Comment #: 20

Software & Information
Industry Association
1090 Vermont Ave NW Sixth Floor
Washington, DC 20005-4095

March 29, 2004

Ms. Toby Milgrom Levin
Federal Trade Commission\Office of the Secretary
600 Pennsylvania Avenue, NW Room 159-H
Washington, DC 20580

RE: Alternative Forms of Privacy Notices, Project No. P034815

Dear Ms. Levin:

The Software & Information Industry Association (SIIA) appreciates the opportunity to comment on this project, and looks forward to working with the Federal Trade Commission (FTC), and the other relevant agencies, as the comments are reviewed and possible next steps explored.

As the principal trade association of the software code and information content industry, the more than 600 members of SIIA develop and market software and electronic content for business, education, consumers and the Internet. SIIA's members are software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. Our membership consists of some of the largest and oldest technology enterprises in the world as well as many smaller and newer companies.

Background Information

SIIA and its member companies bring a unique perspective to the FTC's request as leading innovators of software and digital content over the Internet and through the leadership role we have played in promoting effective privacy protections for many years. We were one of the earliest industry leaders to recognize the importance of adopting effective privacy policies and privacy enhancing technological tools. Since these early steps, SIIA has, through technical assistance and privacy seminars, worked with hundreds of companies to develop, write and implement effective, consumer-friendly privacy policies.

In the U.S., we actively engage with the FTC in its implementation and enforcement of key legislation addressing the protection of personal privacy, including its Section 5 policies in this area, the Children's On-Line Privacy Protection Act (COPPA), and the Gramm-Leach-Bliley Act (GLB Act). At the international level, SIIA is working to encourage company participation in the "safe harbor agreement" negotiated between the Department of Commerce and the European Union. SIIA has regularly advised the Organization for Economic Cooperation and Development (OECD) on privacy enhancing technologies.

Tel: +1.202.289.7442
Fax: +1.202.289.7097
www.siia.net

On the whole, SIIA finds that implementation of Subtitle A of title V of the GLB Act, addressing disclosure of nonpublic personal information, has provided a sound basis for ensuring that the personally identifiable information of our members' customers is managed well and assured adequate protections. We believe that much of the credit for this implementation lies with the careful and thoughtful leadership of the FTC, and the other relevant agencies, which have diligently exercised their responsibilities. While there are a number of areas where improvements could be made (particularly in the area of state-federal responsibilities), SIIA has generally supported the FTC actions to date in this important area.

Simplifying Privacy Notices:
A Challenging Goal

As the FTC has acknowledged, the current legal requirements of the GLB Act and the accompanying regulations "specify the general content, but don't mandate any particular language" when financial institutions, as defined under the Act, provide notice of their privacy policies and practices to their customers.[1] This flexibility was specifically designed into the Act to allow different institutions covered by Title V, especially those that are not traditional financial institutions, to draft notices particular to their practices.

Any effort to prescribe the elements, language, format, or mandatory or permissible aspects of a privacy notice has a number of major obstacles to overcome, including that any such prescription could be a direction that is fundamentally inconsistent with the underlying flexibility of the GLB Act. While it would be convenient to label the challenge as "merely a marketing problem," the practical reality of the GLB Act points to a number of issues that cannot be solved through the micromanagement of notices through additional Rulemaking. As the FTC has itself acknowledged, "the act itself creates complex distinctions regarding what information should be included in the notice, when choice is required, and when information sharing is permitted."[2] Moreover, the GLB Act respects the fact that the information sharing practices are diverse; the Act is not meant to preclude such practices, but to ensure that customers are informed about them. Consequently, it is widely recognized by privacy protection authorities and the private sector that "[i]nformation sharing processes can be complex and difficult to describe in simple language."[3] In short, the prescription of the specific elements, language, format or mandatory or permissible aspects of a privacy notice would potentially force consumers to make false comparisons of distinctly disparate institutions and practices.

