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30 May 2007

Federal Trade Commission
Office of the Secretary
Room 135 (Annex C)
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Jennifer J. Johnson, Secretary
Board of Governors of the Federal
Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Model Privacy Form
FTC File No. P034815
Federal Reserve Docket No. 1280

Ladies and Gentlemen:

We are writing to provide comments of the National Business Coalition on E-Commerce and Privacy (the "Coalition") regarding the Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act (the "Proposal;" the form contained in the Proposal is referred to herein as the "Model Form"), published on March 29, 2007, in the Federal Register by the Federal Trade Commission and several other agencies with jurisdiction over privacy notices under the Gramm-Leach-Bliley Act (collectively, the "Agencies").

The Coalition, founded seven years ago, is a diversified organization of 15 brand name U.S. companies (and an additional three industry associations) devoted to balanced domestic and international policy in electronic commerce and privacy. The Coalition believes strongly in providing consumers with sufficient information about how companies use and share customer information. Consumers should be able to easily identify information sharing practices and compare those practices among various companies. Our members spend significant time and resources to ensure that their privacy policies accurately and completely describe their policies and practices for using and sharing information. While the Coalition includes both financial and non-financial institutions, all of our members have an interest in any federal regulatory proposal that would affect a financial institution's dealings with non-financial (as well as financial) organizations and that would multiply the quantity of privacy notices that a customer receives, thus increasing the risk of customer confusion.

As the existing privacy notices of our members and many other large financial organizations demonstrate, information sharing polices and practices can and do vary. The current rules, including the Sample Clauses, have produced reasonably clear statements of the privacy philosophy and policies of particular companies. Regulatory alternatives, such as the Model Form, may also be useful, but such alternatives must be

workable for both consumers and businesses. That is, any alternative notice system not only must provide sufficient information to consumers and permit accurate descriptions of individual company practices but also must not be so burdensome and limiting as to be dysfunctional.

The Model Form was proposed pursuant to the Financial Services Regulatory Relief Act of 2006 (the "Act"). In enacting the statute, Congress observed that "[r]egulatory burdens imposed on the financial services industry have grown over time" and accordingly "[t]he purpose of this legislation is to lessen the regulatory burden."[1] Section 728 of the Act requires the Agencies to develop a model form to assist companies in providing privacy disclosures required by the Gramm-Leach-Bliley Act ("G-L-B Act").[2] According to section 728, the Model Form is to provide a safe harbor for those institutions that choose to use it, and it must be clear in design, provide for clear and conspicuous disclosures, enable comparisons of information sharing practices among financial institutions, and be succinct and easily readable.

We supported the enactment of the Act and welcome the availability of a safe harbor for providing privacy notices in a specified format. We appreciate the extensive work the Agencies have undertaken to develop the Model Form, and we applaud the agencies' effort to meet the statutory mandate in section 728 of the Regulatory Relief Act. We are concerned, however, that the Proposal appears at odds with the over-arching principle of regulatory burden relief, and that, embedded in the Proposal and Model Form, are a number of fundamental issues about privacy disclosures that we believe warrant general comment from the perspective of a coalition that includes several different organizations:

- Whether the voluntary nature of the Model Form is sufficiently clear, particularly in light of the rescission of the Sample Clauses.

- Whether the Model Form enables an institution to describe its privacy policy accurately or, put another way, whether the Model Form forces an institution to mischaracterize its particular privacy policy.

- Whether the array of format requirements are unduly burdensome.

- Whether a complex institution can develop and use a single, organization-wide disclosure notice.

Additionally, we are providing comments on the proposed rule covering the use of Social Security numbers in effecting opt-outs, and on web-based forms. As to other specific features of the Model Form, we believe particular institutions may be in a better position to offer comments.

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[1] S. Rep. No. 256, 109th Cong., 2d Sess. 1 (May 18, 2006).
[2] Pub. L. No. 109-351, 120 Stat. 1966 (2006).

