MasterCard Worldwide
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Purchase, NY 10577-2509

May 29, 2007

Via Electronic Delivery

Office of the Comptroller of the Currency
250 E Street, SW, Mail Stop 1-5
Washington, DC 20219
Attention: Docket Number OCC-2007-0003

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1280

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
RIN 3064-AD16

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2007-0005

Ms. Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428
Re: Proposed Rule Part 716

Federal Trade Commission
Office of the Secretary
Room 135 (Annex C)
600 Pennsylvania Avenue, NW
Washington, DC 20580
Re: Model Privacy Form
FTC File No. PO34815

Ms. Eileen Donovan
Acting Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Re: File Number S7-09-07
Model Privacy Form

Re: MasterCard Comments on Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act

To Whom It May Concern:

MasterCard Worldwide ("MasterCard")[1] submits this comment letter in response to the Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act ("Proposal") published by the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Trade Commission, the Commodity Futures Trading Commission, and the Securities and Exchange Commission ("SEC") (collectively, the "Agencies") in the *Federal Register* on March 29, 2007. MasterCard appreciates the opportunity to provide its comments on the Proposal.

[1] MasterCard Worldwide (NYSE:MA) advances global commerce by providing a critical link among financial institutions and millions of businesses, cardholders and merchants worldwide. Through the company's roles as a franchisor, processor and advisor, MasterCard develops and markets secure, convenient and rewarding payment solutions, seamlessly processes more than 16 billion payments each year, and provides industry-leading analysis and consulting services that drive business growth for its banking customers and merchants. With more than one billion cards issued through its family of brands, including MasterCard®, Maestro® and Cirrus®, MasterCard serves consumers and businesses in more than 210 countries and territories, and is a partner to 25,000 of the world's leading financial institutions. With more than 24 million acceptance locations worldwide, no payment card is more widely accepted than MasterCard. For more information go to www.mastercard.com.

In General

MasterCard strongly supports the Agencies' objective to develop an alternative to existing privacy policies provided under the Gramm-Leach-Bliley Act ("GLBA"). As we noted in our comment letter in response to the Agencies' December 30, 2003 ANPR on this issue, MasterCard concurs with the Agencies' objective of providing consumers GLBA privacy notices that are more simple, concise, and easy to understand and compare. Congress also expressed its desire to implement this objective when, as part of the Financial Services Regulatory Relief Act of 2006 ("Regulatory Relief Act"), it mandated that the Agencies develop a "succinct" model form that financial institutions could choose to use to satisfy this GLBA disclosure obligation.

The Proposal and its model privacy form ("Model Form") establish a good, basic framework for creating a privacy policy consumers can use and understand. As discussed in more detail below, however, we believe that the specific content of the Model Form and related guidance provided in the Proposal present significant impediments which may stop many, if not most, financial institutions from using the Model Form. In particular, the following key changes must be made before financial institutions will be in a position to actually make use of the Model Form:

1. The Agencies must provide a clear safe harbor that protects financial institutions against liability for using the Model Form, *e.g.*, a financial institution that uses the Model Form should not be susceptible to state law or other claims that the financial institution failed to accurately or adequately disclose the information practices governed by the GLBA or Fair Credit Reporting Act ("FCRA").

2. The Agencies must make it clear that a financial institution that uses the Model Form is permitted to use and disclose information in any manner permitted under the GLBA and the FCRA.

3. The Agencies must provide flexibility for financial institutions to modify the Model Form in appropriate circumstances.

4. The Model Form must truly be "succinct" – the printing and mailing costs of the Model Form (three 8.5" x 11" pages) alone are a substantial impediment to its adoption by financial institutions.

5. The Model Form must more accurately describe existing information practices and opt-out rights.

Consumer Testing

MasterCard commends the Agencies for testing consumers' preferences with respect to GLBA privacy policies. For the Model Form to succeed, it must result in privacy policies that provide consumers with key information in a concise manner. Consumer testing can play a key role in crafting a disclosure that meets consumers' needs and preferences for privacy policies.

MasterCard also appreciates the Agencies' desire for commenters to provide consumer testing results in connection with their comments — the Agencies stated in the Supplementary Information, *in italics* to emphasize the importance of the sentence, that "[c]ommenters proposing alternative model notices or elements of a notice should submit any available supporting consumer research and documentation demonstrating that these alternatives meet the statutory requirements." Although the Agencies will receive many comments urging changes to the Model Form, it appears unlikely that commenters will be in a position to submit significant consumer testing results, particularly because the 60-day comment period provides little time to develop and fully test a revised Model Form. To address this issue, we urge the Agencies to revise and retest the Model Form before taking further action. We request that the Agencies issue a new proposal including a revised Model Form after such testing is complete.

We also urge that the testing process be refined before the Agencies issue a new proposal. In particular, the testing must be done in a context that replicates the practical realities surrounding GLBA privacy notices and other disclosures. As part of this testing, an essential question is how to craft a notice that meets consumer demands *and* can actually be delivered in a cost-efficient manner. The Agency testing to date has not answered this question because it has largely focused on consumer preferences in the abstract. The testing has not adequately considered how to satisfy those preferences in a manner that can be efficiently implemented.

To address this issue, we believe that the Agencies must test shorter formats that are capable of being delivered through the channels currently used to provide GLBA notices. It seems likely, for example, that it is possible to provide effective consumer notices in a format that is concise enough to be included in an application package, or with a monthly billing statement, without increasing mailing costs or dwarfing other potentially more important disclosures. We note that, as proposed, the Model Form would be at least six times the length of the typical (and highly effective) Schumer Box disclosures and would dramatically increase the costs of a typical mailing.

