***NOTE: Stewart & Irwin PC dissolved its practice effective June 1, 2013. Mr. Ivers can be reached at Harrison & Moberly, LLP - (317) 639-4511 and Mr. Wray can be reached at Katz & Korin, PC - (317) 464-1100. You may also contact ADAI's retained counsel, Ron Smith at Bose McKinney & Evans LLP at (317) 684-5179.***

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## **INDEX OF EXHIBITS**

### **1. EXHIBIT "A"**

["PRIVACY NOTICE" is to be used regardless of whether any or all disclosures of consumer and customer information falls within an exempt category. The italicized information in brackets is to help you customize the notice to your dealership. Do not include the italicized language in your actual notice.]

### **2. EXHIBIT "B"**

["ANNUAL PRIVACY NOTICE" is to be used regardless of whether any or all disclosures of consumer and customer information falls within an exempt category. The italicized information in brackets is to help you customize the notice to your dealership. Do not include the italicized language in your actual notice.]

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### 3. EXHIBIT "C"

["Notice of Opt Out Right" is to be used if you make any disclosures that are not covered by exceptions in the regs (i.e. marketing service providers, transaction requested by a consumer, or legal requirements, consumer consent, etc.). You should use this if you do not have a toll free phone number.(see Exhibits "A" and "B") It also should be used if you wish to reserve the right to make any disclosures outside of these exceptions in the future. The italicized information in brackets is instructional information to help you customize the notice to your dealership. Do not include in your actual notice.]

### 4. EXHIBIT "D"

["SIMPLIFIED PRIVACY NOTICE" is to be used ONLY IF all disclosures of consumer and customer information falls within an exempt category. The italicized information in brackets is to help you customize the notice to your dealership. Do not include the italicized language in your actual notice.]

### 5. EXHIBIT "E"

["Service Provider Addendum" may be used to comply with this exemption from the regs. The italicized information in brackets is instructional information to help you customize the notice to your dealership. Do not include in your actual addendum.]

### 6. EXHIBIT "F"

["Consent to Disclosure of Information" may be used if you want make any disclosures that are not covered by exceptions in the regs (i.e. marketing service providers, transaction requested by a consumer, or legal requirements, consumer consent, etc.) And you do not want to wait on the consumer to make an opt out decision. This form cannot be made mandatory. The customer/consumer must be given the option of not signing. The italicized information in brackets is instructional information to help you customize the notice to your dealership. Do not include in your actual notice.]

### 7. EXHIBIT "G"

["Dealer Financial Privacy Policy" may be used

by you to comply with the safeguarding and confidentiality requirements of the statute. This will probably need to be modified after the FTC issues regulations for this section.]

**NOTE: All privacy notices ("Exhibits") may now be found in the ADAI Forms Package distributed by Mr. Donn Wray at Katz & Korin PC. Donn's phone number and email are (317) 464-1100 and [dwray@katzkorin.com](mailto:dwray@katzkorin.com) .**

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