Office of the Comptroller of the Currency
250 E Street, S.W.
Mail Stop 1-5
Washington, DC 20219

Re: Docket ID OCC-2007-0003

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

Re: Docket No. R-1280

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

Re: RIN 3064-AD16

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, DC 20552
Attention: OTS-2007-005

Re: Docket ID OTS-2007-0005

Ms. Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428

Re: RIN 3133-AC84

Federal Trade Commission
Office of the Secretary
Room 135 (Annex C)
600 Pennsylvania Avenue, N.W.
Washington, DC 20585

Re: Model Privacy Form, FTC File No. P034815

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File Number S7-09-07, Model Privacy Form

Ms. Eileen Donovan
Acting Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: RIN 3038-AC04

RE: Interagency Proposal for Model Privacy Form; 72 Federal Register 14940, March 29, 2007

Dear Sir or Madam:

This comment letter is submitted on behalf of the Consumer Bankers Association ("CBA") in response to the Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act ("Proposal") issued by the Office of the Comptroller of the Currency, Office of Thrift Supervision, Board of Governors of the Federal Reserve ("FRB"), Federal Deposit

Insurance Corporation, National Credit Union Administration, Federal Trade Commission, Commodity Futures Trading Commission, and Securities and Exchange Commission ("SEC") (collectively, the "Agencies"). The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. The CBA represents over 750 federally insured financial institutions that collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States. CBA appreciates the opportunity to provide our comments to the Agencies.

Executive Summary

CBA strongly supports the Agencies' efforts to develop a standardized Gramm-Leach-Bliley Act ("GLBA") privacy policy that is relatively easy for consumers to read and understand. We share the Agencies' goal of providing financial institutions with a model form that provides a safe harbor for certain requirements under the regulations issued by the Agencies implementing Title V, Subtitle A of the GLBA ("GLBA Regulations") and that is widely adopted by financial institutions. Because use of the model form developed by the Agencies ("Model") is, by statute, voluntary, it is critically important that the Model be attractive to financial institutions. If the model form does not present an attractive, or even a viable, option to financial institutions, the clear intent of the Agencies and of Congress—to provide a widely adopted approach to GLBA privacy policies—will not be achieved. Unfortunately, CBA believes that the Model does not provide a viable option to many financial institutions. We believe significant changes should be made to the Model in order to improve the likelihood of its use. In fact, we urge the Agencies to consider the comments they receive in response to the Proposal and to issue a revised proposal for further comment based on those comments and on additional consumer testing.

As we discuss in more detail below, our concerns with the Proposal revolve around two general themes: the difficulties associated with delivering the Model and the inability to modify it for any reason without losing the safe harbor. For example, the Model will be extremely expensive to print and mail, and may not lend itself to existing delivery methods used by financial institutions. CBA is also concerned that a financial institution cannot modify the Model, despite the fact that the Model does not reflect information practices employed by significantly large numbers of financial institutions, especially as those practices relate to affiliate sharing.

Regardless of the changes made to the Model by the Agencies before finalization we ask the Agencies to provide financial institutions with a safe harbor as it pertains to the GLBA privacy requirements. In particular, if a financial institution uses the format and text provided, or something substantively similar in content, form, and format, such financial institution should be deemed compliant with the GLBA disclosure requirements. Furthermore, once the Agencies finalize the text of the Model, CBA strongly urges the Agencies to provide a safe harbor for financial institutions that rely on that text while providing them the flexibility to engage in any of the activities permitted and envisioned under the GLBA.

In General

CBA believes, as we state above, that the Agencies should make significant modifications to the Model and repropose it for additional public comment. We believe this is appropriate because it is our opinion that the changes necessary to the Model are of the magnitude as to require an almost entirely new format and text. Specifically, we believe the Agencies should develop a Model that is a single page in length with modifications to the existing textual requirements. We firmly believe this is a realistic objective, and one that can result in a Model that is widely used by financial institutions and that provides consumers with the required information in a consumer friendly manner.

We recognize that the Agencies have spent significant time and effort researching alternatives to the existing GLBA privacy notices. These efforts have included symposia, consumer surveys, and requests for public comment. CBA commends the Agencies for their diligence and good faith in pursuing a worthwhile goal. It appears to us, however, that in connection with their efforts to craft the Proposal, the Agencies are relying almost exclusively on consumer testing which CBA believes is incomplete in its approach. In addition to considering comments received on the Proposal, the Agencies should engage in additional consumer testing of versions of the Model that reflect the realities that will coincide with their use by financial institutions. For example, we believe that the Agencies should test a design that is a page in length to determine whether it is possible to provide GLBA privacy notices that meet the statutory requirements in a manner that is reasonably likely to be employed by financial institutions and that communicate effectively to consumers. In short, the question is not whether consumers prefer a three-page GLBA privacy notice, because it is a moot issue if significant numbers of financial institutions choose not to provide such a notice. A better question is whether a notice that is likely to be used voluntarily by a critical number of financial institutions can provide GLBA privacy disclosures in a manner that is more standardized and consumer friendly than the status quo. To our knowledge, the Agencies have not tested such a concept. CBA strongly urges them to do so.

