

**DATE:** October 5, 2009

**MEMORANDUM TO:** Board of Directors

**FROM:** Sandra L. Thompson  
Director  
Division of Supervision and Consumer Protection

Michael Bradfield  
General Counsel

**SUBJECT:** Interagency Final Model Privacy Form under the Gramm-Leach-Bliley Act

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## **RECOMMENDATION**

Staff recommends that the Board of Directors approve for publication in the *Federal Register* the attached final rule amending the rules that implement the privacy provisions of the Gramm-Leach-Bliley Act (GLBA),<sup>1</sup> which require financial institutions to provide initial and annual privacy notices to their customers. The final rule includes a model form that financial institutions may use to explain their privacy policies and provide consumers the opportunity to opt out of certain information sharing practices. Pursuant to the Financial Services Regulatory Relief Act of 2006 (FSRRA),<sup>2</sup> institutions that provide the model privacy form to their customers will be deemed in compliance with the privacy provisions of GLBA. The final rule will be issued jointly by the FDIC, the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (FRB), Office of Thrift Supervision (OTS), National Credit Union Administration (NCUA), Federal Trade Commission (FTC), Commodity Futures Trading Commission (CFTC) and Securities and Exchange Commission (SEC) (collectively referred to as “the Agencies”).

## **DISCUSSION**

### **A. Background**

The privacy provisions of GLBA and Part 332 of the FDIC’s Rules and Regulations require financial institutions to provide initial and annual privacy notices to their customers. In general, those privacy notices must describe the institution’s policies and practices with respect to the disclosure of a consumer’s nonpublic personal information to both affiliated and nonaffiliated third parties. The notices must also provide consumers with a reasonable opportunity to direct the institution not to share their nonpublic personal information with nonaffiliated third parties other than as permitted by law

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<sup>1</sup> Subtitle A of title V of GLBA, entitled “Disclosure of Nonpublic Personal Information,” is codified at 15 U.S.C. §§ 6801-6809.

<sup>2</sup> Pub. L. 109-351, 120 Stat. 1966 (2006).

(commonly referred to as an “opt out”). The privacy notice must also provide consumers, where applicable under the Fair Credit Reporting Act (FCRA),<sup>3</sup> a notice and an opportunity to opt out of certain information sharing with affiliates.

The Appendix to Part 332 currently contains model language (called Sample Clauses) that institutions may use in their privacy notices and, if so, they are deemed to be in compliance with the privacy provisions of GLBA. The Appendix, however, does not prescribe any particular format for the notices. Instead, institutions are free to design their notices any way they see fit, provided they comply with the law and meet the “clear and conspicuous” standard in the statute and the rule.

## **B. Advance Notice of Proposed Rulemaking and Development of the Model Privacy Notice**

In December 2003, the Agencies published an advance notice of proposed rulemaking (ANPR) soliciting public comment on a wide range of issues related to improving privacy notices, including whether they should engage in consumer testing to develop a model privacy notice that would be easier for consumers to understand. Based on the comments received in response to the ANPR, the Agencies decided that consumer testing would be part of the development of the model privacy notice. As a result, the Agencies hired a contractor who used qualitative testing methods to conduct a series of in-depth consumer interviews, which helped guide the development of the model privacy notice. The Agencies released a report detailing the contractor’s findings in March 2006. Thereafter, the Agencies planned to begin quantitative testing of the notice.

## **C. The Financial Services Regulatory Relief Act of 2006**

Before the Agencies had begun the quantitative testing, FSRRA was enacted in October 2006. It amended GLBA by requiring that the Agencies jointly develop a model privacy form that institutions have the option of using. Under FSRRA, institutions that provide the model privacy form to their customers are deemed to be in compliance with the privacy provisions of GLBA. FSRRA further requires that the model form: (1) be comprehensible to consumers; (2) provide clear and conspicuous disclosures; (3) enable consumers easily to identify the sharing practices of a financial institution and to compare privacy practices among financial institutions; and (4) be succinct, and in a font that is easy to read. FSRRA required that the Agencies propose the model form for public comment by April 11, 2007.

## **D. The Proposed Model Form**

On March 29, 2007, the Agencies issued a notice of proposed rulemaking (NPR), which included the proposed model form, for public comment. The structure and content of the proposed model form reflected the research findings from the qualitative consumer testing. In addition, the Agencies proposed that the model form would ultimately replace the Sample Clauses currently found in an appendix to the Agencies’ privacy rules.

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<sup>3</sup> 15 U.S.C. 1681a(d)(2)(A)(iii)

However, to ease the compliance burden for those institutions that currently provide privacy notices based on the Sample Clauses, the Agencies proposed a transition period of one year, after which financial institutions would no longer be afforded a compliance safe harbor when using the sample clauses. The NPR also indicated that the Agencies would conduct additional consumer testing before finalizing the model form.

