



May 29, 2007

Via Electronic Delivery

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

Re: Model Privacy Form RIN 3064-AD16

Ladies and Gentlemen:

This comment letter is submitted on behalf of Discover Bank in response to the Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act ("Proposal") issued by the Federal Deposit Insurance Corporation, among other federal agencies (collectively, the "Agencies"). Discover Bank, with the issuance of the Discover Card, is one of the nation's largest issuers of consumer credit cards. We appreciate the opportunity to provide our comments and suggestions on the Proposal.

Summary

Congress has directed the Agencies to develop a model form for purposes of delivering privacy policies under the Gramm-Leach-Bliley Act ("GLBA"). Such form must be "comprehensible...clear and conspicuous...[and] succinct." Furthermore, it must "enable consumers easily to identify and to compare privacy practices among financial institutions." Congress also stipulated that the form was not to be mandatory, but rather that it may be used "at the option of the financial institution." Discover Bank shares the desire expressed by Congress for a succinct model financial institutions can use to deliver privacy policies required by GLBA. Such a model would be better for consumers and for financial institutions. For this reason, we commend the Agencies for issuing the Proposal and developing a form that financial institutions can use to comply with their GLBA privacy notice obligations ("Form"). We believe, however, that it would be possible to recraft the Form in a manner that is more appealing to financial institutions, including Discover Bank, while still providing consumers with effective GLBA privacy disclosures.

Based on our review of the Form and the Proposal, we have several suggestions for the Agencies to consider. In sum, we believe: (i) more flexibility is needed to make it reflect the actual information practices of financial institutions; (ii) as proposed, the Form will impose unnecessary costs, discouraging its use; and (iii) a broader safe harbor for those financial institutions using the Form is necessary. The Agencies should revise

the Form and “test market” the new Form with actual customers before issuing another proposal and requesting public comment.

Flexibility

The Agencies need to make the Form more flexible in order for financial institutions to accurately describe their information practices. The Agencies have proposed a Form that cannot be altered without a financial institution running the risk of losing the safe harbor associated with the Form. In fact, the tone of the Proposal suggests that the Agencies could view any GLBA privacy policy that does not closely resemble the Form to be at risk of noncompliance. Given the Agencies’ repeated suggestions that even minor modifications to the Form could result in a financial institution violating the GLBA privacy rules, we are concerned that financial institutions will not be able to make necessary and proper adjustments to the Form without fear of unwarranted liability.

Conformity with Our Existing Practices

Consumers should have an accurate understanding of a financial institution’s information practices after reviewing the GLBA privacy policy, but the Form does not provide the flexibility for financial institutions to discuss their information practices. We assume the Agencies did not intend to force us, or other financial institutions, to alter our information practices to conform with those described on the Form. As such, we ask the Agencies to give us the ability to modify the Form so that the Form can be an accurate reflection of our information practices. Not only is accuracy required by the GLBA privacy rules, but it will allow us to avoid potential state law liability associated with unfair and deceptive practices.

One example of our need to adjust the Form pertains to affiliate sharing. The Form does not describe affiliate sharing in a manner that reflects the scope of our practices, or most anyone else’s. For example, page one of the Form suggests that we may share certain information with our affiliates for “our affiliates’ everyday business purposes.” This may be true, but it is not a representative or complete description of why we may share information with affiliates. While our affiliates may use shared information for “everyday business purposes,” such as fraud prevention or compliance with law, that is not what the Agencies intended to describe in the Form. Rather, we believe the Agencies intended to describe affiliate sharing practices involving affiliates’ use of the information for their own purposes broader than those defined in the Form as “everyday business purposes,” such as marketing.

