

NAIC MODEL PRIVACY OF CONSUMER FINANCIAL AND HEALTH INFORMATION REGULATION

Phillip E. Allen, Esq.
(502) 254-1213

To assist state insurance departments to comply with Title V of the Gramm-Leach-Bliley Act, the NAIC adopted the Model Privacy of Consumer Financial and Health Information Regulation (the “Regulation”).

This article summarizes selected portions of the Model Regulation as it pertains to the privacy of consumer financial information. The section numbers referred to herein refer to section numbers of the Regulation.

Purpose and Scope

The Regulation applies to nonpublic personal financial information about individuals who obtain insurance products or services or who are claimants or beneficiaries of insurance products or services obtained from licensees primarily for personal, family or household use.

The Regulation does not apply to nonpublic financial information about companies or about individuals who obtain insurance products or services from a licensee for business, commercial or agricultural purposes.

Licensee includes every individual, company or other business entity that is subject to regulation under the applicable insurance laws. Licensee includes all insurers, both domestic and foreign, holding a certificate of authority, all licensed producers and all other persons, companies or business entities licensed or required to be licensed, or authorized or required to be authorized, or registered or required to be registered pursuant to such laws.

The Regulation (i) prohibits licensees from disclosing nonpublic personal financial information about consumers and customers to unaffiliated third parties without the prior consent of the consumer or customer, except as otherwise expressly permitted by the Regulation, and (ii) requires licensees to provide notices of the licensee’s privacy policies and procedures to consumers and customers. The Regulation does not prohibit a licensee from disclosing nonpublic personal financial information to the licensee’s affiliates provided the affiliates do not disclose it to unaffiliated third parties except as permitted by the Regulation.

Definitions

Section 4 contains 23 definitions, all of which are necessary to a full understanding of the Regulation. Four of the definitions: “nonaffiliated third party,” “nonpublic personal financial information,” “consumer,” and “customer,” are essential to this summary because the Regulation protects against the disclosure of nonpublic personal financial information about consumers and customers to nonaffiliated third parties.

Nonaffiliated Third Party. Affiliate means any company that controls, is controlled by or is under common control with another company. Control means (i) ownership, control or power to vote 25% or more of the outstanding shares of any class of a voting security, directly or indirectly, or acting through one or more other persons, (ii) control in any manner over the election of a majority of the directors, trustees or general partners, or individuals exercising similar functions, or (iii) the power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the Commissioner determines.

A nonaffiliated third party means:

- Any person except an affiliate, or
- Any person employed jointly by the licensee and a nonaffiliated third party, or
- Any company that is an affiliate solely by virtue of the direct or indirect ownership or control of the company by the licensee or its affiliate in conducting merchant banking or investment banking activities of the type described in

Section 4(k)(4)(H) or insurance company investment activities of the type described Section 4(k)(4)(I) of the Federal Bank Holding Company Act.

Nonpublic Personal Financial Information. Nonpublic personal financial information includes personally identifiable financial information (including 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, including the consumer's name, address and account numbers).

Personally identifiable financial information includes, without limitation, (i) any information a consumer provides to a licensee to obtain an insurance product or service (i.e. information provided on an application for an insurance product or service), (ii) information about a consumer resulting from a transaction involving an insurance product or service, (iii) any information a licensee otherwise obtains about a consumer in connection with providing an insurance product or service, (iv) the consumer's account balance and payment history, and (v) the fact that the individual is or has been a customer of the licensee or had obtained an insurance product or service from the licensee.

Consumers. A consumer is an individual who has not established a continuing relationship with the licensee. Consumer includes, among others, an applicant for an insurance policy or an annuity contract prior to the inception of coverage, an insured or an annuitant under an insurance policy that has been underwritten by the licensee, and a beneficiary or a claimant under an insurance policy that has been underwritten by the licensee.

However, individuals are not consumers solely because (i) they are consumers of another financial institution and the licensee is acting as agent for or provides processing or other services to that financial institution, or (ii) are beneficiaries of a trust for which the licensee is trustee.

Also, individuals are not consumers because they are participants in an employee benefit plan, workers' compensation plan, or covered by a group or blanket insurance policy administered, sponsored, or underwritten by the licensee if (i) the licensee does not disclose any nonpublic personal financial information about such individuals, and (ii) the licensee provides the notices required by the Regulation to the plan sponsor or group or blanket policyholder.

Customers. A customer is a consumer that has established a continuing relationship with the licensee, which is referred to as a customer relationship. Except as noted below, a consumer has a continuing relationship (customer relationship) with the licensee only if the consumer is a current holder of an insurance product issued by or through the licensee, or if the consumer has obtained financial, investment or economic advisory services relating to an insurance product or service from the licensee for a fee.

