

Alternative Forms of Privacy Notices Project No. PO34815

Comments of the National Independent Automobile Dealers Association Directed To The Federal Trade Commission, Washington, D.C. 20580.

A. Background Information.

In November 1999, President Clinton signed into law S. 900, the Financial Services Modernization Act of 1999, more commonly known as the "Gramm-Leach-Bliley Act" (GLB Act). Federal Agencies with regulatory authority were empowered to adopt and implement rules setting forth which business entities are subject to the Act and how to comply with its provisions. The Federal Trade Commission (FTC) is the regulatory agency with enforcement authority over motor vehicle dealers and other members of the motor vehicle industry who are not otherwise regulated by another regulatory agency as set forth in the GLB Act.

The FTC issued a "Final Rule" implementing the provisions of the GLB Act in May of 2000. The FTC's Final Rule became effective on November 13, 2000 and full compliance with the GLB Act and the Final Rule was required by July 1, 2001, including the obligation of covered financial institutions to provide Privacy Notices to their customers. On December 30, 2003, the FTC, together with seven other Federal Agencies, published an Interagency Proposal to Consider Alternative Forms of Privacy Notices Under the Gramm-Leach-Bliley Act. The Agencies are requesting comment on whether they should consider amending the regulations that implement sections 502 and 503 of the GLB Act to allow or require financial institutions to provide alternative types of privacy notices, such as a short privacy notice, that would be easier for consumers to understand.

The National Independent Automobile Dealers Association (NIADA) has represented independent motor vehicle dealers for over 50 years. The National Association and its State Affiliate Associations represent more than 18,000 independent motor vehicle dealers located across the United States. In 2002, a record 43 million used motor vehicles were retailed generating more than \$370 billion in revenues. Because vehicles are lasting longer (the average vehicle on the road today is over 8.5 years old), projections of future used vehicle sale volumes suggest that the used vehicle market will maintain its 40-million-plus volume in the years to come.¹ Given the number of motor vehicle transactions that take place each year, amending the regulations that implement sections 502 and 503 of the GLB Act to allow or require financial institutions to provide alternative types of privacy notices could have a significant impact on the used retail motor vehicle industry. Therefore, NIADA is submitting comments regarding the Interagency Proposal to Consider Alternative Forms of Privacy Notices Under the Gramm-Leach-Bliley Act.

B. General Considerations for Improving Privacy Notices.

The stated purpose of the GLB Act and the Privacy Rules is to ensure that financial institutions respect the privacy of their customers and protect the security and confidentiality of "nonpublic

¹ The 2003 Used Car Market Report, Manheim Auctions, 1400 Lake Hearn Drive, NE, Atlanta, GA 30319-1464.

personal information.” The primary focus of the proposal for improving privacy notices should remain the development of privacy notices that are more understandable and useful to consumers, keeping in mind that the actual content of the disclosures will vary from institution to institution depending upon the information collected and shared. A privacy notice should provide consumers with sufficient information to make an informed decision as to whether they wish to provide nonpublic personal information to the financial institution based upon how the information they are providing may be used and, if appropriate, so that they understand and can readily exercise their right to opt out of the sharing of certain information.

NIADA appreciates the difficulty of the task imposed upon the FTC in establishing and implementing Rules governing privacy notices for the wide range of financial institutions subject to its jurisdiction. NIADA believes that it would be virtually impossible to develop a standardized privacy notice for every industry subject to the Agencies’ jurisdictions. In the motor vehicle industry itself there is some disparity in how motor vehicle dealers conduct a transaction and with whom information is shared. Although most motor vehicle dealerships can use privacy notices having a similar format and language, the examples of the types of information collected and shared and the types of affiliated and nonaffiliated parties with whom the dealership may or may not share the information can vary. For example, the structure of the transaction can vary (sale or lease), as well as the types of financing involved (traditional or subprime, third part or in-house), the dealership may sell or lease a vehicle covered by a manufacturer’s warranty, sell products and services offered by third party service providers and/or utilize outside marketing sources to contact existing and potential customers. Therefore, an approach similar to that taken by the FTC in the initial Privacy Rules remains the most effective.