Before turning to the content of the Proposal and the Model Form, we would like to take note of the process for finalizing the Model Form. The Proposal states that a second phase of consumer research, designed to test the effectiveness of the Model Form among a larger number of consumers, will occur after the Agencies have reviewed comments on the Model Form. We agree that this is an appropriate way of proceeding – that is, to receive a round of comments before further consumer research – and we would urge the Agencies to make the second phase of research public and to allow another round of comments before finalizing the Model Form.[3] We would also suggest that the Agencies involve financial institutions in the second-phase research.

Voluntary Nature of the Model Form

The Proposal advises that use of the Model Form is voluntary and observes, among other things, that "small financial institutions ... would be relatively more likely to rely on the [Model Form] than larger institutions." We agree that use of the Model Form should be entirely voluntary and with the Agencies' expectation that larger institutions are unlikely to use the Model Form. However, most current privacy policies and notices are built around the existing safe harbor – the Sample Clauses-- and the Agencies propose to rescind these Clauses from the safe harbor. Such a rescission is not required by section 728, nor does section 728 mandate that the safe harbor be limited to the Model Form. The proposed rescission would reduce regulatory flexibility. Nor is the justification for the rescission apparent, other than the Agencies' apparent wish to encourage (if not compel) use of the Model Form, a goal that we believe would increase regulatory burden. Accordingly, we recommend that the Agencies retain the Sample Clauses and clarify that use of the Model Form is wholly voluntary.

Accuracy and Flexibility of Privacy Policies

Several of the Requests for Comments in the Proposal (among them, A.1 - .3 and C.3) relate to the accuracy and flexibility of the Model Form relative to the actual privacy policies of financial institutions. The G-L-B Act permits financial institutions to develop different types of privacy policies, provided that opt-outs are offered when necessary, and financial institutions have taken advantage of this flexibility to develop robust privacy policies. The Model Form, however, does not recognize such innovation. The table on the first page of the Model Form requires any institution using the Model Form to take an all-or-nothing position on each of four categories information that might be shared. Moreover, the Model Form does not permit an institution to change the text, only to add additional opt-outs if they exist. Thus, to be eligible for the safe harbor, companies would be required to conform their existing information sharing practices to the particular characterizations stated on the Model Form. An institution with a privacy policy

[3] We are concerned about another statement in the Regulatory Flexibility Act discussion (VI.F.2) that suggests changes to the Model Form will be difficult "without compromising the research findings." Since the second phase of consumer research has not yet occurred, we assume the Agencies do not mean to pre-judge that second phase.

structured or described differently – but nevertheless entirely lawful under the G-L-B Act – would be ineligible for the safe harbor.

Thus, for example, a financial institution that has a single opt-out for both affiliate sharing and affiliate marketing – that is, a consumer who opts out of one also opts out of the other – would be unable to explain this policy within the confines of the Model Form. Another institution with a focused – rather than open-ended – strategy for sharing consumer information in order to market specific products would be shoe-horned into one or more of the "marketing" categories and would have no ability to explain its philosophy in the privacy notice. The Model Form also does not accommodate co-branded credit cards, which often have a limited opt-out relating to the disclosure of protected information solely to the co-brand partner. Further, page two of the Model Form is devoted to a kind of boilerplate, which, while not inaccurate, precludes a financial institution from explaining its own approach to privacy matters in greater detail.

The Model Form also does not give financial institutions the ability to tailor privacy policies to particular products. For example, many credit card issuers offer multiple financial products with varying privacy policies. An issuer may have one policy for its general purpose credit card products but different policies for each of its co-brand or private label products. The Model Form in its proposed, unvarying state will not be available to institutions with more than one policy.

Furthermore, the Model Form assumes legal conclusions about a number of issues that have been left open by the G-L-B Act or FCRA. For example, the Model Form uses the phrase "your personal information" throughout. This phrasing implies a legal conclusion about ownership of information. Neither the G-L-B Act nor the FCRA support that legal conclusion – and, indeed, each carefully avoided addressing this issue. The Sample Clauses, for example, refer to "information about you." We would, therefore, recommend that the Model Form replace the phrase "your personal information" with "information about you."

