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May 25, 2007

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Re: **OCC** Docket No. 2007-0003; **FRB** Docket No. R-1280; **FDIC** RIN 3064-AD16; **OTS** Docket No. 2007-0005; **FTC** Project No. 034815; **SEC** File No. S7-09-07 Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act; 72 Federal Register 14940; March 29, 2007

Ladies and Gentlemen:

The Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Federal Trade Commission, the Securities and Exchange Commission, and the (the Agencies) have proposed a Model Privacy Form (Model Form) for use in disclosing and explaining financial institutions' information sharing practices to customers. Proposal of the Model Form is required under section 728 of the Financial Services Regulatory Relief Act of 2006 (FSRRA).

The American Bankers Association (ABA) appreciates the opportunity to comment on behalf of the more than two million men and women who work in the nation's banks. ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership-- which includes community, regional, and money center banks and holding

companies, as well as savings associations, trust companies, savings banks, and bankers banks-- makes ABA the largest banking trade association in the country.

Summary of Comments

ABA and its members support promoting informed customer choice through effective disclosure. As Federal Reserve Board Chairman Bernanke has observed in the lending context, “If consumers are well informed, they are in a much better position to make decisions in their own best interest.” This aphorism is no less applicable in the context of information sharing practices and choices. The Agencies’ efforts to make Gramm-Leach-Bliley Act (GLBA) privacy notices clear, comprehensible and comparable are to be applauded. ABA’s comments are offered in the spirit of advancing those objectives.

In the comments to follow, we sound four major themes: first, clearly informed customers should not be achieved at the expense of “well informed” customers. Simplification of language that fails to communicate practices and choices accurately may lead to ill-informed decisions and the disappointment of unfounded expectations. In the past, strict adherence to inflexible language to achieve coveted safe harbor status has been the path to boilerplate, not consumer friendly disclosure. **Greater flexibility and accuracy will promote better customer understanding.**

Second, as Julie Williams, Chief Counsel of the Office of the Comptroller of the Currency (OCC) has noted, the elegance of simplified customer notices resides in the win-win situation of better informed consumers and less compliance burden. Just as the information elements of the Model Form fall short, the excessive costs of meeting format requirements of the current proposal do not fulfill the mandate implicit in regulatory relief. **Compliance costs must be reduced** or adoption of the Model Form will be undermined.

Third, the attractiveness of a simplified notice that abstracts from the nuances of the underlying privacy policy of an institution is dependent on the scope of the safe harbor. As currently proposed the safe harbor is narrower than the legal rights and duties it is meant to cover and therefore provides insufficient protections. **The safe harbor should be expanded.**

Fourth, research and testing involving actual customers is as welcome as it is essential to this rule-making process. However, this approach must accommodate the testing of alternatives and the exploration of competing hypotheses to demonstrate the true effectiveness of any proposed model. This is an unfinished aspect of the Agencies’ project. **Broader quantitative testing is still needed.**

ABA supports the concept of a summary table as the “heart” of a model privacy form. We believe, however, that the remainder of the Model Form should allow more flexibility in the content of the notice so that it effectively communicates each financial institution’s privacy policies as well as other relevant customer education information. Finally, ABA underscores that use of the FSRRA Model Form is a voluntary choice and therefore other privacy notice compliance options should not be disadvantaged by the Model Form.

Discussion

The FSRRA mandates creation of a voluntary model form for GLBA Section 503 disclosures that is comprehensible and clear, enables comparison of practices and is succinct. This is a significant challenge given the diversity of information sharing practices in the financial services industry. In developing a workable model notice, there must be balance between the benefits of simplification and the costs of inadequate or inaccurate information. ABA believes this can be struck and a useful model devised if four fundamental rules are followed.

Greater flexibility and accuracy will promote better customer understanding.