Delivery of Model as Proposed

According to the Proposal, the Model must be at least two pages in length, no matter how simple the financial institution's privacy policy. Furthermore, a financial institution must add a third page if it provides any type of opt-out choice to the consumer. The Model must be printed on one side of 8.5" x 11" paper, and must be presented in a manner that allows the consumer to view the first and second pages simultaneously. These requirements will result in enormous *additional* costs on financial institutions. For example, two of our larger (but not largest) members estimate that use of the Model would cost an additional $3 million and $6 million a year, respectively. One of our largest members believes the incremental cost to use the Model among all of its affiliates would be approximately $30 million. If the additional annual cost associated with the Model for only three large banks is almost $40 million, it is reasonable to assume that the financial services industry as a whole would shoulder extraordinary incremental compliance costs each year if the Model were widely adopted.

Cost of Printing

The Agencies have proposed a Model that, if used, would significantly and directly increase printing costs for financial institutions. Based on discussions with our members, we believe that the Model, if widely adopted, would result in large numbers of financial institutions using at least one, if not two, additional pages to deliver GLBA privacy policies than are currently used today. This means that a single large institution would need to order *truckloads* of additional paper if it were to use the Model. It may be a worthwhile exercise for the Agencies to estimate how many paper GLBA privacy policies are provided by all financial institutions in a year and, using that estimate, further estimate how many additional sheets of paper would be bought in just one year if a majority of privacy policies complied with the Model. Regardless of the numbers used, it is certain that the paper costs associated with widespread use of the Model would be significant.

Cost of Postage

Not only would the Model result in significant increased paper usage, but it would also significantly increase the amount of money spent on postage to deliver GLBA policies. This is true because the additional paper used relative to existing practices will result in heavier mailings to consumers. For example, a financial institution that can include a single-page insert in a periodic statement sent to the consumer could incur additional postage as a result of inserting an additional two pages in the same envelope. As we discuss below, many financial institutions would have to mail the Model as a separate mailing which would further increase postage costs. This would be approximately 30 cents per piece for standard mail or 40 cents per piece for first class. In fact, we believe the increased postage alone will cost financial institutions tens of millions of dollars a year if the Model were widely adopted.

Inability to Integrate Model into Existing Delivery Methods

In addition to the direct costs associated with printing and mailing privacy policies that are at least one, if not two, additional pages, the Model would impose other costs that are more difficult to quantify. In particular, many financial institutions would have difficulty delivering the Model as an initial privacy policy and/or as an annual privacy policy using their existing delivery mechanisms.

The GLBA Regulations require, in many circumstances, a financial institution to provide customers the initial GLBA privacy policy no later than at the time the customer relationship is established. There are of course many ways this requirement can be met, but many financial institutions that open credit accounts at the point of sale, for example, have implemented procedures to provide GLBA privacy notices at the cash register. For example, if a consumer applies to open a private label or co-brand credit card while transacting with a retailer, the consumer may receive the GLBA privacy policy as part of the application materials. Financial institutions have developed compliance programs, for example, by integrating the privacy policy into the other required disclosures and materials provided to the consumer. In fact, some financial institutions have developed disclosures that comply with the law in the form of a single brochure that includes a tear-off application for point-of-sale credit applications. Simplicity of delivery is critical in light of the fact that it is not practical to train store clerks on the finer points

of regulatory compliance requirements. If the Model must be three pages, and the pages must not have any other information on them, it is not clear to us how a financial institution could provide failsafe "take one"-style applications (or any other application styles, for that matter) in a retail environment without redesigning significant portions of the marketing and compliance components of the card program. Even in a retail bank branch, additional compliance testing would be required to ensure delivery of the most current version of a multi-page notice to all consumers who should receive such a notice.

In addition to the difficulties some financial institutions may have in delivering privacy policies at the point of sale, financial institutions may have problems mailing the Model, either as an initial or an annual privacy policy. Although some financial institutions may regularly correspond with consumers using envelopes that can reasonably accommodate 8.5" x 11" paper, many do not. For example, credit card issuers generally do not send billing statements in envelopes that could easily accommodate 8.5" x 11" paper. Those issuers that use billing statements to deliver annual privacy policies would need to reconfigure their compliance programs, either by changing envelopes or mailing the annual notice as a stand alone document in a larger envelope. Both options have significant cost implications.

Consideration of a Single-Page Model

We believe that many of the issues we discuss above could be mitigated if the Agencies designed a Model that were no more than a page in length, could be incorporated into other documents (*i.e.*, could have additional information included on it), and need not be printed on 8.5" x 11" paper. CBA believes if some of the formatting conventions in the Model were abandoned (*e.g.*, elimination of unnecessarily unused space in the Model) and if some of the disclosures were simplified, eliminated, or made optional (as we discuss below), it would not be difficult to create a single-page Model that effectively conveys a financial institution's GLBA privacy policy to consumers.