In the portion of page one of the Form that does discuss the sharing of information among affiliates “for our affiliates to market to you,” we understand the Agencies’ intent to be for this disclosure to pertain to Section 624 of the Fair Credit Reporting Act (“FCRA”). The Agencies, however, have not confined this portion of the Form to the scope of the FCRA affiliate marketing provisions. Unlike the Form’s suggestion that the consumer can opt out of sharing of all information among affiliates for marketing purposes, Section 624 allows consumers to opt out of an affiliate’s use of

certain information to generate a solicitation for marketing purposes. The Form represents not just a minor technical misstatement, but rather a complete revision of consumers' legal rights and financial institutions' likely practices. At a minimum, the Agencies need to provide a more accurate description of affiliate sharing practices.

Another example is that the Form does not allow us to state our information practices regarding joint cardholders. For instance, even though we send our privacy policy to the primary cardholder, any joint cardholder has the right to notify us about their sharing preferences and we will treat that request as applying to the entire account. As such, we need to make adjustments to the Form to reflect our actual information practices.

Varying Privacy Policies

Discover Bank is proud of the broad array of financial products and services it offers to consumers and businesses. For example, we offer consumer and business credit cards, home loans, CDs, and money market accounts. We do not necessarily have the same privacy policy for each of these products, however. For instance, our consumer credit cards have a different privacy policy than our business credit cards. We are concerned that the Form would require us to adopt a "one size fits all" privacy policy applicable across all product lines and account types because the Agencies do not appear to grant financial institutions the ability to modify the Form to explain the applicability of the policy to specific products. We ask for the ability to provide variations of the Form that are product specific.

State Law

The current Proposal does not allow financial institutions to refer to state law in the Form other than by noting that state laws may provide additional protections. We do not believe this necessarily provides consumers in those states with useful information that could otherwise be provided through the Form, doing a disservice both to consumers and to us. It is not clear why we should not be able to advise, for example, a California resident if the practices described in the Form may be different for them. We believe this is an appropriate way to notify residents of their state law protections. Otherwise, we would be required to send separate notifications to such cardholders, which would be more confusing for them and more expensive for us. Including the additional state disclosures in the Form would not only result in a more informed consumer, but it would also shield financial institutions from what we believe would be frivolous lawsuits alleging that our GLBA privacy policy deceived consumers in California, for example, with respect to our information practices applicable to Californians. As we discuss below, this is an example of why the Agencies must provide strong, unambiguous safe harbors to those financial institutions that rely on the Form.

Opt-Out Instruction

The Form includes a statement informing the consumer that “unless we hear from you, we can begin sharing your information 30 days from the date of this letter.” This is generally not an accurate statement, nor is it required by the law. A financial institution should be permitted to delete this statement or significantly modify it. For example, we may begin sharing nonpublic personal information at any time if it is “permitted by law.” Even if the information shared is subject to notice and opt out, the Agencies have explained at least one circumstance in the GLBA privacy rules in which a 30-day waiting period is not necessary. Also, like many financial institutions, we do not include a date on our privacy policy, so this reference would be confusing to the consumer. Furthermore, for our existing cardholders who have already received a copy of our privacy policy, we do not have a waiting period when we send out our annual privacy policy. In addition, if a cardholder has already opted-out, they are not required to opt-out again. The Form needs to be flexible to allow us to explain these circumstances to our cardholders.

Color and Logos

The Agencies suggest that financial institutions must use white or off-white paper in connection with the Form, although spot color can be used. Financial institutions should be allowed to use other types of paper so long as the text remains clear and conspicuous. Currently, periodic statements and other required disclosures for credit cards meet regulatory scrutiny on shaded paper and we do not believe our GLBA privacy policy should be treated any differently.

The same point is valid with respect to use of logos or other branding material. The Proposal suggests that we could use “a” corporate logo on any page of the Form. There may be valid reasons to use not only the corporate logo but a graphic design or advertising slogan related to the product(s) covered by the privacy policy, for example. Use of such branding mechanisms should not call into question an institution’s compliance with the requirements of the Form.