One example of a disclosure approach that successfully balances between the need for clear, simple communication and the need for efficient delivery is the so-called nutrition label. It seems likely, that if asked, consumers would say that existing nutrition labels would be easier to read if they were printed using larger fonts, increased line spacing, and with more empty space in the label. Yet, nutrition labels are designed in the context of being delivered in connection with the purchase of food, and they must reflect that reality. Food labels are remarkable in their ability to convey a significant amount of information without requiring grocery manufacturers to redesign product delivery mechanisms, or dwarfing the other components of food packaging. Food labels appear to represent a reasonable balance between consumer preferences on one hand and practicality, cost, and other priorities on the other hand and reflect the type of balance we seek to achieve.

Regulatory Relief Act

Voluntary Use of Model Form

The Regulatory Relief Act directed the Agencies to create a model form that financial institutions *may* use in order to comply with the GLBA requirement to provide certain consumers with a privacy policy. In particular, Congress stated that such form "may be used, at the option of the financial institution." The Regulatory Relief Act clearly states, in other words, that use of the model form is voluntary, not mandatory, for financial institutions.

We applaud the Agencies for repeatedly noting in the Proposal that use of the Model Form is strictly voluntary. For example, in a footnote to the Supplementary Information, the Agencies state that "[financial] institutions could continue to use other types of notices that vary from the model form so long as these notices comply with the privacy rule." Proposed § __.2(a) also states that "use of the model privacy form is not required." We agree with the Agencies' interpretation of the plain language of the statute, and we urge the Agencies to retain this concept in the final rule.

Creation of Safe Harbor

Section 503(e)(4) of the GLBA, as amended by the Regulatory Relief Act, states that "[a]ny financial institution that elects to provide the model form...shall be deemed to be in compliance with the [privacy policy] disclosures" required by the GLBA. This safe harbor can be a powerful incentive to financial institutions to use the Model Form. We are pleased that the Agencies have explicitly recognized the statutory safe harbor in the Proposal. In particular, § __.2(a) of the Proposal states that "[u]se of the model privacy form...constitutes compliance with the notice content requirements" of the GLBA privacy rules. We urge the Agencies to retain this concept in the final rule.

To avoid confusion regarding the scope of the safe harbor, however, we urge the Agencies to clarify that any financial institution that adopts the Model Form is permitted to use and disclose information in any manner permitted under the GLBA and the FCRA. In this regard, it must be recognized that any Model Form that is concise enough to satisfy the Agencies simplification objectives cannot precisely describe every type of information disclosure permitted under GLBA and FCRA. To address this issue, we urge the Agencies to clarify that the Model Form is sufficient disclosure to enable a financial institution to use and disclose information in accordance with the full range permitted under GLBA and FCRA. Financial institutions must be able to use the Model Form to comply with GLBA and FCRA without being exposed to liability under state law or other federal law, such as prohibitions against unfair or deceptive acts or practices.

Similarly, we urge the Agencies to permit appropriate modifications to the Model Form so that it may be used by as many financial institutions as possible. Under the Proposal, the Agencies have provided a safe harbor only if a financial institution adopts the Model Form without a single change in its format or content (other than very limited portions of the text in the Model Form). We do not believe that the statute requires such rigidity with respect to the Model Form. Moreover, there is longstanding precedent for allowing some flexibility when

using model consumer disclosures. For example, Federal Reserve Board Regulation Z permits certain types of changes to the open-end credit model forms and clauses, including the Schumer Box, without losing the safe harbor provided for in the Truth in Lending Act. *See* Regulation Z Commentary Appendixes G and H – Open-End and Closed-End Model Forms and Clauses ¶ 1; Regulation Z Commentary Appendix G – Open-End Model Forms and Clauses ¶ 5. We provide several examples below of circumstances in which it would be appropriate to allow financial institutions to modify the Model Form without losing the safe harbor.

Operational and Cost Issues

Length and Paper Format of Model Form

The Model Form is either two or three pages in length, depending on whether the financial institution's information practices involve disclosures from which the consumer may opt out. The Agencies state that the paper on which the Model Form is presented must be 8.5" x 11" and that the Model Form may be printed on only one side of each sheet of paper. We believe that these requirements create a significant impediment to widespread adoption of the Model Form. We believe that changes can be made to this requirement to create a Model Form that is usable for financial institutions without sacrificing the consumer benefits derived from simplification.

In an effort to efficiently comply with the GLBA requirements, financial institutions provide privacy policies in a variety of ways and in a variety of formats. For example, the format and delivery method used to provide a policy as part of the application process at the time the account is opened may be different than those used as part of the account opening materials or when delivering an annual notice. The proposed three-page 8.5" x 11" Model Form cannot readily be used in many of these contexts. For example, it would be unusual for credit card statements to be delivered in an envelope that could easily accommodate paper of that size, meaning that either the annual privacy notice must be sent separately or card issuers must revamp their account statement envelopes. The same is true for sending privacy policies with many of the applications and "welcome kits" that card issuers send consumers, many of which include the bank's privacy policy. Separately mailing the Model Form as drafted would create tens of millions of dollars of additional postage and printing costs for the financial services industry. For example, there are approximately 550 million general purpose credit card accounts in the United States. Even if only a slight majority of those accounts receive an annual notice, such as 350 million, it would cost card issuers $80.5 million in additional postage *each year* if they had to send the Model Form as a separate mailing instead of as a statement insert (assuming each issuer can qualify for a $0.23/piece rate). This does not include additional postage costs on card issuers alone in connection with mailing initial notices or revised notices. If separate mailings are not used, significant additional costs would still arise from modifying envelopes and additional postage (due to increased weight) and printing. We urge the Agencies to resolve these cost issues as part of a new proposal.