Various portions of the Model Form do not fully reflect current law or provide for practices that are allowed under current law. For example, the proposed language on pages 1 and 2 of the Model Form refers to limiting "sharing" with affiliates for marketing purposes. Section 624 of FCRA, however, does not limit the "sharing" of information with affiliates but rather the use of certain information by affiliates – in some cases – for marketing purposes. The proposed section 624 regulations would allow an institution to share transaction and experience data among affiliates with common customers without triggering an opt-out. The proposed section 624 regulations also would permit the sharing of customer names and addresses without limitation. The disclosure table on page 2 of the Model Form, however, does not recognize these nuances. The Model Form thus either would be inaccurate for some institutions or would force others to adopt all-or-nothing policies.

As another example, the reference on page 3 of the Model Form to a "30-day waiting period" before information sharing begins assumes that the currently pending

FACTA section 214 rules have been made final, that this provision carries over to "affiliate sharing" under FCRA even though there is no statutory basis for such a carryover, and that an institution cannot share before the expiration of any waiting period even despite a consumer's consent to do so. Additionally, the distinction that the Model Form draws between "information about your creditworthiness" and "transaction and experience" information is one that a lawyer technically trained in privacy law can understand, but it is not a distinction easily grasped on the basis of the Model Form itself. Moreover, the required discussion of "sharing practices" on page 2 of the Model Form is unduly harsh; institutions that do not engage in some of these practices nevertheless would be required to include them in their privacy notices.[4]

We would observe as well that the Model Form makes no provision for opt-outs under the FCRA. We believe silence in this area is appropriate at the moment, since the FCRA opt-out rules have not been finalized. When these rules are finalized, however, we believe that these requirements should be included in the Model Form, and we would urge the Agencies to show flexibility in this area.

The Model Form also makes no provision for privacy disclosures required by state law. This omission is of special concern to our financial services members, many of which are also subject principally to state law (which often includes specific California and Vermont disclosures). In particular, our insurance company members are primarily subject to state law requirements. As the Proposal now stands, any institution required to make certain state-law privacy disclosures will have to do so in a separate privacy notice – given the insistence in the Proposal that the Model Form is a stand-alone, essentially unalterable document and the fact that the brief reference in the Model Form to state law typically would be inadequate to comply with state law. An institution's delivery to a consumer of two privacy notices, the Model Form and a state-law document, is unlikely to assist the consumer in understanding his or her privacy rights and is more likely to engender confusion. We would urge that the Model Form be made more flexible to allow for state law disclosures as well.

Further, in terms of content, the Model Form does not allow an institution to inform consumers that they do not need to restate privacy preferences every year. Under current law, a consumer need restate only if he or she is changing his or her privacy preferences. The Model Form implies that annual restatement is necessary, which is likely to lead to unnecessary administrative expense for financial institutions.

Accordingly, while we have no objection to the Model Form as one alternative to privacy policy disclosures, we would urge the Agencies not to make the Model Form an all-or-nothing proposition. Section 728 does not require the Model Form to be the exclusive safe harbor, and the notion of exclusivity set forth in the Proposal is contrary to the principles of regulatory relief and flexibility that underlie section 728 and the

[4] A further note on the disclosure table on page 2: the first row does not appear to be necessary as it is redundant of the description in the "How?" box.

Regulatory Relief Act. We would urge the Agencies to preserve the Sample Clauses in the current privacy regulations, which provide the basis for many privacy notices.

Format

In response to the Requests for Comments in section B of the Proposal, we recognize that whatever form the disclosures take, they should be provided in a readable and usable format.

First, we are very concerned that the Model Form would require at a minimum two sheets of 8.5x11 inch paper, and, in circumstances where an opt-out is provided, a total of three pages. Such a requirement is at odds with the very purpose of the authorizing legislation – to relieve regulatory burden and costs. The proposed two-sheet requirement also obviously increases the use, and cost, of paper and would thereby prevent financial institutions from engaging in more environmentally-friendly practices, such as electronic delivery of notices. We also believe it is incorrect to suppose, as does the Proposal, that three separate pages are necessary to ensure simultaneous viewing; such a requirement would put in question other lawful consumer disclosures that are printed in book or pamphlet form. The same information could be legibly displayed on a single sheet with more flexible dimensions, retain the side-by-side aspect which the Agencies favor, and at the same time provide other information which the customers of our members value on the reverse side with no increase in paper, printing, stuffing and postage costs over present levels.