Dictating a single colloquial description of information sharing practices cannot capture the variability of many underlying arrangements. Instead it may obscure or gloss over differences valuable to customers. As proposed the Model Form severely restricts the provision of information that more faithfully describes privacy policies¹ – a founding purpose of GLBA. Flexibility is warranted for the following reasons:

- ✓ State law privacy requirements can have several different impacts on a privacy notice.² They can alter choices for some customers; but they can also simply require that additional information be conveyed to customers. Latitude to cover this second category of disclosures is not included in the proposed Model Form instructions.
- ✓ As currently written, the Model Form’s language on page 3, relating to opt-outs under “check your choices,” states that “your choice will apply to everyone on your account.” This language will result in automatically requiring financial institutions to opt out all joint account holders when only one has indicated this preference. In contrast, most financial institutions maintain opt-outs on a per customer, not per account, basis. Thus, requiring all joint account holders to be opted out at the request of a single account holder poses serious potential problems.³ ABA therefore recommends that the Agencies eliminate this requirement so that the resulting model form will allow financial institutions to allow joint account holders the flexibility to opt out on their own accord, and not be subject to the preferences of another customer. However, it is important in so doing that the Agencies also not penalize those institutions that do provide opt-outs on a per account basis.
- ✓ Customers find value in receiving in one combined notice information related to privacy and information security. Several ABA members have conducted focus groups that show

¹ “Institutions would not be able to vary content or format, other than as described in this proposal, to take advantage of the safe harbor. Moreover, institutions would not be able to include any other information in the proposed model form nor incorporate this model form into any other document.” 72 Fed. Reg. at 14944.

² In a recent open poll conducted on ABA’s Center for Regulatory Compliance website, more than 50% of respondents from banks larger than \$2 billion in assets said their current notices reference state law privacy requirements. States most often mentioned as imposing requirements at variance with, or in supplementation to, federal privacy rules are California, Vermont and Nevada.

³ For instance, if customer A had joint accounts with customers B and C, and B holds joint accounts with D, and C holds a joint account with E and F, the Model Form’s language would seemingly require all these individuals to be opted out at only the request of customer A. Assuming that financial institutions can affect this scheme, the potential for customers B through F to have complaints when they are automatically opted out at the behest of customer A is fairly obvious.

that customers favor having information on ID Theft and Do Not Call list registration included in their bank's privacy notice. Since the focus groups conducted by the Agencies took place, information security has become an increasingly visible concern among the public. In many cases, bank notices have evolved to describe better their information security practices to give greater assurance to customers about the precautions taken to protect the confidentiality of information maintained by their bank. Describing these practices and related subjects that improve consumer understanding of how better to protect their sensitive information should be allowed in the model.

- ✓ Tailoring the model to address differences in the functionally regulated obligations of affiliated companies should be permitted. Notably, under the SEC's rule, the language within the "what" box of page one and the "sharing practices" box three on page two of the Model Form differs slightly from that used by the other agencies. If banks cannot deviate from the language provided in their model form sections,⁴ the result would be that SEC regulated entities in an affiliated group would be required to provide notices conforming to their separate Model Form, thus preventing all companies in an affiliated group from utilizing the same Model Form. ABA therefore suggests that the final Model Form provide that the SEC language may be used not only for entities regulated by the SEC, but also in any combined form provided by an affiliated group, assuming at least one of the affiliates is regulated by the SEC.
- ✓ Some manner of uniquely identifying customers is necessary, and allowing financial institutions to identify customers via Social Security numbers is a reliable way of accomplishing this function. ABA believes that the best way to effectively implement opt out elections and manage information security in that process is to allow financial institutions the flexibility to develop their own individual efficiencies, and not prescriptively limit alternative methods by use of the Model Form.
- ✓ Our members have expressed the desire to develop their own web-based design for distribution of privacy notices. We believe the Agencies should refrain from entering into development of web-based designs, especially in light of the potential for conflict with numerous state laws. Nevertheless, it is important that the Agencies provide recognition that delivery of the Model Form may be accomplished online, and the Proposed Rule should explicitly make mention of this possibility.

Accuracy of language is important to avoid confusion or misunderstanding. Simplification should not excuse miscommunication.