Lack of Guidance for Electronic Delivery

The Agencies have not provided any guidance to financial institutions with respect to the electronic delivery of the Model, other than to note that the posting of a PDF version of the Model on the financial institution's web site would qualify for the safe harbor in terms of delivering a clear and conspicuous policy to consumers. We ask that agencies acknowledge alternative electronic delivery mechanism and provide a safe harbor. We ask the Agencies to describe how the safe harbor will apply in connection with the use of the Model in a variety of electronic environments (*e.g.*, e-mail text, web site HTML text, etc.). This is particularly important for delivering notices when accounts are opened through an Internet web site.

Revisions to Model, Either by Agencies and/or by Financial Institutions

The Agencies have made clear throughout the Proposal that a financial institution may alter the Model in only a few minor places or risk losing the safe harbor. If the changes financial institutions would need to make to the Model were only a few cosmetic tweaks, the lack of flexibility granted by the Agencies to financial institutions would not necessarily be an issue.

However, the Model as drafted in many respects simply does not reflect financial institutions' information practices, nor does it accurately reflect the scope of consumers' rights under federal law. Many financial institutions would have to make fundamental changes to the information in the Model to describe their practices accurately. The materiality of such changes could make it difficult for financial institutions to evaluate whether the Agencies would deem the resulting GLBA privacy policy to be compliant.[1]

General Accuracy

The Model provides an inaccurate description of many financial institutions' information practices. Not only does the required text fall short of describing information practices accurately, the text also misstates (or simply creates) consumers' rights under applicable federal law. A financial institution must be granted the flexibility to tailor the Model to describe its practices and to reflect only those rights granted to consumers.[2] While it may not be necessary to include text that is unquestionably precise with respect to information practices, the Model should not be patently incorrect with respect to how a financial institution handles information.

Having said this, we agree with the Agencies' observation that the "laws governing the disclosure of consumers' personal information are not easily translated into short, comprehensible phrases that are also legally precise." For example, it would not be practical to list all of the reasons that could be included as an "everyday business purpose" or all of the sources of information collected. Like the existing sample clauses in the GLBA Regulations ("Sample Clauses"), portions of the Model include concise language that gives consumers an accurate impression of *the types* of practices engaged in by a financial institution. We urge the Agencies to retain the existing approach in the Model with respect to those practices that can be described with generality.

Safe Harbor

We provide specific examples below of how the text in the Model could be improved (either by the Agencies or financial institutions themselves if granted the flexibility). Regardless of whether our suggestions are adopted, it is critical that the Agencies expressly state in a final rule that financial institutions that use the text (or something substantially similar) provided by the Agencies will have the flexibility to engage in any information practices permitted under the GLBA and the Fair Credit Reporting Act ("FCRA"), including those permitted by notice and opt out and for "everyday business purposes" (such as through obtaining consumer consent). If the Agencies do not provide such a safe harbor, and the final Model does not include legally precise

[1] Normally we would find it difficult to believe that the Agencies would take an enforcement action against a financial institution that provides an accurate, clear, and conspicuous privacy policy to consumers, regardless of its resemblance to the Model. The Agencies' unusual attention to detail in describing exactly how the Form should look (*e.g.*, discussions of x-heights and sans serif fonts appear to be overly prescriptive) and the Agencies' unusually strong emphasis on the rigidity of the format and content of the Model, however, calls into question whether any significant deviations from the Model will be viewed by the Agencies as evidence of noncompliance with the applicable requirements of the GLBA Regulations.

[2] We assume the Agencies did not intend to use the Model as a mechanism to modify financial institutions' information practices by limiting those practices to what is described on the Model. If we are incorrect in this assumption, we respectfully request the Agencies to make their intentions in this regard clear.

language, financial institutions may not believe that the Model provides acceptable protection from liability, whether through federal, state, or private enforcement.[3] A clear, unambiguous statement by the Agencies is necessary not only to give comfort to financial institutions using the Model for federal enforcement purposes, but also to assist state attorneys general and judges in determining whether liability is warranted under state unfair/deceptive theories of law against financial institutions using the Model in the manner intended by the Agencies.

This safe harbor should be similar in concept to the safe harbor provided in the Truth and Lending Act and Regulation Z for use of forms that are similar in substance, clarity and meaningful sequence to the model forms provided by the Federal Reserve Board. We believe that this approach combining uniformity and flexibility would be most helpful.

Description of Information Practices: For Our Marketing Purposes

Section __.13 of the GLBA Regulations permits a financial institution to disclose NPI to nonaffiliated third parties that perform services on behalf of the financial institution. The privacy policy disclosure provided under § __.13 *usually, but not always*, relates to a disclosure of NPI to a third party service provider performing marketing services on behalf of the financial institution. It is not uncommon, however, for a financial institution to use a service provider described in a § __.13 disclosure for reasons other than its own marketing purposes.

