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IN BRIEF

MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

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YOU MAY NEED TO GIVE YOUR CLIENT NOTICE OF YOUR PRIVACY POLICY

If you have access to nonpublic personal financial information about your clients, and you provide those clients with services that are for the client's personal, family, or household purpose, read on. The Gramm-Leach-Bliley (GLB) Act may require you to give your clients a notice that explains what nonpublic personal information you collect and how you protect their privacy.

LAWYERS PROVIDING FINANCIAL SERVICES

Among other things, the Act defines certain activities as "financial activities" and requires businesses engaged in these activities to tell their customers how the business will protect the customers' privacy.

Enacted to enable the banking, securities, and insurance industries to offer more services to clients, the GLB Act applies to lawyers because of some of the Act's definitions. For example, "financial institution" includes an "accountant or other tax preparation service" and "an entity that provides real estate settlement services." The GLB took language from the Bank Holding Act of 1956 (an Act that established certain activities as being "financial in nature" for the purpose of banking regulation) and established them to be "financial activities" that required specific notices. (Regulations that were enumerated for one reason in the Banking Act to establish activities that banks *could* do were used in the GLB Act to define "financial activities.") The Federal Trade Commission (FTC) staff suggest that lawyers use the list of "financial activities" in section 4(k) of the Bank Holding Act of 1956 and in 12 CFR Part 225.28 as a guide to help determine if they need to provide notice to their clients. Of the listed activities, those most clearly applicable to lawyers include "providing tax planning and tax preparation services to any person" (12 CFR 225.28(b)(6)(vi)), and providing "real estate settlement services" (12 CFR 225.28(b)(2)(viii)). (See related box "Real Estate Settlement Services.") If a lawyer provides tax planning services, tax preparation services, or real estate settlement services to individuals who use the service for personal, family, or household use, the lawyer must give the required notices. (See page 7.)

The Act only applies to "financial institutions" "significantly engaged" in "financial activities." According to the FTC's outline of the GLB Act posted on the FTC web site, whether a "financial institution" is "significantly engaged" in financial activities is a flexible standard that takes into acount all the facts and circumstances. According to a recent ABA CLE presentor, the FTC has taken the position that lawyers who hold themselves out as providing the services specifically named in the Act as "financial activities" are "significantly engaged in the activity" and must give their clients the privacy notice.

FAMILY LAW/BANKRUPTCY APPLICATION DEPENDS ON SERVICES

The tax planning/preparation and real estate settlement descriptions are specifically noted in the Act and are reasonably clear and easy to interpret. Unfortunately, other terms in the Act raise questions that no one is presently able to answer. For example, the Act defines "acting as investment or financial advisor to any person" (12 CFR 225.28(b)(6)) as a "financial activity." When I recently asked a member of the FTC staff whether this regulation applied to services such as those provided by lawyers who

handle personal bankruptcies or family law cases, the staff person stated "the application would depend on the nature and extent of services provided. If any financial services were *de minimis*, no notice would be required." If you practice in these areas and you are concerned about the application of the GLB to a specific fact situation, the FTC staff is available to discuss the issue with you. They can be reached at the FTC's Division of Financial Practices 202-326-3224.

FTC HAS ENFORCEMENT AUTHORITY

The Act gives enforcement authority to the FTC for entities not otherwise under the juristiction of other agencies. Although the GLB Act does not designate penalties, the rules can be enforced by a federal agency under its enabling acts. If considered an unfair and deceptive trade practice, the fine could be up to $11,000 per day per offense.

NOTICE REQUIREMENTS OF THE ACT – CURRENT CLIENTS

The Act covers businesses that provide individuals with financial services for personal, family, and household purposes. 16 CFR § 313(e) and 313(h).

The Act requires "financial institutions" to send a notice to "customers" by July 1, 2001. The regulations define the "customer relationship" as "a continuing relationship between you and a consumer under which you provide one or more financial products or services to the consumer that are to be used primarily for personal, family, or household purposes." A consumer is defined as "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." 16 CFR Part 313 § 313.3(e)(1), (h), (j).

The regulations give some examples of when a "customer" becomes a "former customer." For tax preparation, a customer is a "former" customer if the lawyer has provided and received payment for the services and no longer provides any statements or notices to the customer concerning that relationship. 16 CFR Part 313 § 313.5(b)(2) example (v). For real estate settlement activities, a customer is a "former" customer if the transaction closed and the law firm has discharged all of its responsibilities with respect to settlement. 16 CFR Part 313 § 313.5(b)(2) example (vi). In general, a customer is a "former" customer if there has been no communication with the individual for a period of 12 consecutive months, other than to provide annual privacy notices or promotional materials. 16 CFR Part 313 § 313.5(b)(2)(viii).

NOTICE TO NEW CLIENTS AND ANNUAL NOTICES

After July 1, 2001, new "customers" (i.e. clients) of the "financial institution" (i.e. law firm) must be provided with notice of the "institution's" (i.e. law firm's) privacy policy and practices. Most lawyers who fall within the Act satisfy the requirement by providing new clients with the required privacy notice at the same time that they provide the client with their retainer agreement and engagement letter.

Beginning in 2002, lawyers who fall within the Act will need to continue to give new clients the initial notice and will also have to give its privacy policy annually to current "customers" (clients) for whom it performs the listed financial services. The annual notice must be given to all current clients at least once every 12 months. Therefore, lawyers must decide what kind of system they will use to track the notices given to applicable clients. For example, if a person becomes a client on September 1 and is given a privacy notice with his or her engagement letter, the firm must decide if 1) that client will get an annual notice in September or 2) the firm will send out all annual notices at one time. If you choose the option of sending out the annual notices all at one time, new clients will get two notices during their first year as your client – the initial notice and an annual notice. If you don't send out annual notices all at once, and instead send individual annual notices, you will have to calendar when each client's annual notice is due – a system that is probably more time and labor intensive than the first system.

SAMPLE FORM

Accompanying this article is a sample notice and a list of resources on this topic. The notice provided must include information about the type of nonpublic personal information you collect and how you protect your clients' confidentiality. It must also inform the client that you only disclose information as permitted by law. Although the FTC rules probably do not require lawyers to include an "opt out" provision in their notice, some lawyers prefer to include a paragraph giving the client the right to

notify the firm if the client wants to direct the lawyer not to disclose certain information to anyone. (In some circumstances, if a client chooses to "opt out" of disclosure, the lawyer may be forced to resign either for ethical reasons or because he or she is unable to provide the legal services requested.) The opt out provision is noted in the sample as optional.

THE FUTURE

The American Bar Association recently requested that lawyers be exempt from the Act. The FTC is currently considering the request but has not yet taken a position on it.

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