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James S. Keller
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May 29, 2007

VIA E-MAIL

Jennifer J. Johnson, Secretary
Board of Governors of the
Federal Reserve System
20th Street & Constitution Ave., N.W.
Washington, DC 20551
Docket R-1280
regs.comments@federalreserve.gov

Re: Interagency Proposal for Model Privacy Form
72 Fed. Reg. 14940 (March 29, 2007)

Dear Ms. Johnson:

The PNC Financial Services Group, Inc. ("PNC"), Pittsburgh, Pennsylvania, appreciates the opportunity to comment on the proposed Model Privacy Form jointly issued by the Board of Governors of the Federal Reserve System ("Board"), the Office of the Comptroller of the Currency, 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 (hereinafter collectively referred to as the "Agencies").

PNC is one of the largest diversified financial services companies in the United States, with $122.6 billion in assets as of March 31, 2007. PNC engages in retail banking, institutional banking, asset management and global fund processing services. Its principal subsidiary bank, PNC Bank, National Association ("PNC Bank"), Pittsburgh, Pennsylvania, has branches in the District of Columbia, Florida, Indiana, Kentucky, Maryland, New Jersey, Ohio, Pennsylvania and Virginia. PNC also has 12 other subsidiary banks, which are located, and have branches in, Delaware, Maryland, Pennsylvania and Virginia. PNC also has several broker-dealer affiliates.

PNC shares the goals of Congress and the Agencies in creating a simple, consumer-friendly privacy notice, and we believe that the model form proposed by the Agencies is an initial step toward the realization of this goal. However, we share the concerns of other financial institutions and the Financial Services Roundtable that, in its proposed form, few, if any financial institutions will use the proposed Model Privacy Form ("Proposed Form").

Our more detailed comments on the format and content of the proposed model form follow.

A. CONTENT OF THE PROPOSED FORM

The Agencies requested comment on a number of issues regarding the content of the Proposed Form, including whether the use of standardized provisions and vocabulary is appropriate.[1/]

The legislative history of Section 728 of the Financial Services Regulatory Relief Act of 2006 confirms that Congress expected that the model disclosure form to be developed by the Agencies would, first and foremost, "… satisfy the requirements of GLBA…."[2/] Unfortunately, it appears that the proposed model privacy disclosure form does not entirely meet that expectation.

1. CATEGORIES OF INFORMATION COLLECTED

Section 503(b)(2) of the Gramm-Leach-Bliley Act ("GLBA") requires that each privacy disclosure state "the categories of nonpublic personal information that are collected by the financial institution."[3/] The words "are collected" would seem to evidence a deliberate legislative intent to require disclosure of a financial institution's actual practice with respect to the collection of nonpublic personal information. When the Agencies suggested in the current privacy regulations that financial institutions use certain standardized categories that the Agencies themselves created, it was made clear that such categories should be disclosed only "as applicable,"[4/] indicating that, at least initially, the Agencies, too, intended that a financial institution's disclosure reflect its actual practice.

The Agencies appear to have changed their position, and no longer would require that meaningful disclosure reflect a financial institution's actual practice. Instead, the Agencies would require that each financial institution's privacy disclosure contain

> "….standardized terms [that] are designed to reflect the range of information typically collected by financial institutions … *rather than the specific information collected by each particular institution, and therefore, are not to be modified to reflect an institution's particular practices.*"[5/]

By not requiring and, moreover, not even permitting, a financial institution to disclose the categories of nonpublic personal information that it *actually* collects, the Proposed Form could promote disclosures that are misleading and that do not satisfy the requirements of the GLBA.

1/ 72 Fed. Reg. 14940, 14955 (March 29, 2007).

2/ S. Rep. No. 256, 109th Cong., 2d Sess. 12 (2006).

3/ 15 U.S.C. § 6803(b)(2).

4/ 12 C.F.R. 216.6(c)(1). Citations to the corresponding regulations of the Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, Federal Trade Commission, Commodity Futures Trading Commission and Securities and Exchange Committee have been omitted.

5/ 72 Fed. Reg. at 14952, n.26. (Emphasis added.)

The Agencies note that the Proposed Form for broker-dealers contains specific language pertaining to the categories of information collected that is different from the form language for depository institutions.[6/] Bank and financial holding companies that have both depository institution and broker-dealer subsidiaries, and that currently use one form of privacy disclosure for all of their subsidiaries, would be required to have different model privacy disclosure forms for each type of subsidiary in order to comply with the “not to be modified” prohibition.

2. SOURCES OF INFORMATION COLLECTED

Although Section 503(b) of the GLBA does not specifically require that financial institutions disclose the sources of the nonpublic personal information they collect, the sample clauses in the existing regulations appear to include such disclosures under the authority of Section 503(b)(2)'s requirement that privacy disclosures include “the categories of nonpublic personal information that are collected by the financial institution.”[7/] Again, it would seem that the words “are collected” is evidence of a deliberate legislative intent to require disclosure of a financial institution's actual practice with respect to the sources of the nonpublic personal information it collects.