One of the main stumbling blocks to addressing these issues is the requirement that the three pages for the Model Form must be delivered "so that each page of the model form can be viewed simultaneously." If this requirement were eliminated, financial institutions could

continue to provide their privacy policies efficiently and effectively as part of booklets, binders, fold-outs, or similar products.[2]

Even more importantly, the Model Form should be shortened. It does not appear to be necessary to use three pages to succinctly convey information to consumers in a manner that is easy to understand. As noted above, the widely used food nutrition labels are a noteworthy example of how it is possible to achieve this goal without requiring unnecessarily long disclosures. Another excellent example is the Schumer Box, which has proven to be highly effective in communicating important information in a fraction of the length of the Model Form. A review of the Model Form highlights some options for shortening the document. For example, there is significant space that is not used in the Model Form and could be replaced with existing text, and the required type sizes could be reduced. We urge the Agencies to consider making the Model Form the equivalent of a page in length at most, and allowing financial institutions to use paper sizes and formats that will not require adjustments to existing delivery mechanisms, such as through use of tri-folds or statement inserts.

Even if the Agencies decline to shorten the Model Form to a single page, we believe that requiring the opt-out form to be on its own separate page is unnecessary. It appears that the Agencies have made the opt-out form a separate page because "[s]taff of certain of the Agencies issued [FAQs] stating that a consumer should be able to detach a mail-in opt-out form from a privacy notice without removing text from the privacy policy." Otherwise, according to staff, "the institution may violate section __.9(e) of the privacy rule which requires that a privacy policy must be provided in such a way that a customer can retain the text of the notices *or obtain them later*." (Emphasis added.) It would appear that a financial institution could include a "tear off" opt-out form as part of the first two pages of the Model Form without doing injury to the mandated disclosures. Regardless, by the plain language of the existing rule drafted by the Agencies, even if some of the text were removed, it would not necessarily result in a violation of the GLBA privacy rules regardless of any staff FAQ document to the contrary.[3] Therefore, we believe a financial institution should be permitted to include its opt-out form on the same page as a narrative portion of the Model Form. Such additional flexibility may result in more widespread use of the Model Form.

Electronic Delivery

The Proposal includes a Model Form that may be used only in paper format, although the Agencies "contemplate that institutions that post a pdf version of the [Model Form] may obtain a safe harbor." The Agencies request comment on whether they should develop an Internet-based design of a Model Form. MasterCard strongly urges the Agencies to do so. Some financial institutions may prefer to provide a link to a pdf copy of their privacy policies on the Internet. Others, however, may want to provide a privacy policy in html or other format, such as one that can be e-mailed to a consumer without the need to click on a link or open an attachment.[4] It may also be that financial institutions wishing to give consumers the opportunity to opt out of disclosures via the Internet may prefer to offer the opt-out opportunity

[2] We note that this issue becomes moot if the Model Form is reduced to a single page, as requested above.

[3] § __.9(e) of the GLBA privacy rules state that the notices must be provided "so that the customer can retain them or obtain them later in writing."

[4] We also note that the guidance referencing pdf formats may become dated as technology evolves.

in a relatively seamless manner. Asking the consumer to exit the pdf document and find the opt-out mechanism elsewhere, instead of simply checking a box in the web-based privacy policy itself, for example, may not be the best approach for a financial institution or consumers.

Inability for Diversified Financial Institutions to Use the Same Form

The Agencies appear to endorse the ability of a group of affiliated financial institutions to use the same privacy policy for all of their consumers. It is important for diversified financial institutions to use the same privacy policy if they so choose, and we believe the Agencies should allow this practice. The text of the Proposal as issued by several (but not all) of the Agencies, however, suggests that this option is available only to "financial holding company affiliates." Given the context, it does not appear that the Agencies intended to limit the flexibility in this manner and we request that the Agencies clarify that the same Model Form may be used by any "group of affiliates."

Even with this clarification, however, rigidity of the Proposal is likely to preclude many affiliates from using the same Model Form. All of the Agencies except for the SEC have proposed the same specific text to be used in the Model Form. The SEC has proposed similar, but different, text in several portions of its Model Form. All of these Agencies, including the SEC, have taken the position that *none* of the text in their respective Model Forms may be altered without losing the safe harbor. It would appear, therefore, that a financial institution regulated by the SEC and its bank affiliate would not be able to use the same privacy policy and expect to receive the benefits of the safe harbor. Such a result would discourage or even prevent use of the Model Form in some circumstances. We urge the Agencies to recognize that financial institutions should be able to use the text offered by one or more of the Agencies and still receive the benefit of the safe harbor. This problem may also be addressed by granting sufficient flexibility to enable financial institutions to modify the Model Form by using text that is better tailored to the financial institution's products and/or practices.

Accuracy of Model Form

The GLBA privacy rules require a financial institution's privacy policy to "accurately reflect its privacy policies and practices." The Agencies correctly note, however, that the "laws governing the disclosure of consumers' personal information are not easily translated into short, comprehensible phrases that are also legally precise." Indeed, any Model Form that is "succinct" enough to achieve the Agencies' simplification objectives and implement the intent of the Regulatory Relief Act is unlikely to embody the level of legal precision typically found in federally mandated financial disclosures. As discussed above, we request that the Agencies address this tension between simplicity and precision by clarifying that the safe harbor fully protects institutions against liability for using the Model Form and making it clear that a financial institution that uses the Model Form is permitted to use and disclose information in any manner permitted under the GLBA and the FCRA. In addition, we suggest a few modifications which would make the Model Form more legally precise and consumer friendly.

What Does the Bank "Do" with Information?

The GLBA privacy rules, and the GLBA itself, require only limited information in a privacy policy. For example, under the GLBA privacy rules, a financial institution must disclose the categories of nonpublic personal information ("NPI") it collects, the categories of NPI it discloses, and the categories of affiliates and nonaffiliated third parties to whom the financial institution discloses NPI. Neither the GLBA nor the GLBA privacy rules require a financial institution to disclose what a financial institution "does" with NPI.