- ✓ "Everyday business purposes" is used in several different places in the Model Form attached to several different information sharing descriptions. The phrase is applied to describe information needed "to process transactions, maintain accounts, and report to credit bureaus;" "information about your transactions and experiences;" and "information about your creditworthiness." In the definition, "auditing services" and "responding to court orders and legal investigations" are added as everyday purposes. ABA is concerned (1) that customers not be confused by the variable usage; and (2) that the scope of GLBA permissible sharing not be misrepresented by omitting allowable practices such as reporting to the government. This could be addressed by changing the definition "everyday business purposes" to include "other exceptions as provided by law."

⁴ 72 Fed. Reg. at 14952, n. 26, and 14953, n. 33.

- ✓ The 30 day response time before sharing commences contained in the opt out form⁵ has no legal basis and is infeasible for several reasons: most problematic is the creation of a new 30-day period of non-sharing with each time a notice is sent. Assuming this model notice would be provided on *at least* an annual basis, the result would be a new 30-day period of sharing prohibition at a minimum of once a year. Additionally, “date of the letter” is problematic since nowhere in the Model Form is there a date, or even authority to modify the content of the form by adding a date. This sentence is unworkable, unwarranted and should be removed.
- ✓ In the Model Form’s description of how information is collected, “pay your bills or apply for a loan” are lumped together in the same bullet although they represent different types of information for sharing purposes. This represents a missed opportunity to help make the distinction about information that gets differing treatment under the Fair Credit Reporting Act (FCRA).
- ✓ Readers are presented with different definitions of the term “affiliates” within the Model Form. As used on page two of the Model Form, it is not a list of companies that provide the Model Form – a usage implied by the common usage of the term and as defined in Section 509 of GLBA – but instead represents what is meant by the term “affiliates” as used in page one’s disclosure box. Furthermore, the Model Form’s use of “our affiliates” and “your affiliates” is confusing, particularly since “our” and “your” already refers to all affiliates. This inconsistency should be remedied so that customers are given a clearer definition as to what “affiliates” truly refers.
- ✓ Reference in the Model Form’s table to FCRA Section 624 affiliate marketing as a prohibition on sharing rather than on use is not strictly accurate. Care should be taken that this inaccuracy not mislead customers in any material way.
- ✓ We are concerned that distinctions between “transaction and experience information” and “information on creditworthiness” are not readily comprehended. Given that these terms distinguish very different sharing rights, the Model Form should ensure these terms are clarified.

Ultimately, ABA believes that implementing flexibility and correcting inaccuracies will improve clarity, comprehension or comparability; and will make the model itself more attractive to banks and their affiliates while better informing customers of the true scope of information sharing practices and choices.

Compliance costs must be reduced.

In testimony on regulatory burden relief in September 2005, OCC Chief Counsel Julie Williams predicted that the privacy notice simplification project had “the potential to be a win-win for consumers and financial institutions – more effective and meaningful disclosures for consumers, and reduced burden on institutions that produce and distribute privacy notices.” A year later, Congress passed FSRRA including Section 728 mandating the proposal of a model privacy notice, implicitly endorsing Ms. Williams view that simplified privacy notices would yield burden reduction for banks.

⁵ “Unless we hear from you, we can begin sharing your information 30 days from the date of this letter.” See 72 Fed. Reg. at 14948.

Unfortunately, this premise and this promise have been frustrated by the Model Form’s proposal to require printing of the notice on 8½ X 11 inch paper, single-sided, one page per sheet. These requirements, along with the extensive formatting standards, are expected to cause banks to incur three to ten times the current costs for printing and postage.

