

## FAQ – Privacy Notice Requirement for Trust Organizations\*

Question: *Does my trust organization have to send out privacy notices?*

Answer: *Yes. Privacy notices must be provided to individual customers.*

The Privacy Rule is part of the Gramm Leach Bliley Act promulgated in 1999 (“GLBA”). The first element of the GLBA Privacy Rule is the Notice Requirement. However, it is not clear from a reading of the Privacy Rule whether or how it applies to trust organizations.

An easier question to answer is, “*Does my trust organization have to comply with the GLBA Privacy Rule?*” The answer is yes, a trust organization is considered a financial institution covered by the GLBA, thus must comply with the Privacy Rule. That means if a trust organization shares personal information of its individual customers, even if only with an affiliated or third-party bank, then it must provide initial privacy notices to new customers and annual privacy notices to existing customers. This answers the question asked above, but leads immediately to a follow up question, “*Who is an ‘individual customer’ in the trust industry?*” Is it the grantor of a trust? What if the grantor is deceased, is it the beneficiary? What if the trust was transferred to the trust organization by the Trust Protector who has the power to appoint successor trustees – does that make the Trust Protector the customer? And what about agency accounts, such as custody accounts or investment management accounts, who is the customer?

The Privacy Rule defines a customer as an individual consumer who has established a continuing relationship with an institution under which it provides financial products or services to the consumer. However, in the trust industry it is not that clear because customers are often considered to be those individuals dealt with most frequently, who may include grantors, beneficiaries, financial advisors, trust protectors, investment direction advisors, or others.

In 2001 the FRB published Privacy Rule FAQs that stated, when you act as a trustee, you have a relationship with the trust, which is not an individual. Even if the grantor and all beneficiaries are individuals, they are not customers solely because of their relationship to the trust. At first glance, this seems to indicate a trust organization does not have to send privacy notices, and more than a few such organizations may have been caught by surprise when they received examiner or audit criticism for non-compliance with the requirements. A more detailed review of the requirements reveals this FAQ guidance did not eliminate the need to comply with the Privacy Rule because trust organizations act in different capacities for various account types. For irrevocable trusts, for example, the FAQ clarified that living grantors and/or beneficiaries are not customers and it is not necessary to send them Privacy Notices when the trust organization serves as Trustee. However, if the trust organization serves in a different capacity for that trust, such as custodian or investment manager, then the FAQ does not apply. Assuming an individual opened the custody or investment management account with a trust organization, then that individual is the customer and must receive Privacy Notices.

The bottom line is that trust organizations must comply with the Privacy Rule and provide notices to its individual customers. These individuals include: (1) grantors of revocable trusts who appoint you as trustee; (2) owners of IRAs who appoint you as trustee or custodian; and (3) individuals who appoint you as agent of any account. The rest of this document compiles and summarizes the relevant legal and regulatory guidance for this answer.

\*The information provided in this document has been prepared by Joanne Eby, Managing Partner of Nth Degree Financial Solutions, LLC. It is for informational purposes only and not for the purpose of providing legal advice.

## **2020 Regulatory Overview – Notice Requirement of GLBA Privacy Rule**

Section 503 of the Gramm-Leach-Bliley Act of 1999 requires financial institutions to protect the nonpublic personal information of its customers (“Privacy Rule”). This requirement, codified at 15 U.S.C. § 6801<sup>1</sup>, applies to trust organizations, whether they are a trust department of a bank or a stand-alone trust company.

This overview provides trust organizations with an up-to-date summary of applicable laws and regulations for complying with the Privacy Notice requirements.

One question often asked is whether trust organizations must send out initial and annual privacy notices to its customers? The next question asked is, if so, who, precisely, are the customers that require a privacy notice?