On page 1 of the Model, there is a statement pertaining to a financial institution's ability to disclose NPI to third parties "[f]or our marketing purposes—to offer our products and services to you." The Agencies state that this statement "includes service providers contemplated by section [__.13] of" the GLBA Regulations. We ask the Agencies to modify the form so that the statement can be more reflective of the breadth of disclosures permitted under § __.13. We also ask the Agencies for a more explicit statement indicating that, regardless of any change made to the Model, a financial institution that uses the text provided by the Agencies will have met its obligation to provide the disclosure required under § __.13, even if the disclosure of NPI is for reasons other than those listed in the Model (but still permitted under § __.13).

Description of Information Practices: Affiliate Sharing

CBA believes that the Model's descriptions of affiliate sharing do not accurately describe significant portions of affiliate sharing in which financial institutions engage. For example, two of the three boxes in the chart on page 1 suggest that a financial institution shares NPI with its affiliates "[f]or our affiliates' everyday business purposes"—meaning for the affiliates' disclosure(?)/use(?) in responding to court orders, processing the affiliates' own transactions, and any other purpose that would be permitted for *the affiliates'* purposes under § .__14 or § __.15. While it is true that a financial institution may disclose NPI to an affiliate so that the affiliate can prevent fraud, for example, we do not believe that the text in the Model provides a sufficiently complete description of affiliate sharing to be considered an accurate description. We believe it

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[3] The safe harbor in the Proposal as it relates to federal administrative enforcement pertains only to § __.6 and § __.7 of the GLBA Regulations. The safe harbor does not appear to extend to § __.4, which requires a financial institution's GLBA privacy policy to be one that "accurately reflects [the financial institution's] privacy policies and practices."

would be sufficient to state that the affiliate sharing is "For our affiliates' use" in the boxes that currently refer to "affiliates' everyday business purposes." This is an accurate and concise statement financial institutions can use to describe their affiliate sharing practices.

We also believe it would be appropriate to modify the descriptions of information that may be disclosed to affiliates for affiliates' use. The reference to "transactions and experiences" and to "creditworthiness" are sufficiently descriptive on their face to those familiar with the nuances of the FCRA. It is unclear to us whether they are sufficiently descriptive to consumers. For example, it is not clear that the provisions describe the disclosure of a consumer's name and/or address to an affiliate, which is usually viewed as not requiring notice and opt out. It is also not clear that a consumer would understand his or her payment history with the financial institution to be "transaction" information as opposed to "creditworthiness" information. Instead, we believe it would be more clear to describe such information as "information that is not credit report information" and "information we obtain from you or third parties about your creditworthiness," respectively.

As we have stated elsewhere, it is critical that the Agencies provide a clear shield from liability no matter what language they offer in the Model as it relates to affiliate sharing. A financial institution should have the ability to rely on language specifically chosen and tested by the Agencies for purposes of its compliance obligations under the GLBA and FCRA. It simply cannot be the intent of the Agencies for a financial institution to become a consumer reporting agency under the FCRA, for example, because a consumer successfully alleges that the disclosure provided in the Model is not sufficient to describe the entire information sharing practices of the financial institution with respect to affiliate sharing. CBA strongly urges the Agencies to clarify this. Without such clarification, if the Model is perceived to be inaccurate or incomplete it simply will not be used. The consequences of providing insufficient affiliate sharing disclosures are too significant for many financial institutions to take such risks.

We also note that the Agencies have not accurately described the disclosure financial institutions must provide to consumers under Section 624 of the FCRA. In particular, a consumer must have the right to opt out of certain *uses* of limited types of information by an affiliate to generate a solicitation to the consumer. The law does not provide a blanket opt out with respect to the *sharing* of such information, nor does the opt out apply to the use of all information obtained by the affiliate. The text in the Model, however, suggests that the consumer can opt out of all information sharing among affiliates if the affiliates would use it to market to the consumer. This is simply not an accurate description of how Section 624 of the FCRA operates.

The Agencies should revise the text that currently states "[f]or our affiliates to market to you" but we understand the difficulties involved in simplifying and no other alternative noted. In the chart, in the "can you limit this sharing" column, it could say "no, but you have the right to limit the use of the information by affiliates to make solicitations to you". If the Agencies do not revise the language to reflect the contours of Section 624 of the FCRA, financial institutions will not use the Model as a vehicle to provide the Section 624 disclosures.[4]

[4] Neither the FCRA nor the GLBA require the "affiliate marketing" disclosure to be provided in the GLBA privacy notice.

It is important for the Agencies to make conforming changes to page 2 and 3 of the Model as they relate to affiliate sharing. The descriptions of the opt-out rights granted to consumers on page 2 and 3 should mirror those described on page 1. For example, the opt out on page 3 relating to Section 624 of the FCRA should not suggest that a consumer can block affiliates' use of any information, regardless of type or source, for use in marketing. Certainly an affiliate can use its own information to market to the consumer, regardless of the choice provided in the Model. The explicit safe harbor we have requested would also need to apply to the opt-out language on page 3 as it would to the descriptions of affiliate sharing on page 1.