- ✓ Maintaining the separate page requirement of the Model Form would result in *significant* costs to the industry.⁶ Our members estimate that these costs would include cost of paper, extra postage, materials, and mechanical changes necessitated by increased paper size, extra pages, and folding. Additionally, it is highly likely that the postage cost increase may be higher than anticipated since the Model Form is likely to result in the need for separate mailings.⁷ This requirement would result in many financial institutions having to provide four times as many pages of disclosure than currently used, as well as separate mailings and postage costs in order to achieve the same compliance they presently enjoy at much reduced costs.
- ✓ The Model Form’s requirement that it be delivered separately and not as an insert or enclosure in other compliance materials will increase compliance costs. Assuming that a financial institution has 100 million customers, the Model Form’s requirement would result in postal cost increases of approximately \$30 million, not including materials. Furthermore, additional procedures and staff to monitor delivery of these separate disclosures would be necessary at acquisition points, as well as for all annual mailings.
- ✓ A financial institution with a nationwide presence currently may be expected to spend approximately \$600,000 on combined production and postage to distribute their privacy disclosures. However, if they were to elect to use the Model Form, these costs would increase exponentially to an estimated \$4.5 million, not including the costs associated with technology expenses to reprogram systems.

Far from being a means of burden reduction, the Proposed Rule will increase industry costs by tens of millions of dollars or more – all for an annual notice that more often than not does not change from year to year. This is reason alone, say many ABA members, to cause financial institutions not to adopt the model despite the safe harbor.

⁶ ABA believes that this requirement is unduly burdensome and unnecessary, especially since the Agencies themselves stated “*page one alone was adequate for comprehension and usability*” (emphasis added). Given that the original GLBA rules from June 2000 state that “the Agencies believe that in most cases the initial and annual disclosure requirements can be satisfied by disclosures contained in a tri-fold brochure,”⁶ ABA does not see the utility in this requirement when no concrete indicia exist showing that the Model Form format will increase consumer understanding, nor that it is essential to meet the standard of Section 728 of FSRRA.

⁷ The Model Form states that it cannot be incorporated into any other document. See 72 Fed. Reg. at 14944. However, it is not clear whether this means that inclusion of the Model Form in the same envelope as a customer statement is prohibited, since this could be interpreted as “incorporating” into another document.

The safe harbor should be expanded.

As proposed the safe harbor is limited to Sections _____.6 and _____.7 of the GLBA privacy rules. This is an inadequate safe harbor for the following reasons. First, the Model Form itself purports to cover information sharing practices and choices governed by the FCRA, but the safe harbor provision does not specify inclusion of those sections in the accompanying rules. This is particularly troublesome, since some of the more complex practices covered by the Model Form relate to affiliate sharing, the opt out from such sharing, and the distinctions between transaction and experience information and other information relevant to understanding the effect of one's choice. Thus, the safe harbor provisions of the Model Form should specifically enumerate FCRA Sections 603(d)(2) and 624.

Second, to the extent that the Model Form leaves any misimpression about what information will or will not be shared within or outside the GLBA exceptions, the safe harbor must protect banks from private causes of action that could claim the Model Form was deceptive by act or omission. This can be done two ways: (1) explicitly stating the Model Form enables all sharing within the GLBA exceptions without regard to their being explicitly mentioned in the Model Form; and (2) stating that no cause of action under state unfair or deceptive acts or practices (UDAP) or related laws may be pursued based on the statements made or omitted from the Model Form.

As important as the safe harbor is in fulfilling the purpose of the Model Form, FSRRA Section 728 intends that the Model Form be a voluntary option only. Accordingly, the existing sample clauses contained in the GLBA privacy rules should remain available to financial institutions as examples of compliant notice content. As noted elsewhere, the Model Form may not be an appropriate or preferred option for many banks seeking to tailor their notices to capture their diverse and detailed practices.⁸ Consequently, these institutions will want to continue to rely on the sample clauses as acceptable components for crafting their notices and achieving regulatory compliance. ABA urges the Agencies to keep the sample clauses in the privacy rules.

Quantitative testing is still to be done.

As the supplementary information accompanying the proposed Model Form states, a second phase of testing “designed as quantitative testing, to test the effectiveness of the alternative privacy notice . . . among a larger group of consumers” is still expected to be conducted after receipt of comments in response to the proposal. ABA supports this commitment and believes that such a course is necessary to verify that the ultimate model or models demonstrates an acceptable level of comprehension and that any trade-offs between simplification and accuracy are transparent.