A consumer does not have a continuing relationship (customer relationship) with the licensee if:

- The consumer applies for insurance but does not purchase the insurance;
- The individual is no longer a current policyholder or no longer obtains insurance services with or through the licensee;
- The consumer is a beneficiary or claimant under an insurance policy and has submitted a claim choosing either a lump sum or a settlement option involving an ongoing relationship with the licensee;
- The individual is an insured or an annuitant under an insurance policy or annuity contract but is not the policyholder or owner of the insurance policy or annuity contract;
- The customer's policy has lapsed, expired, or is otherwise inactive or dormant under the licensee's business practices, and the licensee has not communicated with the customer about the relationship for a period of twelve (12) consecutive months, other than annual privacy notices, material required by law or administrative regulation, communication at the direction of a state or federal authority, or promotional materials.

Consumer-Customers. The only individuals who are deemed to be customers under the Regulation are consumers who have paid a fee to a licensee for financial, investment or economic advisory services relating to an insurance product or service, or who are current policy or contract holders of the licensee.

An individual is a consumer until he establishes a continuing consumer relationship (customer relationship) with the licensee, at which time the consumer becomes a customer of the licensee. When a consumer becomes a customer, he does not cease to be a consumer. He is both a consumer and a customer. All customers are consumers, but all consumers are not customers.

An individual who requests a licensee to give him financial, investment or economic advice relating to an insurance product or service is a consumer until the licensee agrees to provide the advice for a fee, at which time the individual also would become a customer. An individual who applies for an insurance policy is a consumer until the policy is issued, at which time he also would become a customer.

If a customer-policyholder's policy is inactive or dormant under the licensee's business practices and the licensee has had only specified limited communications with the policyholder for a period of twelve (12) consecutive months, the policy or contract holder ceases to be a customer but continues to be a consumer.

If a customer-policyholder's last known address according to the licensee's records is deemed invalid, the policyholder no longer has a continuing relationship with the licensee and ceases to be a customer, but continues to be a consumer. An address of record is deemed invalid if mail sent to that address by the licensee has been returned by the postal authorities as undeliverable and if subsequent attempts by the licensee to obtain a current valid address for the individual have been unsuccessful.

Individuals such as insureds, annuitants, beneficiaries, and claimants are consumers, but they are not customers unless they also are policy or contract holders or unless they also have paid fees to a licensee for financial, investment or economic advice relating to an insurance product.

Notices

Sections 5, 6, 8, 9 and 26 require licensees to provide notices to consumers and customers.

Initial Notices to Consumers Who Are Customers. Section 26 requires licensees to mail initial notices of their privacy policies and procedures to the licensee's consumers who are existing customers not later than July 1, 2001; and Section 5 requires licensees to provide initial notices of their privacy policies and procedures to each individual who thereafter becomes a customer of the licensee not later than when the customer relationship is established.

Initial Notices to Consumers Who Are Not Customers. Section 5 also requires licensees to provide initial notices of their privacy policies and procedures to the licensee's consumers who are not also customers before the licensee discloses nonpublic personal financial information about the consumer to nonaffiliated third parties. However, a licensee is not required to provide initial notices of their privacy policies and procedures to consumers who are not customers if (i) the licensee does not disclose any nonpublic personal financial information about the consumer to any nonaffiliated third party, other than as authorized by Sections 14, 15 and 16 of the Regulation, or a notice has been provided by an affiliated licensee as long as the notice identifies all licensees to whom the notice applies.

Annual Notices to Consumers Who Are Customers. Section 6 requires licensees to provide a notice of their privacy policies and procedures to each consumer who also is a customer at least once in any period of twelve (12) consecutive months during which the consumer continues to be a customer.

Revised Notices to Consumers and Customers. Section 9 requires that if a licensee has provided an initial notice to a consumer and/or customer under Section 5 which does not disclose the licensee's intention to disclose nonpublic personal financial information about the consumer and/or customer to a nonaffiliated third party, and if the licensee subsequently decides to change that policy and disclose nonpublic personal financial information about the consumer and/or customer to an unaffiliated third party, the licensee must first provide a revised notice to the consumer and/or customer describing its revised privacy policy and procedures and must give the consumer and/or

customer an opportunity to opt out of such disclosure in accordance with the requirements of Section 8 of the Regulation.