We want to address the specific questions posed by the FTC. With regard to specifying the *language* of a privacy notice, there is not adequate research to indicate that there are particular "privacy" terms or words that consumers, outside of a specific institutional-customer relationship and course of

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[1] Opening Remarks of FTC Chairman Tim Muris, INTERAGENCY PUBLIC WORKSHOP: GET NOTICED: EFFECTIVE FINANCIAL PRIVACY NOTICES, December 4, 2001, Transcript p. 4, found at: http://www.ftc.gov/bcp/workshops/glb/GLBtranscripts.pdf.
[2] Id. at p. 5.
[3] Ibid.

conduct, understand that could be mandated in a short notice. As more fully described below, the lack of real market testing presents a major obstacle to having a complete record before the Agency in making any such determination.

As to *mandatory clauses*, we urge the FTC to exercise extreme caution in providing such guidance either informally or through rulemaking. As the agency is well aware, the initial regulations implementing the GLB Act included suggested clauses.[4] With all due respect, these early attempts to formulate suggested clauses were, in fact, the source of confusion for many our members' customers during the first round of notices. This experience suggests that micromanaging the clauses that would be in short notices may create more confusion for customers than relying on complete statements that meet an institution's legal responsibilities under the act. Moreover, mandatory clauses may not facilitate accurate explanation of different information practices that exist among companies covered by Title V of the GLB Act. Finally, based on our review and analysis of the GLB Act, the FTC and other agencies may not be permitted to prescribe mandatory clauses (or for that matter, any other elements thereof or short notices (or any elements thereof) and impose liability for failure to meet the requirements of the Act.

With regard to the *formats* of a privacy notice, a number of technical and operational issues are present. If the illustrative examples are any indication, they use typefaces and formats that may not be accessible to many of our members' customers. As the FTC is aware, the notices required under the GLB Act may be delivered in paper, electronic or other form provided for in the regulations. When sending any information (including notices) in electronic form, our industry has determined that a "one size does not fit all" when it comes to formats. For example, many customers do not use html-enabled email services that are necessary to support such fonts and typefaces. As a general matter, prescribing through regulation the specific format of privacy notices will, in our view, deter creativity and responsiveness to specific consumer feedback on how private notices can be made adaptable to a variety of contexts.

Ultimately, even if the FTC, and the other relevant agencies, were to determine that fixed clauses and formats would be appropriate and authorized by the GLB Act, there are a host of unresolved issues about the operation of simplified notices under the current framework. It is not clear from the questions raised or analysis provided in the Advanced notice of proposed rulemaking (ANPR) to assess whether alternative notices would be supplemental to the longer (and legally required) notices, or a substitute for the requirements. This is an important question to answer, since any determination of the costs and benefits has to factor in whether an institution's liability and responsibility – and whether a customer's choice and understanding – is enhanced or mitigated by utilizing shorter notices. As we understand the GLB Act and based on the experiences of our members in complying with the Act, liability would attach to both shorter and longer notices and thereby would potentially impose greater time and expense to ensure that both comport to an institution's actual information sharing practices and the requirements of the GLB Act (both under the privacy and safeguards rule).

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[4] See Privacy of Consumer Financial Information; Final Rule, 16 CFR Part 313 – Appendix A (Sample Clauses).

Even if the FTC, and the other relevant federal agencies, were to address the liability flowing from the GLB Act satisfactorily, it appears that there is little, if anything, that the federal enforcement authorities could do to resolve any liability exposure from state enforcement bodies, including state attorneys general. As the FTC is well aware, Congress did not intend, either expressly or by implication, to preempt state laws protecting consumer financial privacy except to the extent that such laws actually conflict or are "inconsistent" with federal law, [5] and then only where the state law fails to provide greater privacy protection.[6]

As a result of this uncertainty, any determination of the costs and benefits associated with notice simplification remains shaky, and any mandatory requirement for using short notices exposes companies and entities to greater uncertainty and liability – even when the companies are complying with "consistent" state and federal laws. In short, mandatory clauses and/or formats are likely to be inconsistent with the need to assure dynamic notices that are sent and received each year.