Security Measures Designed to Comply with Federal Law

The Agencies propose to require financial institutions to state that they "use security measures that comply with federal law." Although virtually all financial institutions believe such a statement would be true as it applies to their operations, we do not believe the Agencies should require financial institutions to make such a statement. A financial institution could be found to be technically noncompliant with federal law in this regard for even minor, nonsubstantive reasons, making the statement incorrect and potentially subjecting the financial institution to liability relating to the accuracy of its GLBA privacy policy. Furthermore, the information security requirements under the GLBA are flexible, and appropriately so. A necessary result of this flexibility, however, is that financial institutions cannot be *certain* that an examiner will deem their programs to be compliant with the requirements. We believe it would be more appropriate to include a statement indicating that the financial institution's security program "is reasonably designed to comply with federal law."

Description of Affiliates

The GLBA and the GLBA Regulations require a financial institution to inform consumers of the "categories" of affiliates to whom the financial institution may disclose NPI. If the financial institution does not have affiliates, *or if the institution does not disclose NPI to the affiliates it has*, the institution need not make reference to affiliates in the privacy policy. The Model, however, would appear to require a description of affiliates regardless of whether the financial institution has any or discloses NPI to them. This is unnecessary.

For those financial institutions that must describe the categories of affiliates to whom they disclose information the Model is not clear as to how to describe those affiliates. We assume the financial institution would describe only those affiliates to whom it may disclose NPI, not all of the affiliates it may have. We also assume that a financial institution need not list each affiliate despite the instruction to "list affiliates" in C.3.(b). of the Proposal. CBA also believes that the existing language to describe affiliates is awkward for financial institutions that may list only one or two affiliates. It should be sufficient to name the affiliates in question, or the category to which they belong.

Description of Nonaffiliates and Joint Marketing Partners

The GLBA and the GLBA Regulations require a financial institution to inform consumers of the "categories" of nonaffiliates to whom the financial institution may disclose NPI. We appreciate that the Agencies would permit financial institutions to state that they do not share with such entities, if such is the case. As we note below, however, it may be more appropriate to allow financial institutions to omit these two boxes from the Model if they do not share with nonaffiliated third parties other than "for everyday business purposes."

We also believe that financial institutions should not be required to list the types of third parties to whom they may disclose NPI. Such a list could become unnecessarily cumbersome for financial institutions attempting to adopt the Model across a family of affiliates. For example, if five affiliates each shared with one type of third party, but none shared with the same type of third party, the Model may need to include all five types of companies in order to ensure compliance absent additional guidance. Not only is this unnecessary, but it also incorrectly and unfairly implies to the consumer that his or her NPI could be disclosed to each of the five types of nonaffiliates. CBA asks the Agencies to eliminate the requirement to list the types of nonaffiliates to whom NPI may be disclosed, or to provide additional guidance to permit a list of two or three types of companies to be sufficient in all circumstances.

State Law

Given the fact that state privacy laws is affecting the financial service industry, requires policies, we are surprised at the lack of attention paid to state law in the Model or the Proposal. The only reference to state law in the Model is that "[s]tate laws...may give you additional rights to limit sharing." CBA fears that this may not be sufficient for financial institutions to avoid potential liability at the state level. For example, the Agencies would require a financial institution to use a separate document to explain any difference in its information practices that may vary as a result of state law. Although we believe such a document should, strictly speaking, be sufficient, financial institutions may not view this as an appealing option if state attorneys general or the class action plaintiffs bar view such a practice to be somehow unfair or deceptive. In other words, a financial institution may not be willing to risk a class action lawsuit over this issue.

We believe the Agencies should permit financial institutions to include state law addenda in the Model itself. We recognize that this may make the Model less appealing due to the length that would be required to fit such addenda into the expanded format of the Model. It is not realistic, however, to force financial institutions essentially to ignore state law risks in their GLBA privacy policies. Perhaps such a result would focus policymakers on the need to create a single standard so that it is, in fact, possible to provide consumers with standardized, concise privacy policies.[5]

Contacting the Financial Institution to Opt Out

[5] CBA notes that Congress has directed the Agencies to develop a "succinct" privacy policy that allows consumers to "compare privacy practices among institutions." We urge the Agencies to consider whether state laws would be preempted to the extent that they prevent the implementation of the federal law.