We cannot shy away from the time this process will take. As OCC Chief Counsel Julie Williams has said, “We need to be patient, and we need to be willing to invest both the time and the

⁸ Continuation of the current sample clauses is particularly important to those financial institutions engaged in insurance-related activities, especially since state insurance regulators will likely require substantial time to revise their privacy forms in order to bring them into concert with the Agencies' Model Form. Section 504(a)(1) of GLBA requires the Agencies to consult “as appropriate” with state insurance authority representatives when developing the privacy rules. In order to ensure as much uniformity and comprehensiveness as possible, ABA recommends that the Agencies consult with state insurance authority representatives regarding the Model Form.

resources required to conduct the type of testing essential to design of effective disclosure materials.”

Before embarking on such testing, however, ABA urges the Agencies to share a draft of testing specifications so that public comment can be received about whether it captures appropriate indicia of “effectiveness.” In addition to testing customer comprehension of terms and options, other areas of interest include:

- ✓ Whether the premise is accurate that people will retain the notice to compare against policies of different institutions?
- ✓ Do customers indeed prefer delivery of their notices on 8 ½ x 11” paper?
- ✓ Is the one page per sheet requirement truly beneficial to customer comprehension and retention?
- ✓ Does requiring delivery of the privacy notice to customers via separate delivery truly outweigh the excess compliance costs incurred by the industry, or can financial institutions continue to include such notices with other documents?

Additionally, ABA asks that the Agencies also share the final version of testing specifications so that those inclined to replicate the testing against the proposed Model Form or alternative models may do so contemporaneously with the Agencies’ second phase program.

The Agencies invite commenters to submit “additional research that may inform the statutory requirements” and instruct that proposals of alternative model notices should be accompanied by supporting research and documentation demonstrating that these alternatives meet the statutory requirements. ABA understands the value of such submissions and expects the Agencies to accept such information beyond the 60 day comment period on this Proposed Rule. As the Agencies certainly recognize from their own experience, consumer research does not materialize overnight, or over 60 days or even in a year.

ABA cautions that the merits of one’s comments and contribution to the privacy notice discussion should not be dismissed for lack of specific consumer research. After all, the Model Form is intended to be a voluntary option, and compliance with GLBA privacy rules is still to be possible in the absence of model adoption. In fact, we believe that the greatest value of the Model Form exercise may not be the adherence to a one-size-fits-all safe harbor notice, but rather the development of a number of alternative effective and compliant ways to communicate information sharing benefits and choices. It could very well be that customer acceptance in the market place will provide the most useful test of the value of disclosure models.

As previously noted, it is important to maintain existing examples of compliant notice language that may continue to guide those who do not, or cannot, elect to use the voluntary Model Form. We are particularly pleased on behalf of many of our community bank members that the Agencies have stated that “an institution could continue to use a simplified notice . . . if it does not have affiliates and does not intend to share nonpublic personal information with nonaffiliated third parties outside of the exceptions” See 72 Fed. Reg. 14944, n. 22 (Mar. 29, 2007). This could save many banks the expense of reinventing their notices without any adverse consequences for their customers.

Conclusion

ABA recognizes that customer receptiveness to the Model Form and other options is a main driver for how simplified privacy notices should be drafted and evaluated. However, we feel that further testing should be conducted, and the industry should be allowed to do their own testing not only on the Model Form, but also on variations which could provide for greater customer understanding and likelihood of utility. ABA supports the concept of a summary table as the “heart” of a model privacy form. We believe, however, that the remainder of the Model Form should allow more flexibility in the content of the notice so that it effectively communicates each financial institution’s privacy policies as well as other relevant customer education information. Finally, ABA underscores that use of the FSRRA Model Form is a voluntary choice and therefore other privacy notice compliance options should not be disadvantaged by the Model Form. If the Agencies have any questions about these comments, please contact Richard Riese at (202) 663-5051, or Chris Paridon at (202) 663-5056.

Sincerely,



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