Ability for Affiliates to Use Same Form

The Agencies state that “a group of financial holding company affiliates that use a common privacy notice” can use the same Form. We appreciate the Agencies recognizing that such an approach may be attractive to financial institutions, but we ask for two revisions to this point. First, the Agencies should provide us the opportunity to explain the companies that are covered under the privacy policy. The Form does not appear to have a section that allows for such an explanation. Second, we ask the Agencies to clarify that the group of affiliates need not be part of a “financial holding company” as such term is defined in the Bank Holding Company Act. Many depository institutions and other financial service providers subject to GLBA, including Discover Bank, are not organized as financial holding companies. We do not believe there is any reason to restrict this benefit to such entities, nor do we believe that was the Agencies’ intent.

Costs Associated with the Proposal and Form

In addition to the changes necessary to the Form's content to make it more appealing to financial institutions, we believe the Agencies should also make changes to the Proposal and Form to reduce the unnecessary costs associated with the Form's use. As proposed, the Form must be three pages of 8.5 inch by 11 inch paper that contains no information other than the privacy policy. This is a material change to how most financial institutions, including Discover Bank, provide GLBA privacy policies and it would result in significant additional costs. In particular, the Form could be difficult to deliver using existing delivery processes and require increased postage and paper.

Delivery

Discover Bank delivers its GLBA privacy policies in a variety of ways. For our new customers, we include the GLBA privacy policy in a booklet with our Cardmember Agreement. With the proposed Form, we would no longer be able to deliver all the information about our customer's card account in one convenient booklet, but instead we would be required to deliver the information as several documents, which makes it easier for the customer to misplace or lose the information. For our annual GLBA privacy policy, we deliver it to some of our customers as an insert to their periodic statement. The envelopes we use for our statements are not designed to contain full sized sheets of paper, as the Agencies would require the Form to be. Assuming we used the Form, we would need to consider changes to our existing processes to provide our annual privacy policy. These options could include revising the manner in which we send periodic statements, using a special mailing for those statements that include the policy, or sending the policy as a stand alone mailing. None of these options are appealing nor are they cost-effective. We therefore ask the Agencies to provide additional options in terms of the size of the paper we can use for the Form.

Postage

If the Agencies retain the notion that the Form must be three pages, we would incur increased postage costs as a result of the increased weight of our mailings. Today we provide our customers with a privacy policy that is approximately the equivalent of a single page in length, which is quite common in the industry. To triple the weight of the policy would impose unnecessary costs on us. This is, of course, in addition to any increased postage we would incur if, due to the logistics of mailing full sized paper, we had to send the Form as a separate mailing instead of combined with other correspondence with our customers. A separate mailing would cost us at least \$15 million.

Printing

The Proposal would triple the amount of paper we use for purposes of printing our GLBA privacy policies, not counting any additional envelopes we would need to mail them to our customers. This would be costly and wasteful. We ask the Agencies to

consider the impact of their requirement if every financial institution in the United States had to double or triple the amount of paper used to print its GLBA privacy policies. That is a lot of money spent, a lot of paper used, and a lot of paper thrown out. In addition, consumers are unlikely to want more paper to read or discard.

To further reduce the costs of printing the GLBA privacy policies, we believe the Agencies can shorten the Form to a single page, yet still have a comprehensible, succinct GLBA privacy policy. It seems likely that if key credit card pricing information can be conveyed in about one-half of a page through use of the Schumer box, and complete nutritional information can be conveyed in even less space, that a GLBA privacy policy should be able to fit in a page. The Form could be made shorter simply by omitting information that is not required by GLBA, the FCRA, or the GLBA privacy rules. For example, the title frame, the Why? box, the How? box, and the Contact Us box could be removed from the first page alone without sacrificing any information required by law. The second page also contains several additional boxes that are not currently required by GLBA privacy rules. We also note that the formatting of the Form could be condensed to provide for more complete and efficient use of space without negatively impacting consumer comprehension. A financial institution should, however, have the option to include their information. In order to encourage greater use of the Form, we believe the Agencies should provide flexibility with respect to the length of its contents.

