February 13, 2023

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: Court-Ordered Gramm-Leach-Bliley Act (GLBA) Violations

Dear Director Chopra:

The National Association of Federally-Insured Credit Unions (NAFCU), the Credit Union National Association (CUNA), the American Bankers Association (ABA), and America's Mutual Banks (AMB) (collectively, the Associations) write to you today to highlight significant threats to Americans' financial privacy and mutually-owned financial institutions (FI). Together, the Associations represent the full spectrum of U.S. FIs, from the country's smallest credit unions and community banks to some of the largest credit unions and banks in the world, that, in turn, serve hundreds of millions of American consumers with personal and business financial services products. In *Seidman v. Spencer Sav. Bank*[1], the Superior Court of New Jersey for Passaic County, New Jersey (NJ Superior Court) has run roughshod over the GLBA in ways that require Spencer Savings Bank (Spencer) to violate all of its members' financial privacy and potentially undermine all mutually-owned banks' and credit unions' capacity to serve, maintain, and attract members. The CFPB has general GLBA rulemaking authority[2] and a statutory responsibility to ensure that inconsistent state legislation, regulation, executive action, and judicial orders do not displace the GLBA's requirements.[3]

The Associations strongly encourage the Consumer Financial Protection Bureau (CFPB) to track this and any similar litigation and to more fully partner with state financial regulators to uphold the GLBA. Specifically, we ask that the CFPB issue guidance that provides no state legislature, regulator, executive, or court may circumvent the requirements in Regulation P that FIs provide consumers adequate financial privacy notices and generally prohibit FIs from disclosing consumers' nonpublic personal information to nonaffiliated third parties without consumers' notice or consent, with certain well-defined exceptions. Additionally, we ask the CFPB to consider taking direct legal action in *Seidman v. Spencer Sav. Bank* to prevent the unlawful disclosure of tens of thousands of consumers' nonpublic personal information.

[1] Lawrence B. Seidman et al. v. Spencer Savings Banks, S.L.A., et al., Docket No. PAS-C-91-21, Superior Court of New Jersey, Chancery Division, Passaic County.
[2] 12 CFR § 1016.1(b)(1).
[3] 12 CFR § 1016.17(b).

The Associations may each highlight slightly different benefits of or prefer slightly different approaches to comprehensive federal data privacy legislation. But all of the Associations support the GLBA's robust data privacy and information security standards which simultaneously protect Americans' financial privacy and help reduce overall risks to the financial services industries and the broader U.S. economy. All of the Associations also strongly believe that those standards – and those standards alone – are appropriate for and should be evenly applied to all FIs.

No state should be permitted to subject any FI to data privacy or information security standards that are inconsistent with those established by the GLBA. In *Seidman v. Spencer Sav. Bank*, the NJ Superior Court is steadfastly highlighting the damage state courts can do to the GLBA's consumer protections through decisions at loggerheads with the financial data privacy and information security practices that Americans have rightly come to expect from their FIs.

Below is a summary of the facts and developments of *Seidman v. Spencer Sav. Bank*. Spencer is a state-chartered, mutually-owned community bank with nearly $4 billion in assets, more than 43,000 members, roughly 300 employees, and 26 branches across New Jersey. Spencer is a member of the Federal Deposit Insurance Corporation and was supervised by both the New Jersey Department of Banking and Insurance (NJ Dept. of Banking and Insurance) and the Office of Thrift Supervision (OTS) until OTS's dissolution in 2011. Today, Spencer is supervised only by the NJ Dept. of Banking and Insurance. The plaintiff wants to join Spencer's board of directors (BOD), and this litigation is primarily concerned with the plaintiff's failures to do so over the last two decades.