Broad-based and Real Time Market Testing Required to Evaluate Consumer Reaction

As indicated above, it is the view of SIIA that the specific costs and benefits of requiring mandatory simplified notices cannot be determined in the context of the legal obligations imposed on financial institutions subject to Title V of the GLB Act.

We also want to point out that, in addition to conformance to the GLB Act, the available research does not answer the central question, "does … more effective notice actually make a difference in the choices consumers make? Does it affect behavior?"[7]

It is our view, based on our own industry expertise, that the answers to these questions cannot rely on limited focus group testing of templates. We have reviewed a number of the serious efforts to assemble templates. These efforts have been helpful in identifying potential tools that companies could employ, as appropriate, in their own privacy notices. On the whole, however, the conclusions drawn have relied on small focus group discussions. The literature on the limitations of focus groups has identified a number of problems. For example, one of the most well-known deficiencies is the so-called `group effect.' In other words, "focus groups produce a group product [where] each person influences the other."[8] In determining the impact on the actual choice a customer may make, however, it is essential to get individual responses based on the customer's actual experience. Moreover, "focus groups are not very efficient for collecting quantitative information" with the result that "focus groups seldom generate information that you can generalize to the target population as a whole."[9] Yet, to

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[5] Section 507(a) of the GLBA, 15 U.S.C. § 6807(a).
[6] Section 507(b), 15 U.S.C. § 6807(b).
[7] Concluding Remarks of FTC Consumer Protection Director J. Howard Beales, III, INTERAGENCY PUBLIC WORKSHOP: GET NOTICED: EFFECTIVE FINANCIAL PRIVACY NOTICES, December 4, 2001, Transcript p. 281, found at: http://www.ftc.gov/bcp/workshops/glb/GLBtranscripts.pdf.
[8] Dr. Penni Stewart, York University and a former Director of the Qualitative Research and Resource Centre (QRRC) in the Department of Sociology at York University, found at http://www.isr.yorku.ca/newsletter/fall03/article1.html.
[9] Dr. Darla Rhyne, Research Associate at the Institute for Social Research at York University, found at same link.

determine whether the benefits outweigh the costs of imposing short notices under the GLB Act, it is precisely the measure of actual behavior impact on a wide and diverse selection of the population that is necessary.

It is our view that any change in requirements that impose use of simplified forms (or any elements of the ANPR) must utilize actual market experience, quantitative and qualitative measurements, and on-going tests using short notices in a variety of formats. It is essential to avoid conclusions based only on the experiences of traditional financial institutions, since the GLB Act covers entities that have different information sharing practices and customer relationships. To ensure widespread participation in the testing, SIIA believes that the FTC, and the other relevant agencies, will need to provide incentives to affected institutions under the GLB Act to try it out experimental short notices, perhaps by utilizing a "safe harbor" during this testing period in order to avoid unintended liability.

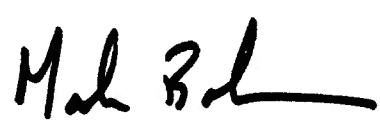
Conclusion

The members of SIIA look forward to working with the FTC to achieve greater clarity and user-friendly approaches to privacy notices required by the GLB Act. We believe much is being done to make language simpler, utilize elements of visual design, and, where appropriate and consistent with the Act, short forms without prescriptive regulations.

The uncertainties surrounding requiring specific clauses or formats, however, stem from the lack of real, market-driven information on what will, in fact, lead to more informed decisions by customers, and to the legal uncertainties surrounding the additional liabilities for requiring essentially two notices – both the short and longer forms.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Mark Bohannon
General Counsel &
Senior Vice President Public Policy