These questions are asked because Federal banking authorities excluded<sup>2</sup> from the Privacy Rule those individuals who are beneficiaries of trusts and participants of employee benefit plans that the bank either sponsors, or for which it acts as trustee or fiduciary. The rationale behind this exclusion is that the trust/plan itself is the customer and is not an individual, therefore the Notice requirements of the Privacy Rule do not apply. This exclusion is included in the definition section of the Privacy of Consumer Financial Information regulations.<sup>3</sup> The FDIC Privacy Rule handbook affirms this by noting that individual grantors or beneficiaries of trusts for which the trust organization serves as trustee are not considered consumers under the privacy rule.<sup>4</sup>

The short answer to the first question is yes, trust organizations may have to send initial and annual privacy notices to its customers, but only to those customers covered under the rules. To answer the next question the trust organization must consider in what capacity it provides services to the account. As a general rule of thumb, the following types of customers should receive privacy notices:

- If you serve as trustee of a revocable trust, where the grantor is an individual who can revoke the trust, it is standard in the trust industry to consider the grantor as the customer. Because the grantor is an individual who has selected your trust organization to provide financial services, the individual is considered a customer, thus privacy notices are required.
- If you serve as trustee or custodian for an individual who has created an Individual Retirement Account (IRA), that individual is considered a customer.
- If you serve as agent for an account that is associated with an individual, the individual who entered into the agency agreement is considered the customer. Because the customer is an individual, privacy notices are required. Examples of such agency accounts include:
  - Investment Manager where the trust organization was appointed by an individual to manage a portfolio of assets. This holds true even if the portfolio of assets represents trust assets for an irrevocable trust. For instance, an individual who is both the grantor and trustee of his/her trust may enter into an investment management agency agreement with the trust organization.

- Custodian where the trust organization was appointed by an individual to custody assets. Examples may include custody for an UGMA/UTMA account or other account belonging to an individual.

The FDIC Trust Examination Handbook provides practical guidance for complying with the Privacy Rules, including not only requirements associated with the Notice requirement, but also with the Safeguard requirement.<sup>5</sup>

The following chart lists types of clients a trust organization may have and indicates whether they do or do not require privacy notices.

Capacity	Account Type	Customer	Required	Rationale
Trustee	Revocable Trust	Living Grantor	Yes	A living grantor of a fully revocable trust is considered a consumer because they have chosen to directly obtain a financial product and service from your trust organization for their personal, family, or household purposes.
Trustee, Custodian	Individual Retirement Account (IRA)	Individual who established IRA	Yes	An individual who establishes an IRA account for which your trust organization act as custodian has obtained a financial product or service to be used primarily for personal, family, or household purposes; therefore, he/she is a consumer.
Agent (Custodian, Investment Manager, Recordkeeper, Escrow Agent)	Agency (Custody, Investment Management, Recordkeeping, Escrow)	Individual	Yes	The GLBA Privacy Rule Notice requirements apply to customers who are individuals. Thus, when an individual established an agency account with your trust organization that individual would require privacy notices.
Trustee	Irrevocable Trust	Living Grantor	No	When your trust organization act as trustee, the relationship is with the trust. Because the trust itself is not an individual, it is not a consumer under the Privacy Rule. Even if the grantor and all beneficiaries are individuals, they are not your consumers solely because of their relationship to the trust. In other words, the trust is your customer.
Trustee	Irrevocable Trust	Beneficiary	No	Individuals who are beneficiaries of trusts have been excluded from the GLBA Privacy Rule.
Trustee, Sponsor, or Fiduciary	ERISA Qualified Employee Benefit Plan	Participant of EB Plan	No	Individuals who are participants of Employee Benefit plans have been excluded from the GLBA Privacy Rule.
Agent (Custodian, Investment Manager, Recordkeeper, Escrow Agent)	Agency (Custody, Investment Management, Recordkeeping, Escrow)	Entity (such as LLC or LP)	No	The GLBA Privacy Rule Notice requirements apply only to customers who are individuals. Thus, an agency account opened by an entity would not require privacy notices.

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## Relevant Legal and Regulatory Guidance

### **<sup>1</sup> U.S. Code § 6801 Protection of nonpublic personal information**

#### ***(a) Privacy obligation policy***

It is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information.