We urge the Agencies to revise the Model Form so as not to imply that it informs consumers what a financial institution "does" in every respect with NPI. For example, the title at the top of each page is "What does [financial institution] do with your personal information?". The last sentence in the "Why?" box instructs the consumer to "read this notice carefully to understand what we do." Yet, the Model Form does not necessarily inform the consumer of what a financial institution "does" with NPI. It informs the consumer only of certain information collection and disclosure practices, as required in the GLBA privacy rules. We ask the Agencies to modify the Model Form as necessary so as not to expose a financial institution to potential liability resulting from any allegation that the Model Form does not, in fact, explain what such financial institution "does" with NPI despite the Model Form's title and supporting text. This could be done, for example, by eliminating the title of the document, or stating simply "[Financial institution's] Privacy Policy" and accurately describing the scope of the Model Form elsewhere in the document.

Disclosures under § __.13

The GLBA privacy rules require financial institutions to make a disclosure in their privacy policies to consumers if they may use service providers in a context not covered under § __.14 or § __.15 of the rules. In most circumstances, the use of service providers under § __.13 will be for marketing purposes. However, there may be other reasons to use a service provider other than for marketing purposes which would necessitate a disclosure under § __.13. The Model Form attempts to incorporate the § __.13 disclosures in two boxes, one for service providers and one for joint marketing. The description of the use of service providers is "[f]or our marketing purposes—to offer our products and services to you". This statement could be incomplete. For example, there are reasons to disclose information to service providers under § __.13 other than just for marketing purposes.

Affiliate Sharing: In General

Under the existing GLBA privacy rules, a financial institution must disclose the categories of NPI it discloses and the categories of affiliates to whom it discloses NPI. The Agencies also require financial institutions to include the affiliate sharing notice and opt out under the FCRA in every privacy policy if the financial institution relies on such notice and opt out for purposes of disclosing "consumer report" information among affiliates. Further, § 624 of the FCRA includes yet-to-be-implemented provisions pertaining to consumers' rights to limit the *use* of certain information by affiliates to generate solicitations.

Affiliate Sharing: The Model Form's Complexity Threatens Its Accuracy

As noted above, financial institutions must make a general disclosure about the categories of NPI they disclose and the categories of affiliates to whom they disclose such information. Except in limited circumstances under the FCRA, consumers do not have a right under federal law to opt out of these disclosures. Today, those financial institutions that make affiliate sharing disclosures in their GLBA privacy policies generally describe the categories of NPI disclosed to affiliates and the categories of affiliates which receive the NPI. Usually, the financial institution reserves the right to disclose all of the NPI to its affiliates, and then provides the consumer the opportunity to opt out of affiliate sharing for the information collected that is used to determine the consumer's eligibility for credit (or other FCRA purposes). Financial institutions tend to define this as "creditworthiness information" or something similar in their privacy policies.

We believe it would be appropriate for the Agencies to take a similar approach in the Model Form. It may be simpler for the relevant box in the chart to read "For our affiliates' use" *without attempting to categorize the information.* An affiliate that shares information among affiliates would print "yes" in the first column. Those who do not share consumer report information in a manner that triggers the FCRA opt-out right would be able to print "no" in the second column. Those who do share consumer report information in such a manner would print "Yes, but only creditworthiness information (Check your choices, p.3)". The opt-out form would explain what "creditworthiness" information is, *i.e.*, information collected for purposes of determining the consumer's eligibility for credit.

MasterCard respectfully suggests that this approach is more straightforward than that chosen in the Model Form. The Model Form describes disclosures to affiliates as disclosures "[f]or our affiliates' everyday business purposes" and then attempts to segregate the types of information into two categories, "information about your transactions and experiences" and "information about your creditworthiness." In fact, an affiliate will oftentimes use the information for purposes broader than those described in the Model Form as "everyday business purposes." Furthermore, the distinction between transaction/experience information and creditworthiness information may not be clear to the consumer as provided in the Model Form. For example, where would the consumer assume name and address would fall? What about late payment history? Our approach also has the benefit of condensing the chart by at least one row while likely being more comprehensible to the consumer.

Affiliate Sharing: Opting Out of Affiliate Marketing

The Agencies propose text to be used in connection with disclosures a financial institution may provide pursuant to Section 624 of the FCRA. MasterCard believes it is premature to propose how such disclosures should be given in the Model Form because regulations implementing Section 624 have not yet been issued. It is also difficult for us to provide comments without knowing what the regulatory requirements for Section 624 of the FCRA will be. We ask the Agencies to propose the Section 624 disclosure as part of their reissuance of the Model Form for comment, by which time the regulations implementing this provision should be issued.

Affiliate Sharing: Why Can't I Limit All Sharing?

We believe that the Agencies should conform this portion of the Model Form to the revised disclosure provided above. Specifically, the Model Form should state that consumers have the right to limit sharing for "affiliates' use—creditworthiness information". We also believe the reference to "affiliates to market to you" should be deleted for the same reasons we believe the Agencies should delay their proposal of a Section 624 affiliate marketing opt out.

Timeframe to Opt Out

Although we have more substantial comments below on the required disclosure stating that the financial institution "can begin sharing [the consumer's] information 30 days from the date of this letter," one such comment relating to accuracy is necessary here. A financial institution may begin disclosing information to anyone immediately under §§ __.13, __.14, and __.15 of the GLBA privacy rules. It need not wait any period of time for the consumer to submit an opt out. Furthermore, there is no waiting period at all in connection with the delivery of an annual notice, even if the information in question is subject to a notice and opt-out right. We believe the Model Form should be modified to avoid the inaccurate implication that a financial institution will not share information for 30 days or until the consumer opts out, whichever comes first. Rather, if this portion of the Model Form is retained (and we discuss below why the Agencies should delete it), it should state that "*with respect to the types of sharing you can limit, if this is the first privacy policy you have received in connection with this product* we can begin sharing your information...".