Page 3 of the Model requires financial institutions to state "[u]nless we hear from you, we can begin sharing your information 30 days from the date of this letter." CBA notes that this language is required neither by the GLBA nor by the GLBA Regulations. For that reason it should not be required in the Model. If the Agencies retain the concept of informing consumers about a timeframe to opt out, the required language must be amended to account for the following issues:

- A financial institution can share NPI immediately (and even prior to the privacy policy being delivered) for any reason other than pursuant to notice and opt out;
- Even for third-party disclosures subject to an opt out, even the Agencies have indicated that a 30-day time period is not necessary in all circumstances;
- There is no waiting period at all if the notice is an annual notice;
- If the consumer has already opted out, he or she needs not opt out again and the 30-day reference is meaningless;
- The Model may or may not be part of a "letter;"
- The Model most likely does not have a "date" printed on it from which the consumer can start a 30-day clock; and
- By suggesting that the financial institution need only "hear from [the consumer]" the statement implies that the consumer can opt out by contacting the financial institution in any manner, regardless of whether such manner is designated by the financial institution.

Inability to Otherwise Customize when Appropriate or Necessary

CBA believes a financial institution should be able to make modifications to the Model if the financial institution determines such modifications to be appropriate or necessary. For example, the Model makes several declaratory statements regarding a financial institution's information practices which may or may not be true. The Model makes statements such as "[w]hen you close your account, we continue to share information about you according to our policies," "[t]he types of personal information we collect and share depend on the product or service you have with us," and "[w]e also collect your personal information from others, such as credit bureaus, affiliates, or other companies." These statements, and several others, may or may not be true depending on the financial institution or the product offered. The financial institution should have the ability to state that the information collected "may" vary depending on the product, for example.

A financial institution may also need to explain features of its information practices that are not currently included in the Model. For example, it is common for a financial institution to have multiple privacy policies depending on the financial product in question. As another example, a jointly marketed financial product may have a privacy policy applicable to both financial institutions that is different from the privacy policy each institution delivers to its other respective customers. The Model does not appear to give financial institutions the ability to explain the limited applicability of a specific privacy policy in these circumstances. Similarly, financial institutions oftentimes rely on consumer consent in connection with disclosures of NPI to third parties, such as co-brand partners. A financial institution should be able to explain the scope of the consumer's consent as part of the Model. The inability to customize the Model in

these and other ways will serve as a significant disincentive to financial institutions using the Model if they need that flexibility.

Ability to Modify for Use by Diversified Financial Institutions

The Agencies specifically state that the Model could be used by "a group of financial holding company affiliates that use a common privacy notice."[6] However, the SEC has provided text that differs from the other Agencies' text, yet no Agency will allow for deviation from its text without sacrificing the protection of the safe harbor. It would be impossible, therefore, for a diversified brand that has both a broker-dealer and a bank to provide the same privacy policy to all consumers. CBA urges the Agencies to grant a safe harbor to a financial institution that uses any text offered by any Agency in connection with its use of the Model. Unless such flexibility is granted, many diversified financial institutions will not be able to enjoy the benefits of the Model.

Brevity

As we state above, CBA firmly believes that financial institutions should be given an option of providing a one page Model to consumers. We believe that this goal is realistic, especially given the unused space in the Model as it is proposed. Not only is there significant empty space that could be eliminated without sacrificing the clarity of the Model, but there are also significant amounts of information that are not necessary to comply with the GLBA or the GLBA Regulations. If the Agencies eliminate these portions, or allow financial institutions to delete them at their option, we believe the Model could be significantly shorter.

For example, the following portions of the Model are not required under any law or regulation:

- The "FACTS" title line on each of the pages;
- The information in the "Why?" box;
- The information in the "How?" box;
- The joint marketing disclosure for financial institutions that do not engage in joint marketing;
- The FCRA affiliate sharing disclosure for financial institutions that do not share consumer report information with affiliates;
- The "[f]or nonaffiliates to market to you" disclosure for financial institutions that do not share NPI with third parties for that purpose;
- The information in the "Contact Us" box;
- The information in the "How often does [financial institution] notify me about their practices" box;
- The information in the "Why can't I limit all sharing" box;

[6] CBA asks the Agencies to revise this portion of the Proposal to avoid any implication that the Model could not be used by a group of affiliates that is not part of a "financial holding company" as such term is defined in Section 3(p) of the Bank Holding Company Act.

- The information in the "Affiliates" box for financial institutions that do not share NPI with affiliates;
- The information in the "Nonaffiliates" box for financial institutions that do not share NPI with nonaffiliates; and
- The information in the "Joint marketing" box for financial institutions that do not share NPI pursuant to joint marketing agreements.

Even if the Agencies were to eliminate only those disclosures that no financial institution, regardless of information practices, is required to make under law, the Model would be approximately one less page of text without having to modify the format of the Model.

CBA certainly understands that the information described in the bullets can have value both to consumers as well as to financial institutions. For this reason the information should be *optional*. We believe that financial institutions would be more likely to include such information in the Model if the information did not result in a disclosure of more than one page, but some financial institutions may still choose to include those disclosures even if the Agencies were to determine that such disclosures might necessitate a second page.