#### ***(b) Financial institutions safeguards***

In furtherance of the policy in subsection (a), each agency or authority described in section 6805(a) of this title, other than the Bureau of Consumer Financial Protection, shall establish appropriate standards for the financial institutions subject to their jurisdiction relating to administrative, technical, and physical safeguards—

- (1) to insure the security and confidentiality of 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 unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.

### **<sup>2</sup> Regulation P: Privacy of Consumer Financial Information Frequently Asked Questions**

(Published December 2001 by the staff of the Board of Governors of the Federal Reserve System. The frequently asked questions (FAQs) were developed to assist financial institutions in complying with the privacy provisions of the Gramm-Leach-Bliley Act (GLB Act) and the Board's Regulation P (in the FAQs, termed the "Privacy Rule")).

*A.3. I provide trust services. In this capacity, I serve as the trustee of trusts whose beneficiaries are individuals. Does the Privacy Rule apply to my trust operations?*

When you act as a trustee, you have a relationship with the trust. Because the trust itself is not an individual, it is not a consumer under the Privacy Rule. Even if the grantor and all the beneficiaries are individuals, neither the grantor nor any of the beneficiaries are your consumers solely because of their relationship to the trust. If, for example, the trust requires you, as trustee, to transfer money to a beneficiary, you provide that financial service to the trust rather than the individual who is the beneficiary. In other words, grantors and beneficiaries of a trust are not your consumers unless they directly obtain a financial product and service from you for their personal, family, or household purposes. Accordingly, you do not have any obligations under the Privacy Rule with respect to the trust. Your duties as a fiduciary, however, may require you to maintain the confidentiality of information about the trust, its grantor, and its beneficiaries.

*A.4. I act as a custodian for Individual Retirement Arrangements ("IRAs"). Are the individuals who own the IRAs my customers?*

Yes. An individual who establishes an IRA account for which you act as a custodian has obtained a financial product or service that is to be used primarily for personal, family, or household purposes; therefore, he or she is a consumer. When an individual selects you to act as custodian for his or her IRA, the individual enters into a continuing relationship with you and becomes your customer under the Privacy Rule. By contrast, an individual

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who is a participant or a beneficiary of an employee benefit plan that you sponsor or for which you act as trustee or fiduciary is *not* your customer because your relationship in that case is with the plan.

<sup>3</sup> **Excerpt from 12 CFR § 332.3**

(e)(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.

(2) Examples--

(vi) An individual is not your consumer solely because he or she has designated you as trustee for a trust.

(vii) An individual is not your consumer solely because he or she is a beneficiary of a trust for which you are a trustee.

(viii) An individual is not your consumer solely because he or she is a participant or a beneficiary of an employee benefit plan that you sponsor or for which you act as a trustee or fiduciary.

<sup>4</sup> **Applicable Excerpts for the Notice Requirements from FDIC Privacy Rule Handbook\*\***

The privacy rule governs when and how banks may share nonpublic personal information about consumers with nonaffiliated third parties.

The rule embodies two principles - notice and opt out. In summary:

- **All** banks must develop **initial** and **annual** privacy **notices\***. The notices must describe in general terms the bank's information sharing practices.
- Banks that share nonpublic personal information about consumers with nonaffiliated third parties (outside of opt out exceptions delineated in the privacy rule) must also provide consumers with:
  - an opt out notice
  - a reasonable period of time for the consumer to opt out

**State Law:** A provision under a State law that provides greater consumer protection than provided under the GLBA privacy provisions will supercede the Federal privacy rule. The bank will be obligated to comply with the provisions of that State law to the extent those provisions provide greater consumer protection than the Federal privacy rule. The Federal Trade Commission determines whether a particular State law provides greater protection.

**\*Privacy Notices**

**Every bank must develop initial and annual privacy notices** - even if the bank does not share information with nonaffiliated third parties.

**A revised notice** may be required when a bank changes its information sharing practices.

The following table reflects the rule's requirements for delivering initial, annual, and revised notices to consumers and customers.