Affiliate Marketing Opt Out

The opt-out form gives the consumer the choice to direct the financial institution to "not allow your affiliates to use my personal information to market to me." As we discuss above, we ask the Agencies to repropose the affiliate marketing provisions when they repropose the Model Form. Regardless, we note that the disclosure implies that a consumer can prevent all affiliates from marketing to the consumer regardless of the origin of the information used to generate the solicitation. For example, a strict reading of the clause would prohibit a financial institution's affiliate from using the affiliate's own information to market to the consumer. We do not believe the Agencies intended to imply such a broad effect of the opt out to consumers. We urge the Agencies to rephrase this portion of the opt-out form to reflect the true scope of the opt out afforded to consumers under Section 624 of the FCRA.

Flexibility to Modify Model Form

In General

As we note above, the Agencies have made clear that a financial institution may not modify the Model Form without losing the safe harbor. We understand the need for the Agencies to provide some sort of standardization as part of a "model" to be used by industry. Furthermore, it is difficult to grant a safe harbor to a document if financial institutions are given too much flexibility to deviate from some established minimum standards. Having said this, we believe the Agencies could grant additional flexibility to financial institutions that would prefer to use the Model Form. As mentioned above, there is precedent for such flexibility in

Regulation Z, for example. We believe such flexibility would result in increased use of the Model Form and more precise disclosures provided to consumers. We also believe that financial institutions should be given the option of not including certain portions of the Model Form that are not required by the statute or the GLBA privacy rules.[5]

Varying Policies for Varying Products

The Model Form appears to be drafted for a financial institution that uses the same privacy policy for all of its financial products and services. While this may be the case for many financial institutions, other financial institutions may have a variety of GLBA privacy policies depending on the product or service offered. It is unclear how a financial institution with multiple privacy policies could use the Model Form without making modifications to it, as the financial institution does not appear to have the ability anywhere in the Model Form to specify the products to which the privacy policy applies. Therefore, such financial institutions may be discouraged from using the Model Form without the flexibility to specify the scope of the privacy policy while still receiving the benefits of the safe harbor.

Modifying the "What?" Box

MasterCard urges the Agencies to consider allowing a financial institution to make modest changes to the text in the "What?" box on page one to reflect more accurately the institution's practices. For example, a financial institution should be permitted to say that the types of personal information it collects and shares "may" depend on the financial product or service. In the alternative, a financial institution should be permitted to say that "The types of personal information we collect and share can include:" instead of the longer text in the Model Form as proposed.

We also believe a financial institution should be able to modify the examples of information collected and disclosed. For example, it may be that a financial institution collects *none* of the information described in the Model Form. Also, although a financial institution may collect the information described, it may not necessarily disclose such information.

A financial institution should be able to modify the last sentence in the box, as well. Many financial institutions restrict the disclosures of NPI for former customers to only those that are described in § __.14 and § __.15. Yet, the Model Form requires a financial institution to state that it will treat a former customer's NPI "according to our policies" (presumably according to the policies described in the Model Form), regardless of whether that is how the financial institution would treat the information.

Information Practices Not Described in the Model Form

We fear that financial institutions that use information practices other than those described by the Model Form will be discouraged from using the Model Form. The Model Form includes descriptions of relatively common information practices, but those descriptions do not cover other common types of information practices. However, the Agencies would not allow a financial institution to revise the Model Form to describe the financial institution's

[5] Deletion of such provisions may even be preferable in order to reduce the length of the Model Form.

practices without losing the safe harbor. We do not believe the safe harbor should be so dependent on the underlying information practices.

For example, a financial institution may ask for the consumer's consent to disclose information to a nonaffiliated third party. A financial institution may also condition the availability of a product or service on the consumer's consent for disclosures, such as could occur in the context of a cobrand or affinity credit card. Each of these practices is permissible, yet neither could be disclosed on the Model Form.

The Agencies would allow a financial institution to customize the Model Form, however, to offer opt outs "beyond those required under Federal law, so long as the additional information falls within the space constraints of the [Model Form]." It is not clear how a financial institution would be able to achieve this. For example, if a financial institution allowed for a consumer to opt out of the *use* of information by the financial institution for marketing its own products or services, it is not clear how it could modify the Model Form to make such a disclosure and still retain the safe harbor. This would be especially difficult since such a phrase does not readily fit into the chart describing disclosures and opt outs from such disclosures since there is, in fact, no sharing of information involved.

FCRA Disclosures Not Required under Current Law

The existing GLBA privacy rules require financial institutions to provide the affiliate sharing FCRA disclosures only if the institution is otherwise required to provide them. In other words, neither the GLBA, the GLBA privacy rules, nor the FCRA require a financial institution to provide FCRA affiliate sharing disclosures as part of the GLBA privacy notice if the financial institution is not sharing "consumer report" information among affiliates in a manner that would necessitate the disclosure. The Model Form, however, requires the FCRA affiliate sharing disclosure regardless of whether the financial institution must provide it for any other purpose.

We have proposed language above that would make this a moot issue. If the Agencies retain the existing approach, however, we ask the Agencies to allow financial institutions the ability to omit the FCRA affiliate sharing disclosure if they do not disclose "consumer report" information among affiliates in a manner that would necessitate the disclosure. As a practical matter, it will reduce the length of the Model Form and make it more appealing to those financial institutions that do not share such information among affiliates.

Contact Information

A financial institution that uses the Model Form must provide both a toll-free telephone number and an Internet web site address for use in contacting the financial institution. We do not believe that this information is required by the statute, nor is it specifically required by the GLBA privacy rules. Rather, the Agencies indicate that the provision was added in the Model Form "in response to consumers' preferences during testing." While financial institutions will often provide their customers with contact information in a variety of ways, we do not believe that the Agencies should mandate that such information be included in the Model Form. Indeed, to provide such information to the consumer on the front of the Model Form suggests

to the consumer that he or she may use that information to opt out of the information practices disclosed on the same page. This may not necessarily be the case, and could cause consumer confusion. This should be a provision that is optional, allowing financial institutions to provide the information if they desire to do so.