Recognizing that information sharing practices may vary and a financial institution may need flexibility in describing the categories of information collected and the affiliated and nonaffiliated parties to whom it may be disclosed, the Privacy Rules implemented by the FTC contain sample clauses that institutions may use in privacy notices, but do not prescribe any specific format or standardized wording for the notices. Instead, institutions may design their own privacy notices based on their individual practices, provided they are consistent with the law and meet the clear and conspicuous standard. Clear and conspicuous means that the notice must be easy to understand and designed to call attention to the nature and significance of the information contained therein. While neither the GLB Act nor the FTC’s Privacy Rule mandate the use of any particular technique for making the notices clear and conspicuous, they specify that information should be presented in clear, concise sentences, paragraphs and sections, that “everyday” words should be utilized, and that the type size and style should also be easy to read and boldface or italics should be used for key words.

Currently, neither the GLB Act nor the FTC’s Final Privacy Rule requires a financial institution to publish lengthy notices. Moreover, the development of a new “short notice” may not be necessary to achieve the goals articulated by the Agencies in the Request for Comments. Most motor vehicle dealerships are able to make the appropriate disclosures on one side of an 8 1/2 X 11 document now and few dealerships are required to provide an opt out notice. In fact, while the formats may differ, the length of the sample privacy notices in Appendices A and B of the Interagency Proposal and much of the language used therein are similar to that utilized by motor vehicle dealerships today. At a minimum, if the Agencies develop a “short notice” and all of the information a financial institution would otherwise be required provide in the long form privacy notice is addressed, then NIADA proposes that the short notice should serve as a substitute for, rather than a supplement to, a more detailed notice. Overwhelming consumers with mandated disclosures and documentation dilutes the meaningfulness of the

disclosures provided and discourages consumers from attempting to read the documents that are presented to them.

While NIADA does not believe the proposed short notices would help to reduce the overall length of its Members' privacy notices, NIADA supports the adoption of an interagency interpretation of the Privacy Rule that contains a model format and model language for privacy notices. Direction from the FTC regarding how the mandated disclosures should be presented, the types of words that customers have found readily understandable, and the appropriate type size and style to ensure that the disclosures are clear and conspicuous would benefit both customers and financial institutions, as would industry appropriate examples in brackets where more specific details about the types information collected and the affiliated and nonaffiliated parties to whom it may be provided should be inserted. The model privacy notices should still be designed to address all of the relevant elements listed in the GLB Act and the Privacy Rule, including a description of the types of nonpublic personal information an institution collects, the institution's policies for sharing that information with third parties and a description of how consumers can opt out of information sharing, if applicable. Many states are also developing their own privacy notice requirements and, in order to avoid duplicative and multiple disclosures where possible, another section could be added for financial institutions to include privacy related disclosures mandated by state law.

Following the format and language of a model privacy notice, such as that provided in Appendix C, would benefit both consumers and financial institutions. The development of uniform privacy notices would enhance the ability of customers to readily compare privacy notices, promote the informed use of nonpublic personal information, and protect consumers from unknowingly granting financial institutions permission to use their information. At the same time, financial institutions would have appropriate direction as to the format and language that is most easily understood by their customers. Furthermore, as the Federal Privacy Rules will be applied nationally, uniformity should be one of the foremost considerations of the FTC. Implementation of uniform laws and rules is an underlying principal that has led to the rewrite of Articles in the Uniform Commercial Code and enactment of legislation such as the Electronic Signature in Global and National Commerce Act.

Finally, while NIADA believes that the use of the model privacy notices should be discretionary, those financial institutions that elect to use them should have the benefit of a safe harbor from administrative enforcement actions and consumer and regulatory challenges regarding the notice. Establishing a safe harbor for financial institutions that utilize the model privacy notice is consistent with standards adopted in other state and federal statutes. For example, Uniform Commercial Code Article 9 contains a sample Default Notice that creates a safe harbor for entities that use a substantially similar form, while permitting entities to incorporate other notices mandated by state retail installment sales and consumer protection acts.

C. Conclusion.

NIADA believes that most motor vehicle dealerships already have developed privacy notices that comply with federal and state privacy requirements and are consumer friendly. However, NIADA supports the adoption of a model privacy notice if it is consistent with the approach taken by the FTC in the initial Privacy Rules, does not result in duplicative notices and use of the model privacy notice creates a safe harbor for the institution and a presumption of compliance with the GLB Act and the FTC's Privacy Rule.

NIADA would like to thank the FTC for the opportunity to comment with respect to the Interagency Proposal to Consider Alternative Forms of Privacy Notices Under the Gramm-Leach-Bliley Act. Any questions the FTC has regarding NIADA's comments and the position taken herein may be directed to NIADA's Legal Counsel, Keith E. Whann or Deanna L. Stockamp, of the law firm Whann & Associates located at 6300 Frantz Road, Dublin, Ohio 43017.