Safe Harbor

Express and Broad Safe Harbor Necessary

Discover Bank appreciates the safe harbor that the Agencies have provided in the Proposal. In particular, if a financial institution relies on the Form, that financial institution would receive a safe harbor with respect to §12 C.F.R. Parts 332.6 and 332.7 of the GLBA privacy rules. It is critical, however, that the Agencies broaden the scope of the safe harbor for financial institutions that rely on the Form. For example, if a financial institution uses the Form, that financial institution should have the flexibility to engage in any information practice that is permitted under GLBA and FCRA (without becoming a consumer reporting agency). As we describe above, it is not clear on its face that the Form would give financial institutions such flexibility; unambiguous clarification from the Agencies is necessary. In particular, the Agencies should indicate that use of the Form, if the “opt-out chart” is filled out properly, would result in a safe harbor for purposes of §12 C.F.R. Part 332.4’s accuracy requirement. The Agencies should also make clear that a financial institution should not be liable under any state law theories in connection with its description of its information practices if it uses the Form.

Electronic Notices

The Agencies have declined to provide a safe harbor for the electronic transmission of the Form except to note that a pdf version of the Form posted on a web site would be compliant, an unduly narrow and technology-specific exception. Discover

Bank believes that posting a pdf is not necessarily the most efficient or consumer-friendly manner to provide a GLBA privacy policy electronically. We request that the Agencies look to expand the safe harbor to include, for instance, the posting of a GLBA privacy policy as a separate page on a web site, or by sending it as an e-mail to customers.

Specific Comments Requested by Agencies

Highlighting Changes to the Policy

The Agencies also request feedback as to whether financial institutions should be required to alert consumers to changes in the GLBA privacy policy. We do not believe this is required by GLBA or the GLBA privacy rules, and we urge the Agencies to decline such an approach. This could require financial institutions to have multiple privacy policies for the same product—one for the initial policy (with no “changes” highlighted since it is the first one given) and one for the annual/revised privacy policy. Financial institutions would also need to devise a system to ensure that all customers received the “alert” but that the “alert” was also phased out so as not to refer repeatedly to “changes” in the policy that have been included in one or more policies previously sent to consumers. The proposed restriction on referencing state law changes in our Form further exacerbates risks under state law liability theories.

Testing a New Form

Finally, before the Agencies approve a new Form, we suggest that they explore the feasibility of “real world” testing of the impact of such a new Form on consumers. While the Agencies may contemplate the “testing” of the Form through consumer surveys, focus groups, or notice-and-comment proceedings, such studies tend to examine individual sections in isolation or use other techniques that may not replicate the experience of actual consumers.

The best way for the Agencies to evaluate the true impact of the new Form on consumers would be to work with financial institutions on tests that would involve furnishing such Forms to a sample of current or new customers, and measuring their responses. This approach would provide the Agencies with demonstrable evidence of the efficacy of such Forms before finalizing. On the other hand, it could also provide a sound basis for abandoning or rethinking the Form if it demonstrated that consumers had a negative reaction or were confused.

Conclusion

Discover Bank commends the Agencies for their work on the Form. It is a worthwhile endeavor, and one that will hopefully result in a Form that appeals to us and other financial institutions. We believe the Agencies should engage in “real world” testing of a more streamlined, succinct Form. The Agencies should then repropose that Form for comment with additional flexibility granted to financial institutions in terms of

format, content and presentation. If the Agencies succeed in developing a Form with flexibility and a strong safe harbor, we are confident that many financial institutions will utilize the Form.

Thank you again for the opportunity to comment on the Proposal. Please do not hesitate to contact me if we can be of further assistance.

Respectfully submitted,

A handwritten signature in cursive script that reads "Christina Favilla".

Discover Bank
By: Christina Favilla
President