Second, the additional costs for paper, printing, stuffing, and postage for a separate, three-page, 8.5x11 inch notice would, our members believe, increase the total cost of annual privacy notices fivefold.[5] Most annual privacy disclosures are sent with periodic statements, and many of these processes use envelopes less than 8.5 inches wide. In these cases, a separate mailing would be necessary for the Model Form.[6] Even where an institution's current practices can accommodate 8.5x11 inch sheets, costs will increase substantially. For many large institutions with tens of millions of customers, the Model Form would likely create additional costs in the hundreds of millions of dollars for additional paper and postage. Currently, most privacy notices are single sheets, printed on both sides. Many of the notices contain information that goes beyond the required G-L-B Act and FCRA disclosures and opt-outs, including information about opting out of pre-screened offers, the Direct Marketing Association mail preference service, solicitation preferences, and the notice of furnishing negative information to credit reporting agencies required by section 217 of the Fair and Accurate Credit Transactions Act of 2003. Some institutions also use the annual notice as a mechanism to provide tips on identity theft prevention, a significant concern of many consumers. Our members

[5] The Regulatory Flexibility Act discussion in the preamble to the Proposal argues that the costs associated with the Model Form are small and incremental. We believe that this suggestion is incorrect, and the logistical costs would be significant.

[6] We would note that the physical sizing issue may present a serious concern for both large and small institutions, if they use smaller envelopes for regular mailings. This may well cause the Proposal to be a significant regulatory action within the meaning of Executive Order 12866.

believe this additional information is valuable to customers – and is required in the case of section 217 – and will want to continue to provide the information. Allowing financial institutions to include this additional information in the Model Form will not only reduce unnecessary mailing and production costs for financial institutions, but also provide customers with more information to safeguard their privacy rights in one convenient document. The proposed Model Form, however, will require three additional sheets of paper.[7]

Further, the duty to provide an additional two or three sheets of paper to a customer will prove especially cumbersome for point-of-sale deliveries. Privacy notices for private label or co-branded credit cards and for stored value cards are often delivered at the point of sale by a store clerk or by inclusion in a package sold on a "J hook" or through a kiosk. To accommodate these circumstances, private notices currently are printed on a card application or inserted in the retail packages. The Proposal precludes inclusion of the notice on an application, and the two- or three-page requirement makes it impractical to insert the Model Form in a retail package. Accordingly, as currently proposed, the Model Form will not be a realistic alternative for many private label or co-branded cards or for stored value cards.

The Proposal sets forth specific requirements for type font and size. These requirements are too limiting and do not enable financial institutions to make the best use of the space available for the required information. The requirement for a minimum font size is not required by statute. Indeed, the statutory requirement is for a "clear and conspicuous" disclosure, the same legal standard that is used in other federal disclosure laws, which have operated successfully for decades without a minimum font requirement. We believe the Agencies may wish to recommend a particular font size, but a fixed requirement is not supported by the G-L-B Act or the FCRA.

We also are concerned that the Proposal forbids the Model Form from being incorporated in other documents. Such incorporation is often convenient for both customers and institutions, and many other consumer disclosures of at least equal importance are incorporated in a similar manner. As previously mentioned, many financial institutions send annual notices with a billing statement or other mailings to ensure the consumers receive the notice and to reduce unnecessary costs. There are also instances where attaching privacy notices to a contract or other document ensures that policies are provided and disclosed to the consumer when a relationship is established. Attaching notices to a contract or other documents also ensures it does not become lost or separated and ensures that the consumer retains the notice. Neither the G-L-B Act nor the FCRA requires a fully physically separate notice, and we would recommend that the Agencies allow institutions to incorporate the Model Form in other documents.