If the Agencies retain the mandatory nature of the contact information content, we ask the Agencies to clarify that the contact information can be that used for customer service or any other number a consumer can use to reach the financial institution. We also ask the Agencies to allow financial institutions that do not have toll-free customer service numbers (some financial institutions operate only locally, for example, and therefore have only local telephone numbers) to use another telephone number they make available for customer service purposes. We also ask the Agencies to require a web site only if the financial institution has one already available to its customers. In other words, a financial institution should not be required to create a toll-free number or a web site solely for purposes of using the Model Form.

The "How Often Does [Financial Institution] Notify Me About Their Practices?" Box

A financial institution must disclose that "[w]e must notify you about our sharing practices when you open an account and each year while you are a customer" as part of the Model Form. This statement is not required by the statute, nor the GLBA privacy rules, and therefore should be optional. Furthermore, we note that not all financial institutions have "account" relationships with customers—there may be another underlying relationship giving rise to the "customer relationship" as defined in the GLBA privacy rules. A financial institution should have the ability to tailor this sentence to have relevance to that relationship.

The "How Does [Financial Institution] Protect My Personal Information?" Box

The Model Form requires a statement that the financial institution's information security program "compl[ies] with federal law." Although the financial institution may aspire to compliance with these federal requirements, it is not the arbiter of whether it is, in fact, in compliance. It would not be appropriate to hold a financial institution liable for an inaccurate disclosure as part of the Model Form if the financial institution is not in compliance with the relevant information security requirements. For example, it does not seem appropriate to expose a financial institution to liability for an inaccurate GLBA privacy policy if the bank's report to its board regarding its information security program is a month late. Rather, the financial institution should be permitted to state only that its information security program is "reasonably designed to comply with federal law."

The "How Does [Financial Institution] Collect My Personal Information?" Box

Similar to our comments above, we ask that each financial institution have the flexibility to tailor the examples of situations in which it may collect NPI to those situations in which it actually does collect NPI. We also note that the disclosure states that the financial institution collects NPI from "others, such as credit bureaus, affiliates, or other companies." This statement may or may not be true. We ask that financial institutions be able to delete it or state that they "may" collect information in such a manner.

State Laws

As we discussed in our comment letter on the ANPR, state law variations on financial privacy make it very difficult to craft a simple, concise privacy policy that all financial institutions can use. This is true because there are several states that have different requirements than the federal law, meaning that consumers in different states will have different rights or information practices applicable to them. Financial institutions generally feel obligated to inform consumers in those states of any variations to their standard privacy policies in order to avoid allegations of providing such consumers inaccurate privacy policies or of acting in unfair or deceptive ways with respect to those consumers. It is challenging to convey these variations to consumers in a concise and meaningful way.

Many financial institutions may determine that they cannot use the Model Form because the Model Form does not give them the opportunity to explain state law variations. This means that financial institutions may explain state law variations only in a document that is separate from the Model Form. We do not believe that this is an attractive option to financial institutions seeking to avoid state law liability.[6] For example, it is not clear whether a financial institution that provides a "privacy addendum" as a separate document to the Model Form will still face lawsuits or enforcement actions in a state as a result of the Model Form providing inaccurate or incomplete descriptions of information practices for consumers in that state. The odds of class action lawsuits being filed to challenge this approach are relatively high, making it less likely that a financial institution will risk attempting such an approach.

To make the Model Form more attractive to financial institutions, we urge the Agencies to allow financial institutions to include state law variations in the Model Form itself. The Agencies should permit financial institutions the flexibility to craft such provisions themselves so they can be tailored to a specific financial institution. For example, an institution that does not share information among affiliates subject to notice and opt out under the FCRA may not include a Vermont provision, nor should it be required to discuss Vermont law on affiliate sharing.

Describing Affiliates

According to the Proposal, a "financial institution that shares with affiliates must use, as applicable, the following format: '*Our affiliates include companies with a [name of financial institution] name; financial companies such as [list companies]; and nonfinancial companies, such as [list companies].*'" We believe that the Agencies should provide the flexibility for financial institutions to make a disclosure that describes affiliates the financial institution may have in the future. For example, a financial institution that does not have any financial affiliates should still be permitted to disclose to consumers that it may make disclosures to financial affiliates even if they cannot name any at the time.

[6] We assume that financial institutions would not face criticism from federal regulators under federal law for not including state law variations in the Model Form because to do so is prohibited, even though the Model Form may not be accurate with respect to all consumers who receive it. If the Agencies retain this approach in the final rule, we ask the Agencies to clarify this specifically.

It is also not clear how a financial institution with only one affiliate or with a variety of affiliates, for example, would complete this portion of the Model Form. Because the Proposal states that a financial institution "must use, *as applicable*" the format provided (emphasis added), it appears there is some flexibility with respect to how the affiliates are described. Yet we believe more flexibility is necessary. For example, if Mars Bank has only one affiliate, Mars Finance Company, it appears that Mars Bank would need to state that "Our affiliates include companies with a Mars name; and financial companies such as Mars Finance Company." Such a disclosure suggests that Mars Bank has more than one affiliate. Conversely, a financial institution with several affiliates should be permitted to describe one or two types of affiliates without having to provide an unnecessarily long (and irrelevant) list. Indeed, perhaps the most equitable and simple solution is to delete this requirement in its entirety.

It is also not clear how a financial institution that has affiliates, but that does not disclose any information to such affiliates, should describe its affiliates in the Model Form. It would not be appropriate to require the financial institution to list such affiliates since neither the GLBA privacy rules nor the GLBA require such a disclosure. Furthermore, to require such a disclosure would suggest to the consumer that the financial institution *does* disclose information to such affiliates. We ask that financial institutions be permitted the flexibility to state that "[Financial institution] does not disclose the personal information described in this notice to affiliates."