We also note that it is not necessary to require the opt-out provisions on a separate page. These could be included on the same page as the rest of the privacy policy, as many financial institutions currently do today in full compliance with the law. The Agencies suggest that the Model includes the opt-out form on a separate page because staff at some of the Agencies stated in a prior FAQ that a financial institution could not provide a detachable opt-out form that removed some text of the privacy notice itself. Regardless of the fact that this staff interpretation does not reflect the Agencies' plain language requirement in the GLBA Regulations,[7] it would be possible to include a tear-off opt-out form on a single-page Model without removing any of the text.

Bias Against Information Practices

CBA believes that a financial institution will be less likely to use a Model if that Model suggests the financial institution's information practices are somehow inappropriate. We note for the record that consumers *benefit* from information disclosures. Consumers can only benefit from being made aware of competing offers, new products, or special pricing. We recognize that opponents of information sharing have succeeded to some extent in demonizing the practice of information sharing, but the consumer benefits associated with information sharing cannot be denied.[8]

Having said this, CBA recognizes that policy decisions have been made to allow consumers to opt out of certain information disclosures. We agree that consumers should receive a clear and conspicuous description of a financial institution's information practices and consumers' legal rights. We do not believe, however, that the privacy policy should be designed

[7] The GLBA Regulations require a financial institution to provide GLBA privacy notices to "customers" so that the "customer can retain them *or obtain them later*." (Emphasis added.)

[8] To the extent that consumers wish to avoid the mechanism through which such offers are provided, existing law gives them simple options to opt out of receiving information through telemarketing and e-mail marketing.

to make a financial institution appear profligate or irresponsible with respect to information sharing. CBA believes that asking a financial institution to include a chart implying widespread and reckless information sharing, *i.e.*, one that requires it to answer "yes" to up to seven questions about sharing, is not conducive to having such financial institutions use the Model. For example, virtually every financial institution makes disclosures "for its everyday business purposes" and to service providers under § __.13. These information disclosures are innocuous and expected. They probably do not warrant their own places in a chart, especially since these portions of the chart will not serve to differentiate the vast majority of financial institutions.

We also note that requiring a financial institution to tell consumers "no" in a chart repeatedly is also not going to encourage the financial institution to use the chart. This is, in essence, how the Agencies have constructed the chart by using "[c]an you limit this sharing?" as a heading and requiring financial institutions to say "no" repeatedly. It may be equally effective, however, to include as a column heading such as "You can limit this sharing" and require the financial institution to check the appropriate boxes if the consumer can, in fact, limit the sharing in question. Alternatively, the heading could be "Does [federal] law give you the right to limit this sharing?" with use of the word "federal" depending on how the Agencies address state law issues.

CBA also believes that a financial institution should have the *option* of explaining why it shares information with affiliates and/or third parties, even if it increases the length of the Model. The Agencies use significant text and space in the Model to explain a variety of things to consumers, virtually none of which are required by the GLBA or the GLBA Regulations. It would seem reasonable, therefore, that financial institutions should have the ability to explain why consumers benefit from affiliate sharing and/or third-party sharing. Again, our objective is to encourage use of the Model. We believe that this flexibility will result in more, not less, financial institutions using the Model.

Branding

CBA commends the Agencies for allowing financial institutions the ability to use "spot color" on the Form and to include "a corporate logo on any page of the notice, so long as it does not interfere with the readability of the model form or the space constraints of each page." We ask the Agencies to grant financial institutions broader flexibility so that the Model may include colors, markings, logos, and other visual effects consistent with other communications from the financial institution.

Financial institutions spend significant resources determining how best to communicate with their customers. The GLBA privacy policy, like periodic statements or account applications, is one more opportunity for a financial institution to communicate with its customers. We believe that a financial institution should be permitted to brand such communications in a manner that it determines to be appropriate. For example, it may:

- Choose to use a certain color paper (other than white or cream) to send communications to the consumer;
- Include its corporate logo in more than one place in documents;

- Include a logo associated with the product; and/or
- Include a branding phrase, such as "[Name of bank], the Bank in Your Neighborhood".

So long as these branding mechanisms do not interfere with the disclosures provided, we do not believe the Agencies should limit a financial institution's ability to customize the appearance of the Model.

Other

Repeal of Existing Safe Harbor and Sample Clauses

The Agencies propose to repeal the Sample Clauses and their safe harbor status in the GLBA Regulations one year after a final rule is adopted. CBA asks the Agencies to retain the Sample Clauses and the existing safe harbor. Although Congress directed the Agencies to develop "a" model form as part of the Financial Services Regulatory Relief Act of 2006, it did not direct the Agencies to make it "the" model form, nor to repeal any existing models. CBA is also concerned that many financial institutions will not be able to use the Model absent significant revisions to it, and that a repeal of the current safe harbor will leave financial institutions with no meaningful guidance or legal certainty with respect to their GLBA privacy notices. Not only would this result in unnecessary uncertainty at the federal level, but financial institutions could also face significant difficulties at the state level if there is not a widely accepted standard with respect to adequate GLBA privacy policies.