The Agencies collectively received approximately 110 comments from a variety of banks, thrifts, credit unions, credit card companies, securities firms, insurance companies, and industry trade associations, as well as from consumer and other advocacy groups, the National Association of Attorneys General (NAAG), the National Association of State Insurance Commissioners (NAIC), and individual consumers. Consumer and other advocacy groups, NAIC, NAAG, and individual consumers generally supported the proposed form, particularly its standardized format, clear language and omission of extraneous information. They also supported the elimination of the Sample Clauses.

A number of institutions also expressed support for the model form. Some stated that they are either already using it or intend to use it once it is finalized. One industry association conducted an informal poll of its community bank members and found that many are likely to use the model form and that most found it more consumer-friendly than the Sample Clauses. Other industry commenters, however, objected to several key aspects of the proposal, such as the format of the model form and the elimination of the Sample Clauses.

#### **E. Additional Consumer Testing**

Following the publication of the proposed model form and review of the public comments, the Agencies revised the form and began quantitative testing. In the spring of 2008, a contractor selected by the Agencies conducted a survey of approximately 1,000 consumers in five shopping malls in various parts of the country. The objectives were to evaluate the effectiveness of the revised model form for comprehension and usability when compared to three other types of notices. Two expert advisors to the Agencies analyzed the research data obtained by the contractor and submitted a report to the Agencies confirming the overall effectiveness of the proposed model form as revised. In April 2009, the SEC solicited comment on the research.

Upon further consideration of the comments received in response to the proposed model notice and the results of the consumer testing, the Agencies further revised the model form slightly. As a result, the Agencies hired a contractor to conduct limited validation testing, which confirmed that those revisions did not affect the comprehension, usability, or design integrity of the model form.

#### **F. The Final Model Privacy Form**

Like the proposed form, the format of the final model form is standardized. It consists of two pages, rather than three pages as proposed, and may be printed on a single piece of paper. The Agencies are not mandating a specific paper size in the final model form as

long as the paper is in portrait orientation and sufficient to accommodate minimum font size, spacing, and content requirements. Financial institutions may include corporate logos in the form, so long as they do not interfere with the readability or space constraints.

The first page of the final model form has five parts: (1) a title; (2) an introductory section, which provides context to help the consumer understand the purpose of the notice; (3) a disclosure table that describes the types of sharing possible for all financial institutions, which of those types of sharing the institution providing the notice actually engages in, and whether the consumer can opt out of any of the institution's sharing; (4) if applicable, information for the consumer on how to opt out; and (5) the institution's customer service contact information.

The second page provides additional explanatory information that, in combination with the first page, ensures that the notice includes all the elements required by GLBA and the Agencies' privacy rules. Supplemental information about the financial institution and what it does with personal information is found at the top of the second page, with key definitions below. Space is also provided at the bottom of the second page for financial institutions to (1) discuss state and/or international privacy laws; and/or (2) include an acknowledgement of receipt. The instructions that accompany the form require that no additional information – other than what is specifically permitted – may be included in the model form in order to obtain the benefit of the compliance safe harbor.

The Agencies' rules incorporating the model form are effective 30 days after publication in the Federal Register, except for the amendments regarding the Sample Clauses, which are discussed below. In addition, the Agencies will be providing a link to an online version of the model form that institutions may use to create their own customized notices using the model form as a template. This online form will be available in late 2009.

## **G. The Sample Clauses**

As proposed, the Agencies are eliminating the Sample Clauses and related safe harbor (or, for the SEC, guidance) from their privacy rules following a transition period to help ease the compliance burden for institutions that currently have privacy notices based on the Sample Clauses. Thus, financial institutions will not be able to rely on the safe harbor for the Sample Clauses incorporated into notices that are delivered to consumers on or after January 1, 2011. The Sample Clauses will be removed entirely from the Agencies' rules on January 1, 2012. In addition, while the final model form provides a compliance safe harbor, institutions may continue to use other types of notices that vary from the model form, including notices that consist of the Sample Clauses, so long as these notices comply with GLBA and the Agencies' privacy rules.

## **H. Additional Privacy Rule Amendment**

The Agencies are also amending the section of their privacy rules concerning the information that financial institutions, which choose not use the model form, must include in their privacy notices, in light of the model form research. The rules currently provide that if a financial institution shares information with third party nonaffiliates in a manner that does not require an opt out, the institution is only required to include a statement in its privacy notice that it engages in such sharing *as permitted by law*. The FDIC, FRB, OCC, OTS, NCUA, SEC and CFTC are revising their rules to allow, as an alternative, a statement that the institution shares such information for its *everyday business purposes*, including a list of all applicable examples. The FTC is amending its rule to allow a statement that the institution shares such information for its *everyday business purposes*, such as to process transactions, maintain account(s), respond to court orders and legal investigations, and report to credit bureaus.

## **CONCLUSION**

For the reasons discussed above, staff recommends that the Board approve the attached final rule and authorize its publication in the *Federal Register*. Staff also recommends that the Board authorize the Executive Secretary and the General Counsel to make technical, nonsubstantive, or conforming changes to the text of the final rule where necessary to ensure the Agencies can jointly publish it, and to take such other actions and issue such other documents as they deem necessary or appropriate to fulfill the Board's objectives.

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Attachments