Describing Nonaffiliates

For those financial institutions that disclose information other than "for everyday business purposes," the Agencies require a listing of the "categories" of nonaffiliates to which it discloses information, including in connection with joint marketing arrangements. The Proposal, however, includes "categories" that are very narrow relative to the categories provided in the existing GLBA Regulations. For this reason financial institutions may need to list five or six "categories" to have confidence that they have listed sufficient representative examples of nonaffiliates. Even greater numbers of examples could be necessary if the financial institution shares the Model Form with a variety of affiliates, each of whom disclose information to different types of affiliates. We ask the Agencies to omit the requirement to list a variety of nonaffiliates, or to allow a description of two or three types of nonaffiliates to be sufficient.

Timeframe for Opting Out

MasterCard believes that financial institutions should have the flexibility to delete the sentence on page 3 of the Model Form that states "[u]nless we hear from you, we can begin sharing your information 30 days from the date of this letter." Neither the statute nor the GLBA privacy rules require a financial institution to disclose the timeframe a consumer has for opting out. The Model Form should not require what neither the statute nor existing regulations require in terms of substantive disclosures. We also note that a financial institution may not date its correspondence, or the date on it may not reflect the date it was actually sent. Without such information, it is difficult to give the consumer any meaningful "start date" for the 30-day clock to begin.

If the Agencies retain a disclosure similar to the one provided with respect to a timeframe for opting out, we request that financial institutions have the ability to modify it. For example, Section __.10 of the GLBA privacy rules *explicitly avoids establishing a minimum timeframe for opting out.* The Agencies stated in the Supplementary Information to the GLBA privacy rules that they "believe the wide variety of suggestions [with respect to what constitutes a reasonable opportunity to opt out] underscores the appropriateness of a more general test that avoids setting a mandatory waiting period applicable in all cases." The Agencies also stated that "rather than try to anticipate every scenario and establish a time frame that would accommodate each, the Agencies think it is appropriate simply to state that the consumer must be given a reasonable opportunity to opt out." We agreed with the Agencies' analysis in the Supplementary Information to the GLBA privacy rules, and it is not clear why the Model Form does not appear to reflect this approach. In fact, the Model Form explicitly rejects the Agencies' earlier analysis by adopting a "one size fits all" time frame for every scenario. We are especially concerned with the Model Form's requirement to disclose that a consumer has 30 days to opt out because the GLBA privacy rules explicitly provide at least one scenario in which the Agencies state it is acceptable *not* to allow the consumer 30 days to opt out. If the Agencies retain the requirement to disclose the timeframe under which a consumer may opt out, we ask that financial institutions be given the flexibility to modify the 30-day time period to reflect their practices. In other words, the Model Form should not be a tool to modify those practices, but one to disclose the existing practices.

We also note that the Model Form states that the consumer can opt out within 30 days "of the date of this letter." In addition to the issue raised above regarding the date of the correspondence, a financial institution's delivery of the privacy policy may not be in the form of a letter. It may be part of a periodic statement or even sent by itself (in which case the institution simply could not reference a date, since the Agencies do not allow for it in the Model Form). If this disclosure is retained in the Model Form, a financial institution should have the flexibility to describe appropriately the manner in which the Model Form is being sent.

We also note that the Model Form states that the consumer "can contact us at any time to limit our sharing." This is accurate, so long as the consumer contacts the financial institution in a manner designated by the institution. Therefore, we ask that this phrase state that the consumer can "contact us any time *as described here* to limit our sharing." The financial institution should also be permitted to indicate that the consumer need not opt out a second time if they have opted out previously.

Joint Accounts

According to the GLBA privacy rules, a financial institution may permit each consumer in a joint account relationship to opt out separately so long as any one of the joint consumers may opt out on behalf of all the joint consumers. The Model Form does not reflect this option for financial institutions. Rather, the Model Form states that a consumer's "choices will apply to everyone on your account." We ask that the Agencies amend the Model Form to allow financial institutions utilize the flexibility they have under the GLBA privacy rules with respect to joint accounts. For example, a financial institution could state: "For joint accounts: Unless

you check this box, your choices will apply only to you and not to anyone else on your account."

Opt-Out Mechanisms

The third page of the Model Form is to be used by financial institutions that provide consumers an opt out with respect to certain information disclosures. The Model Form includes mechanisms by which financial institutions may disclose telephone, Internet, and mail opt-out mechanisms. The Agencies state that a financial institution need not provide all three mechanisms. We applaud the Agencies for recognizing that financial institutions may provide only one of the three opt-out mechanisms to comply with the GLBA privacy rules, and we urge the Agencies to retain this flexibility in the final rule.

We note, however, that the third page of the Model Form implies to the consumer that an opt out returned to a financial institution would be an opt out with respect to all relationships between the financial institution and the consumer. The opt-out request, for example, allows the consumer to state simply "[d]o not share my personal information with nonaffiliates to market their products and services to me." By its plain language it suggests that the consumer can opt out, and such opt out is at the institution level, not the account level. We ask that the Agencies give financial institutions the flexibility to indicate whether the opt-out relates to account-level information or institution-level information. To grant such flexibility, the Agencies would need to modify the description of the opt out as well as allow financial institutions the ability to describe how the opt out will be implemented.

The text of the Proposal grants financial institutions flexibility to modify the information requested from consumers in order to opt out. We believe this is appropriate, and we ask the Agencies to retain this approach in the final rule. We ask, however, that the Agencies clarify the flexibility they are granting to financial institutions. For example, some financial institutions may not require a consumer to provide more than a name and an account number or a name and a Social Security number ("SSN") to effectuate an opt out. The Model Form includes a request for the consumer to provide his or her address even though the address may not be necessary. We ask that financial institutions have the flexibility to modify not only the information requested, but whether to request certain information as part of the opt out.