As with the case of disclosures regarding the categories of nonpublic personal information collected, the Proposed Form

> “….regarding sources of information *does not permit a financial institution to customize the sources of information it collects* [because] the disclosure is intended to include the range of information sources typically used by institutions … *rather than the information sources used by each particular institution*.”[8/]

By not requiring and, moreover, not even permitting, a financial institution to disclose the sources of nonpublic personal information that it actually collects, the Proposed Form could promote disclosures that are misleading.

Here, too, the Agencies note that the Proposed Form for broker-dealers contains specific language pertaining to the sources of information collected that is different from the form language for depository institutions.[9/] As noted above, bank and financial holding companies that have both depository institution and broker-dealer subsidiaries and that currently use one form of privacy disclosure for all of their subsidiaries would be required to have different model privacy disclosure forms for each type of subsidiary in order to comply with the “not to be modified” prohibition.

6/ *Id.*
7/ 15 U.S.C. § 6803(b)(2). *See*, Sample Clause A-1 in Appendix A of 12 C.F.R. Part 216.
8/ 72 Fed. Reg. at 14953, n.33. (Emphasis added).
9/ *Id.*

3. INITIAL PRIVACY DISCLOSURE

Section 503(a) of the GLBA requires that an initial privacy disclosure be provided "[a]t the time of establishing a customer relationship with a consumer…."[10/] The Agencies made it clear that the phrase "establishing a customer relationship" contemplated a single event, and that any subsequent opening of an additional account or obtaining an additional product or service would not require any additional privacy disclosure, assuming, of course, that such existing customer had already received an accurate initial disclosure or annual disclosure, as the case may be.[11/]

The Proposed Form appears to reverse course by requiring that the following statement be included:

> "We must notify you about our sharing practices when you open an account …."[12/]

That proposed language could create an expectation on the part of consumers that they should receive a new privacy disclosure with each new account they opened.

4. ADDITIONAL OPT-OUT RIGHTS

Although the proposed model privacy disclosure form would appear to permit a financial institution to modify at least some parts of the form to provide additional opt-out rights to their customers or to expand the scope of the opt-out rights mandated by the GLBA,[13/] it is unclear exactly how a financial institution might accomplish that. For example, if a financial institution granted its customers the right to opt out of sharing any information with its affiliates for any purpose, would that financial institution continue to use the first checkbox on the proposed model form and add an additional checkbox, or would it be permitted to modify the language of the first checkbox? It would seem that the second alternative would be preferable to avoid the confusion that would necessarily arise from seemingly duplicate disclosures.

5. STATE LAW REQUIREMENTS

Section 507 of the GLBA expressly permits the several states to enact requirements that afford greater privacy rights and protections to their citizens than those afforded them under the GLBA.[14/] It does not appear that the proposed model form could be used by any financial institution that may be required to provide state-mandated disclosures or rights that go beyond those mandated under federal law. We suggest that the Agencies address this problem in their final regulation.

[10/] 15 U.S.C. § 6803(a).

[11/] 12 C.F.R. §216.4(d)(2).

[12/] 72 Fed. Reg. at, 14947, 14950, 14962, 14967, and 14997.

[13/] 72 Fed. Reg. at 14953.

[14/] 15 U.S.C. § 6807.

B. FORMAT OF THE MODEL FORM

The Agencies requested comment on a number of issues relating to the format of the proposed model privacy disclosure form, including whether each page should be on a separate piece of paper and what size paper would be appropriate.[15/]

The Board created a highly informative booklet entitled "Privacy Choices for your Personal Financial Information." The Board invites financial institutions to reproduce copies of that booklet and to make them available to their customers and potential customers:

> "You can use this PDF file to print 8½ x 11 inch pages that can be copied back-to-back, folded and made into a 5½ x 8½ inch booklet; staples along the spine will help keep pages together. You can also download this file and take it directly to a printer who is able to print from PDF format files."[16/]

Neither the 5½ by 8½ inch dimensions of the booklet nor the fact that the pages thereof are printed on both sides appears to diminish in any way the ability of readers to comprehend its content.

The physical design specifications of the Proposed Form require that it be "printed separately and only on one side of an 8.5 by 11 inch piece of paper …."[17/] The Agencies offer no justification for the size requirement. The only justification offered by the designers of the Proposed Form is that, during the course of their testing a variety of draft forms, they

> "….neutralized many of the design elements so that participants focused on content. We controlled testing variables: we did not use color; we used a readable and large font; and we used 8.5" x 11" paper."[18/]

Thus, it appears that 8½ x 11 inch paper was used simply as a control device in order to eliminate paper size as a testing variable. Apparently, the designers could just as easily have used the 5½ x 8½ inch paper on which "Privacy Choices for your Personal Financial Information" may be printed or, indeed, any other size paper. As the designers so clearly state, the focus should be on the content, not on the paper size.