Even if the Agencies eliminate the existing Sample Clauses and safe harbor, we believe the Agencies should provide financial institutions with guidance as to whether the Agencies will view use of the Sample Clauses as indicia of noncompliance with the GLBA Regulations. The Agencies note in the Proposal, for example, that they are granting a year for continued use of the Sample Clauses "for compliance purposes." Although CBA appreciates the fact that the Agencies are not proposing to delete the Sample Clauses immediately, we are concerned with the implication that financial institutions must cease use of the Sample Clauses in order to be in compliance with the GLBA Regulations after the one year transition period. We agree with the Agencies' existing views that a financial institution can comply with the privacy policy notification requirements of the GLBA Regulations through use of the Sample Clauses. We are unaware of any developments that would change this view, and we believe it would be capricious for the Agencies to grant the Sample Clauses safe harbor status one day and view them as evidence of noncompliance literally the next day. For this reason, we strongly urge the Agencies to indicate that the Model will not become a *de facto* requirement, either intentionally or through examiner reliance on it as the only acceptable method to comply with the GLBA Regulations.

Alerting Consumers to Changes in Policy

The Agencies request comment on whether "financial institutions should be required to alert consumers to changes in an institution's privacy practices as part of the model form." We do not believe the Agencies should adopt such a requirement. As a primary matter, Congress has not required such information to be included in the GLBA privacy policy, and we do not believe

it is necessary for the Agencies to do so. This is especially true since the Model already runs the significant risk of being too long to be adopted by many financial institutions. It is also not clear to us how the Agencies could view use of the Model, minus any highlighting of changes, to violate the GLBA Regulations since the Agencies' regulations themselves do not require such information.

There are practical problems to the requirement to inform consumers to changes in an institution's privacy practices, as well. For example, a description of a change may not be as simple as it would appear. Would a financial institution need to "alert" consumers if a listed affiliate changed a name? Was sold? A category of affiliates was added/deleted? Even if a change in the disclosure practices were the only item that required "highlighting," it is not clear how such a requirement would work if there was a merger or acquisition because setting a baseline for comparison would be difficult. Of course, as state laws continue to change, it would seem that such a requirement could create interesting compliance decisions as to how to inform residents of that state of changes specific to that state when the state law disclosures are not permitted on the Model in the first place.

SSNs/Account Numbers

The Agencies also request comment as to whether financial institutions "need [the consumer's account number, Social Security number, or other personal information] in order to process opt-out requests, or would the customer's name and address alone, or the customer's name, address, and a truncated account number for a single account, be sufficient to process opt-out requests, including for customers with multiple accounts at the same institutions?" In short, financial institutions should continue to be permitted to request Social Security numbers or any other reasonably necessary information in connection with an opt-out request.

A consumer that provides only a name and address may or may not provide sufficient information to implement an opt out. For example, the name provided by the consumer on the opt-out form may or may not match the name on any given account depending on whether the consumer lists his/her name on the opt-out form exactly as it appears in the financial institution's records. The same is true for an address. This is especially difficult if there are two people with the same or similar names at the same address. Even if name and address were sufficient, consumers' handwriting is not always legible. Additional searchable information, such as SSNs, results in increased ability to record consumers' choices accurately.

While an institution may in some circumstances be able to use the last four digits of an account, in conjunction with a name and address, to implement an opt out on a single account, the institution may not be able to implement the opt-out "across the board," even if the Agencies were to permit a financial institution to allow a consumer to indicate such a preference for such a broad opt out. The consumer could have used multiple versions of the same name and/or used different addresses in connection with multiple accounts with the same financial institution. There simply must be a unique identifier available to the financial institution if it must implement opt outs across accounts. This is also true for those affiliated entities that implement opt outs across the family of companies.

CBA is concerned that the Agencies have raised this issue in the context of the Proposal. If the Agencies were to delete the option from the Model to collect a unique identifier, they would be suggesting that to request such information could violate the GLBA and GLBA Regulations. If the Agencies did not mean to imply such a result, there would be no reason to exclude affirmatively that option from the Model and its safe harbor. We strongly urge the Agencies to permit financial institutions to collect the information they deem to be important through use of the Model when implementing consumers' opt-out requests.

Conclusion

CBA strongly urges the Agencies to develop a Model that will provide consumers with clear, concise, and succinct GLBA privacy policies. In order to achieve this goal, however, the Agencies must develop a Model that financial institutions are willing to use for large numbers of accounts. We believe the Model currently has several material shortcomings that will hinder its widespread adoption by financial institutions. CBA hopes the Agencies will consider the comments it receives, engage in additional consumer testing involving privacy policies likely to be delivered to consumers, and repropose a Model for additional feedback.

Again, we thank the Agencies for the opportunity to comment on the Proposal and the Model. Please do not hesitate to contact me if you have any comments or questions, or if we may be of further assistance in this matter.

Very truly yours,

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