In compliance with the GLBA and the New Jersey Savings and Loan Act (NJSA)[4], Spencer's bylaws require that all potential BOD nominees and qualified BOD nominees submit all proxy vote communications to Spencer for its distribution to its members. At oral arguments in 2021, plaintiff's counsel argued that Spencer's next BOD election can be conducted fairly only if the plaintiff is able to directly solicit Spencer's members' proxy votes. Plaintiff's counsel then requested that Spencer be required to provide the plaintiff's preferred proxy solicitor the names and contact information of all of Spencer's members. Spencer's counsel countered that, as the New Jersey Department of Banking and Insurance (NJ Dept. of Banking and Insurance) already determined in a separate administrative proceeding involving the litigants, both the GLBA and the NJSA generally prohibit Spencer from disclosing its members' nonpublic personal information to a nonaffiliated third party and provide only narrow judicial exceptions that are not applicable to *Seidman v. Spencer Sav. Bank*.

Persuaded by neither Spencer's counsel nor the NJ Dept. of Banking and Insurance's prior determination, the NJ Superior Court granted the requested relief. Spencer appealed the NJ Superior Court's order to the Supreme Court of New Jersey (NJ Supreme Court). On grounds

[4] N.J.S.A. 17:12B-1.

unrelated to the GLBA, the NJ Supreme Court stayed the order, pending the resolution of related, still-ongoing litigation. Absent an unforeseen development, when that related litigation is concluded, the NJ Superior Court's order will become effective and require that Spencer hand over all of its members' names and contact information to an unaffiliated proxy solicitor that is not subject to either the GLBA or any similar federal or state-level data privacy law.

Compared to most other federal and state-level data privacy laws, the GLBA is remarkably straightforward. In the very first lines of Title V, subtitle A, of the GLBA, Congress stipulated 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." The GLBA goes on to generally provide that a "financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 503 [of the GLBA]."[5] The GLBA defines the term "nonpublic information" as "personally identifiable financial information (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution." And, plainly, Spencer is subject to the GLBA because Spencer is "an institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956."[6]

Both shareholders in a publicly-traded company and mutually-owned FIs' members are generally entitled to vote at their respective annual meetings. However, in grafting legal standards appropriate for litigation involving a fight for control of a publicly-traded company onto litigation involving a mutually-owned FI, the NJ Superior Court willfully ignores the most relevant distinction between the two groups. Any equity interests a mutually-owned FI's members acquire are not acquired for investment purposes and are only incidental to members' establishing and maintaining financial accounts at a mutually-owned FI.

By the NJ Superior Court's logic, no mutually-owned FI could possibly respect and protect Americans' financial privacy as the GLBA requires because any member of a mutually-owned FI would be entitled to at least the names and contact information of all other members – and, perhaps, much more. Americans would effectively face the choice of banking with a publicly-traded or privately-held FI capable of respecting and protecting their financial privacy or surrendering their GLBA rights to join a mutually-owned FI. Mutually-owned FIs' existing members would flee, and mutually-owned FIs would be able to attract few, if any, new members.

There is little doubt this would have been removed to federal court and swiftly decided in Spencer's favor if some federal regulator exclusively responsible for supervising mutually-owned

[5] Sec. 502(a).
[6] Sec. 509(3).

banks still existed. The OTS's dissolution, however, created a vacuum of effective GLBA implementation and regulator-led financial privacy advocacy in some states. The NJSA, like many state laws intended to incorporate and implement the GLBA's data privacy and information security standards, provides that all determinations as to the GLBA's applicability shall rest exclusively with the NJ Dept. of Banking and Insurance. Regardless, many state financial regulators, like the NJ Dept. of Banking and Insurance, simply do not have the budgets or the headcount to fully execute all the non-exam supervisory tasks necessary to effectively implement, enforce, and defend the GLBA.

It is obvious that many state financial regulators lack the capacity to effectively implement, enforce, and defend the GLBA. In these instances, the Associations strongly urge the CFPB to more fully partner with state financial regulators and take other action as appropriate to uphold the GLBA and to issue guidance providing that states may not flout Regulation P's requirements through legislative, regulatory, executive, or judicial means.

Sincerely,

National Association of Federally-Insured Credit Unions

Credit Union National Association

American Bankers Association

America's Mutual Banks