Opt Out Notices to Consumers and Customers. Section 8 provides that before a licensee can disclose any nonpublic personal financial information about a consumer and/or customer, the licensee must provide the consumer and/or customer with an opt-out notice which (i) states that the licensee will disclose or reserves the right to disclose nonpublic personal financial information to a nonaffiliated third party, identifying the categories of information and the categories of the nonaffiliated third parties involved, and (ii) provide the consumer and/or customer a reasonable means by which he can opt out of such disclosure. A consumer that elects to opt out prohibits the licensee from disclosing nonpublic personal financial information about him. A consumer that does not elect to opt out consents to the licensee disclosing nonpublic financial information about the consumer.

Content of Notices. Privacy notices must clearly and conspicuously describe the privacy policies and procedures of the licensee. Section 7 lists the information that must be disclosed in the initial, annual and revised privacy notices. Such information includes, without limitation: (i) the categories of nonpublic personal financial information that the licensee collects, (ii) the categories of nonpublic financial information that the licensee discloses, (iii) the categories of affiliates and nonaffiliated third parties to whom the licensee discloses nonpublic personal financial information about both current and former customers, and (iv) the categories of nonpublic personal financial information the licensee discloses to nonaffiliated third parties under service and joint marketing agreements permitted under Section 14 of the Regulation.

Subsection C.(5) of Section 7 provides for a simplified notice if the licensee does not disclose and does not wish to reserve the right to disclose nonpublic personal financial information about customers or former customers to affiliates or nonaffiliated third parties except as authorized under Sections 15 and 16.

Delivery of Notices. Section 10 provides that a licensee shall provide the notices required by the Regulation so that each consumer can reasonably be expected to receive actual notice in writing, or, if the consumer agrees, electronically. A licensee can reasonably expect that a consumer will receive actual notice if the licensee hand delivers the notice to the consumer or mails the notice to the consumers last known address, either separately or with a policy, billing or other written communication.

Prohibited Disclosures

Disclosures Prohibited Without Consumer's Consent. Section 11 prohibits a licensee or the licensee's affiliates from disclosing any nonpublic personal financial information about a consumer and/or customer except as permitted by Sections 15 and 16, unless the licensee has provided an initial notice to the consumer and/or customer under Section 5, has provided the consumer and/or customer with the revised notice required by Section 9, has given the consumer an opt-out notice that complies with Section 8, and the consumer and/or customer has not opted out.

Disclosures Prohibited Except to Consumer Reporting Agencies and Licensee's Producers and Service Providers. Section 13 prohibits a licensee from directly, or indirectly through an affiliate, from disclosing, other than to a consumer reporting agency, a policy number or similar form or access number or access code for a consumer's policy or transaction account to any nonaffiliated third party for use in telemarketing, direct mail marketing or other marketing through electronic mail to the consumer. However, disclosures can be made under this section to the licensee's service provider solely in order to perform marketing for the licensee's own products or services as long as the service provider is not authorized to directly initiate charges against the account, and to a licensee who is a producer solely in order to perform marketing for the licensee's own products or services.

Disclosures Permitted Without Consumer's Consent

Disclosures to Affiliates. Licensees may disclose nonpublic personal financial information to its affiliates without the consumer's consent provided (i) the licensee identifies its affiliates to which disclosure will be made in its privacy notices to consumers, and (ii) the affiliates do not further disclose such nonpublic personal financial information except in compliance with the Regulation.

Disclosures for Service Providers and Joint Marketing. Section 14 permits disclosure of nonpublic personal financial information to be made without the consumer's consent to nonaffiliated third parties to perform services for the licensee or functions on the licensee's behalf, if the licensee: (i) provides the initial privacy notice in accordance with Section 5, and (ii) enters into a contractual agreement with the third party that prohibits the third party from disclosing or using the information other than for the purposes for which the licensee disclosed the information to the third party or under Sections 15 or 16.

The services a nonaffiliated third party performs for a licensee may include marketing of the licensee's own products or services or marketing of financial products or services offered pursuant to joint agreements between the licensee and one or more financial institutions. A joint agreement means a written contract pursuant to which the licensee and one or more financial institutions jointly offer, endorse or sponsor a financial product or service.

Disclosures for Processing and Servicing Transactions. Section 15 permits the disclosure of nonpublic personal financial information without the consumer's consent to the extent necessary to process, service or administer transactions requested or authorized by the consumer.

Disclosures for Specific Purposes or to Specific Persons. Section 16 permits the disclosure of nonpublic personal financial information without the consumer's consent for specific purposes and to specific persons, to include, without limitation, (i) to protect or prevent actual fraud, (ii) to persons holding a legal or beneficial interest relating to the consumer or acting in a fiduciary or representative capacity on behalf of the consumer, (iii) to insurance rate advisory organizations, guaranty funds or organizations, (iv) to the licensee's attorneys, accountants and auditors, and (v) to comply with federal, state and local laws.