The only justification offered by the Agencies for requiring that the Proposed Form be printed on only one side of separate pages is that

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[15/] 72 Fed. Reg. at 14955.

[16/] Board of Governors of the Federal Reserve System, http://www.federalreserve.gov/pubs/privacy/default.htm. The referenced .pdf file is available at http://www.federalreserve.gov/pubs/privacy/privacybrochure.pdf.

[17/] 72 Fed. Reg. at 14944-14945.

[18/] Kleimann Communication Group, Inc., *Evolution of a Prototype Financial Privacy Notice: A Report on the Form Development Project*, 5 (Feb. 28, 2006).

> "….during testing consumers expressed a preference for the model which allowed them to view the information on pages one and two side-by-side."[19/]

As demonstrated in "Privacy Choices for your Personal Financial Information," two pages can appear side-by-side in a booklet.

The agencies have determined in their existing privacy regulations that it is important that customers be able to retain the privacy notices they receive.[20] The agencies suggest, again in their existing regulations

> "… in most cases the initial and annual disclosure requirements can be satisfied by disclosures contained in a tri-fold brochure."[21/]

Such a brochure has a clear and distinct advantage over a disclosure printed on separate pieces of paper: there is no risk that one of several sheets might be lost or otherwise separated from the others.

The privacy disclosure of PNC and its subsidiaries is a "quint-fold" brochure, i.e., a brochure with five columns printed on both sides of a single piece of paper and folded between each column so that the dimensions of the resulting folded brochure are approximately 8¼ by 3¾ inches. In addition to having all of the disclosed information on one piece of paper, such a brochure has the advantage of fitting easily into a standard envelope in which periodic account statements are mailed. Similar to most financial institutions, PNC mails its annual privacy disclosure to its customers as an enclosure with a periodic account statement.

The Proposed Form, with its requirement that it be printed on one side only of three separate sheets of 8½ by 11 inch paper would create the risk that a consumer might lose or misplace one of the pages of the notice, and would impose significantly higher printing, collating, and mailing costs on financial institutions. PNC estimates that the requirement that the Proposed From be printed on 8½ by 11 inch paper would result in four million additional customer mailings for PNC annually.

C. SAMPLE CLAUSES

Section 728 of the Financial Services Regulatory Relief Act of 2006 creates a statutory "safe harbor" for financial institutions that choose to use the model privacy disclosure form by providing that they "….shall be deemed to be in compliance with the disclosures required under [Section 503 of the GLBA]."[22/] Section 728 of the Financial Services Regulatory Relief Act of

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[19/] 72 Fed. Reg. at 14945.

[20/] 12 C.F.R. § 216.9(e).

[21/] 65 Fed. Reg. 35161, 35175 (2000) and 65 Fed. Reg. 40333, 40347 (2000).

[22/] Pub. L. No. 109-351, 120 Stat. 1965, 2004, to be codified at 15 U.S.C. § 6803(e)(4).

2006 does not, however, mandate that the Proposed Form constitutes the exclusive "safe harbor" for compliance with the GLBA requirement.

Today, a "safe harbor" exists for those financial institutions that use the Sample Clauses that are set out in Appendix A to the current regulations, to the extent, of course, that those Sample Clauses reflect their actual practice.[23/] Although the Agencies propose to continue to recognize those Sample Clauses as a "safe harbor" during a transition period, such recognition would be in effect for only

> "…one year after which financial institutions would no longer obtain a safe harbor by using the Sample Clauses. … The Sample Clauses would be rescinded one year after the transition period ends."[24/]

Although Section 728 makes it clear that the use of the model privacy disclosure form is to be "at the option of the financial institution,"[25/] the practical effect of eliminating the Sample Clauses is to require financial institutions to use the model privacy disclosure form as the sole vehicle that permits them to remain in the "safe harbor." If the Sample Clauses satisfy the disclosure requirements of the GLBA, their continued use as a "safe harbor" should be permitted.

CONCLUSION

We join the Financial Services Roundtable in its comments, including its recommendation that the Agencies reissue the proposed model form for a second round of comments, after the form has been revised to take into account issues raised in this comment period and the results of additional testing.

Furthermore, we recommend that the Proposed Form be a compliance alternative for financial services firms, not a substitute for the Sample Clauses contained in the existing privacy regulation. This would permit individual financial services firms to determine the most appropriate means to comply with the privacy notice requirements of federal and state law.

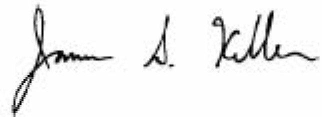
23/ 12 C.F.R. § 216.2.

24/ 72 Fed. Reg. at 14955.

25/ Pub. L. No. 109-351, 120 Stat. 1965, 2003, to be codified at 15 U.S.C. § 6803(e)(1).

If you have questions about this comment letter, please feel free to contact me.

Sincerely,



James S. Keller

cc: Gary TeKolste
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