[7] We also note that the prescribed blocks of black or dark shading in the Model Form create problems in high-speed printing and stuffing operations because they may not dry completely, resulting in pages sticking together or smearing.

Finally, there is not sufficient flexibility for a financial institution to incorporate the company logo onto the form or use company colors. Financial institutions understand the importance of consumers recognizing the company's brand, and to essentially prohibit the use of that brand on privacy notices fails to recognize the premium that these companies place on the integrity of their privacy policies. In fact, as the proposal notes, one of the main goals of the Model Form is to ensure that consumers can easily compare the information sharing practices of various entities – this would certainly be made easier if companies are given sufficient ability to display their logo and other branding elements on the privacy form.

Securities Affiliates

As the Proposal itself recognizes, the Model Form for an SEC-regulated entity is not identical to the Model Form for other financial institutions. The inflexibility of the Model Form means that a financial institution with a securities affiliate will be unable to use a single form. (Request for Comment C.6.) Several of our member companies have securities affiliates and will encounter this problem. The notion that an institution with a securities affiliate must develop a second privacy notice to be sent to its customers – many of whom also are customers of other affiliates and thus would receive two substantially similar notices – will place greater costs and burdens on the financial institution, as up to six full pages would be required for the privacy notices. Additionally, a customer would not expect and may easily be confused by receiving two Model Forms from the same organization. We would urge the Agencies to make clear that complex financial institutions may use either the Model Form or the SEC Model Form, although the institutions would still be subject to significant costs for the three-page notice.

Social Security Numbers

The Proposal requests comment on the use of SSNs in managing opt-outs. (Request for Comment C.7.) As the Agencies are aware, a Social Security number ("SSN") is the only unique identifier that accompanies an individual throughout his or her life. Names, addresses, and telephone numbers change, often frequently, but the SSN remains the same and is thus often the most effective identifier of a particular individual. For this reason, the SSN is a significant component in ensuring the correct identity of an individual who is seeking an opt-out under an institution's privacy policy. Name and address alone may not be sufficient to identify the person seeking the opt-out, and thus the institution may face potential liability for not removing the correct individual from the relevant lists. The SSN is also particularly important as an identifier where a customer may have multiple accounts at the same institution. We support the continued ability to include all or part of an individual's SSN as part of the opt-out process if there is no other matching ability.

Web Model Forms

With respect to Request for Comment C.4, privacy policies and information sharing practices are readily available on financial institutions' web sites and are an important resource for consumers. The value of the web-based privacy policy is that consumers can have all the relevant information in front of them without inundating them with paper and without imposing significant costs on businesses. The use of an electronic version of the Model Form that could be provided to customers via email (as many customers prefer electronic statements) would be useful, subject to the principles state previously about the need for flexibility in describing information sharing practices. However, we strongly believe that financial institutions should be able to provide their full privacy policy and information sharing practices on their web sites without further limitation or mandates as are contained in the Model Form.

Conclusion

We strongly support the principle of a safe harbor for use of a particular form for explaining privacy policies. However, such a form must enable financial institutions to accurately and completely disclose their information sharing practices, rather than limiting the institutions to inflexible choices that do not accurately reflect their actual practices. The form should be usable by consumers, but must balance usability with the costs to business of providing numerous sheets of paper. Additionally, any form should enable the institutions to appropriately use their brand and logo, so that consumers comparing information sharing practices can be clear about which company has which practices.

Financial institutions face a potentially costly choice under the proposed Model Form. Those that choose to use the Model Form and thus obtain the safe harbor may need to change their information sharing practices to reflect the limited options on the Model Form. The burden of making such a change, coupled with the cost of providing so many sheets of paper per customer, may drive companies away from the safe harbor. Those that choose not to use the Model Form are not covered by the safe harbor, and therefore face increased potential liability.

If you have any questions regarding the foregoing, I may be reached at 202-756-3372 or by email at tom.boyd@alston.com.

Sincerely,

Thomas M. Boyd/DG

Thomas M. Boyd