Type of notice	Who gets it	Delivery
<b>Initial privacy notice</b> (all banks)	<ul style="list-style-type: none"> <li>• all existing bank customers</li> <li>• all new bank customers after July 1, 2001</li> <li>• consumers who are not customers</li> </ul>	<ul style="list-style-type: none"> <li>• <b>no later than July 1, 2001</b></li> <li>• when the customer relationship is established</li> <li>• <b>only</b> if the bank intends to share nonpublic personal information about the consumer with a nonaffiliated third party</li> </ul>
<b>Annual privacy notice</b> (all banks)	<ul style="list-style-type: none"> <li>• customers</li> </ul>	<ul style="list-style-type: none"> <li>• at least once in any period of 12 consecutive months while the customer relationship continues</li> </ul>
<b>Revised privacy notice</b> (as applicable)	<ul style="list-style-type: none"> <li>• customers and consumers who are not customers</li> </ul>	<ul style="list-style-type: none"> <li>• <b>before</b> the bank shares nonpublic personal information in a manner not described in the most recent notice delivered to the customer or consumer</li> </ul>

### Who is protected by the privacy rule?

The privacy rule protects "consumers." **All consumers receive the same privacy protections.**

However, a subset of consumers defined as **customers** must receive certain disclosures, such as an annual privacy notice, that need not be provided to consumers who are not customers.

Thus, it is important to know the distinction between consumers and customers to understand the different disclosure requirements under the privacy rule.

**Consumer:** Any individual who is seeking to obtain or has obtained a financial product or service from a bank for personal, family, or household purposes is a consumer of that bank. The definition of consumer includes individuals who:

- **apply for** a financial product or service (e.g., a loan or a deposit account) for personal, family, or household purposes
- **actually obtain** a financial product or service (e.g., a loan or a deposit account) for personal, family, or household purposes

**Customer:** As the following diagram reflects, customers are a subset of consumers. A customer is a consumer with whom a bank has a **continuing relationship**. Although the rule does not define "continuing relationship," it provides examples of transactions that are and are not considered continuing relationships. Consumers who have a deposit account, obtain a loan, or obtain an investment advisory service are considered customers. See Section 332.3(i).



Additional guidance regarding the customer relationship can be found in the Supplemental Information (the preamble) of the rule, which notes that a continuing relationship is established "where a consumer typically would receive some measure of continued service following, or in connection with, a transaction." See page 35168, Federal Register, Vol. 65, No. 106.

**The next diagram depicts the relationship between all individuals** who do business with a bank and those who meet the regulatory definitions for **consumers** and **customers**. As the diagram shows, only a portion of the individuals who conduct business with a bank are consumers under the privacy rule. For example, individuals are not considered consumers under this rule if they are commercial clients, grantors or beneficiaries of trusts for which the bank is trustee, or participants in an employee benefit plan that the banks sponsors.



NOTE: Although the FDIC's rule only applies to certain banks and some of their subsidiaries, all financial institutions must comply with similar privacy rules adopted by their supervisory agencies. For example, although securities subsidiaries of FDIC-supervised banks do not have to comply with the FDIC's privacy rule, they do have to comply with a similar privacy rule adopted by the Securities and Exchange Commission. There are no published regulations for compliance with the Notice requirements of the GLBA Privacy Rule specific to trust organizations, thus guidance such as this published by the FDIC continue to be relevant.

\*\* The complete FDIC Privacy Rule Handbook is available online at:

<https://www.fdic.gov/regulations/examinations/financialprivacy/handbook> (last accessed April 14, 2020)

<sup>5</sup> **Section F.2 FDIC Trust Examination Manual – Privacy Issues Faced by the Fiduciary**

is available online at:

[https://www.fdic.gov/regulations/examinations/trustmanual/section\\_10/section\\_x.html#F2](https://www.fdic.gov/regulations/examinations/trustmanual/section_10/section_x.html#F2) (last accessed April 14, 2020)