The Agencies specifically request comment in connection with a financial institution's ability to request a SSN in connection with a consumer's desire to opt out. The Agencies ask whether "institutions need [SSNs and other personal information] in order to process opt-out requests, or would the customer's name and address alone, or the customer's name, address, and a truncated account number for a single account, be sufficient to process opt-out requests, including for customers with multiple accounts at the same institution." While the answer to this will vary by institution, it is likely that a financial institution will need a unique identifier for a consumer if they are to process an opt-out request across all accounts at the institution. This is true because the consumer may have multiple accounts using different names (*e.g.*, Tom J. Smith, Thomas Smith, and T. J. Smith could be three people or one person), different addresses (*e.g.*, home, work, vacation, school, P.O. Box), and different account numbers. The

SSN (or other unique identifier) would therefore be necessary in order to effectuate an opt out across multiple accounts for many institutions.[7]

Repeal of Existing Safe Harbor

Appendix A of the GLBA privacy rules includes sample clauses ("Sample Clauses") that financial institutions may use to comply with the requirement for a clear and conspicuous notice that meets the content requirements of the GLBA privacy rules.[8] The Agencies propose to eliminate the Sample Clauses as part of the Proposal.

MasterCard understands the Agencies' desire to encourage a standardized privacy policy. We are concerned, however, that for the reasons we discuss in this letter that the Model Form may not provide a viable alternative to many financial institutions. The result of its adoption without significant revision would, therefore, leave financial institutions without any language from which they can draw upon for compliance purposes. Our primary concern is that the Agencies amend the Model Form so as to make it useable for financial institutions. Nonetheless, even if appropriate changes are made to the Model Form, financial institutions must have a viable alternative to ensure the optional nature of the Model Form. Accordingly, we ask that the Agencies retain the Sample Clauses or a variation of them for use by financial institutions.

If the Agencies do not retain the Sample Clauses, it is critical for the Agencies to announce publicly that the Model Form is not a *de facto* requirement for financial institutions. We are concerned that, without such a statement, examiners and others may treat the Model Form as the standard for compliance with the GLBA Regulations. Not only would this be inconsistent with the Agencies' repeated statements that the Model Form is voluntary, but it would also contravene the law and the clear congressional intent that the Model Form be optional.

Miscellaneous

Reference to the FCRA

Part B.1. of Appendix A in the Proposal includes a bracketed note regarding the disclosure of "certain information" and obligations under the FCRA. It is not clear what this reference to the FCRA is intended to signal, other than a restatement of a law that is not implemented by the Proposal. We ask the Agencies to delete this reference, as it is unnecessary and redundant.

Logos and Color

According to the Supplementary Information, the "Agencies recognize that financial institutions have a strong interest in ensuring that documents they provide to the public have a distinctive look that may be readily recognized by consumers. Thus, a financial institution that uses the [Model Form] may include its corporate logo on any of the pages, so long as the logo

[7] SSNs also provide a useful backstop when consumers' handwriting is illegible.
[8] The SEC does not grant an automatic safe harbor in connection with the use of the Sample Clauses.

design does not interfere with the readability of the [Model Form] or space constraints of each page." We applaud the Agencies for allowing financial institutions the flexibility to customize the Model Form with their logos. We ask the Agencies to grant additional flexibility for a financial institution to include other marks or phrases, so long as they do not interfere with the Model Form. A financial institution may have not only a logo, but a slogan or similar branding mechanism that it would like to include on the Model Form. For example, using the Agencies' example of Mars Bank's privacy policy, if Mars Bank's commonly recognized slogan is "The World's Best Bank", then Mars Bank should be permitted to put its logo and that phrase on the Model Form.

The Proposal also indicates that a financial institution may include "spot color...to achieve visual interest." Again, we appreciate the Agencies' understanding that financial institutions may want to add color to the Model Form. It appears, however, that the Agencies intend to limit how that color can be used by permitting only "spot" color. We ask the Agencies to clarify their intent in a manner that allows financial institutions maximum options without detracting from the readability of the Model Form.

Highlighting Changes to the Policy

The Agencies request comment as to whether financial institutions "should be required to alert consumers to changes in an institution's privacy practices as part of the model form." We do not believe the Agencies should impose such a requirement in the final rule. Under the existing GLBA privacy rules, financial institutions are required to provide revised privacy policies only if they engage in disclosures of information to third parties that are not otherwise described in the existing privacy policy. The existing rules do not require financial institutions to highlight any changes. We do not believe the requirements of the Model Form should deviate significantly from the requirements of the GLBA privacy rules. To do so invites confusion among financial institutions, including with respect to the meaning of the existing regulations.

It is also unclear how, and in what circumstances, a financial institution could inform consumers of changes through the Model Form. As proposed, the Model Form could not be amended by financial institutions to highlight changes even if they wanted to use it to do so. To accommodate such a requirement, the Agencies would need to allow financial institutions to lengthen a document that is already probably too long in the eyes of many. Furthermore, would such highlights be necessary only if there were disclosures to *nonaffiliated third parties* as is currently required? To affiliates? In the case of changes to nonmandatory disclosures, such as those under Section 624 of the FCRA? If the financial institution changes its opt-out mechanism? If the Agencies were to impose such a requirement, guidance as to how to comply with it would be important for financial institutions acquiring portfolios, lines of business, or entire companies as well. MasterCard believes that a more workable solution would be if the Agencies allow, but not require, financial institutions to highlight changes in their privacy policies to consumers.

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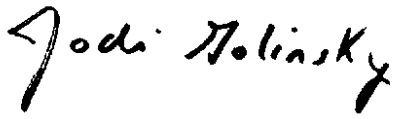
Once again, we appreciate the opportunity to comment on the Proposal. If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me at (914) 249-5978 or our counsels in connection with this matter, Michael F. McEneney of Sidley Austin LLP at (202) 736-8368, or Karl F. Kaufmann of Sidley Austin LLP at (202) 736-8133.

Sincerely,



Jodi Golinsky
Vice President &
Regulatory and Public Policy Counsel

cc: Michael F. McEneney, Esq.
Karl F. Kaufmann, Esq.