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Legal & Regulatory Group

May 29, 2007

Via Web

Office of the Secretary
Federal Trade Commission
Room 135 (Annex C)
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Model Privacy Form, FTC File No. P034815

Dear Secretary:

The National Automobile Dealers Association ("NADA") submits the following comments in response to the Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act ("GLB") by the Federal Trade Commission ("FTC"), Office of the Comptroller of the Currency, Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, Commodities Futures Trading Commission, and Securities and Exchange Commission (collectively "the agencies")(72 Fed. Reg. 14,940 – 15,000 (Mar. 29, 2007)).

NADA represents approximately 20,000 franchised automobile and truck dealers in all 50 states and the District of Columbia who (i) sell new and used motor vehicles; (ii) extend vehicle financing and leases to customers that routinely are assigned to third-party finance sources; and (iii) engage in service, repair, and parts sales.[1] Our members collectively employ well in excess of 1 million people nationwide. A significant number of our members are small businesses as defined by the Small Business Administration. Accordingly, NADA is particularly focused on regulatory changes that will increase the regulatory burden on these entities.

NADA continues to support the creation of an optional model privacy notice that financial institutions may use to fulfill their GLB and privacy rule responsibilities.[2] The agencies clearly have attempted to produce a well-tested model form that enables consumers to better understand and compare the privacy policies of the different financial institutions with which they conduct business. Nevertheless, as discussed below, we are concerned that (i) adoption of the proposed model form is not voluntary as required by the statute; (ii) certain language in the model form

[1] Our members include approximately 18,140 automobile and light-duty truck dealers that routinely engage in financial activity with consumers and thus would be impacted by changes to the FTC Privacy Rule.

[2] NADA initially expressed its support for this effort in comments to the Agencies dated March 19, 2004 (see Project No. P034815, *Alternative Forms of Privacy Notices*).

may not be appropriate for use by franchised automobile and truck dealers; and (iii) the agencies have underestimated the burden the new form will impose on small financial institutions.

Adoption of the Model Form is Not Voluntary

In addition to developing a model form that financial institutions may use to comply with the notice provisions in GLB and the institutions' respective privacy rule, the agencies propose to "eliminate the Sample Clauses from the privacy rule," 72 Fed. Reg. at 14,955, thereby removing the safe harbor protection that the clauses in Appendix A of the current rule ("Sample Clauses") presently provide. This proposal is neither mandated by the enabling statute nor consistent with the statute's directive that the agencies produce an optional model privacy form.

Section 728 of the Regulatory Relief Act[3] directs the agencies to "jointly develop a model form which *may* be used, *at the option of the financial institution*, for the provision of disclosures under [section 503 of the Gramm-Leach-Bliley Act]" (emphasis added) and affords safe harbor protection to any financial institution that uses the new model form. This directive clearly is intended to permit financial institutions to use the model form without compelling that result. If Congress intended otherwise, it would have used language eliminating the current safe harbor protection afforded by the Sample Clauses. Instead, it chose the discretionary language cited above (financial institutions "may" use a model form at their "option") which in no way suggests an intent to eliminate the safe harbor protection provided by the Sample Clauses.

The agencies regard the joint proposed rule as consistent with the discretionary language in section 728 since the rule does not mandate that financial institutions adopt the new model form. This would be consistent with the statute if the agencies limited the rulemaking to the creation of a new safe harbor notice. However, by taking the additional, nonessential step of eliminating the existing safe harbor, the agencies have created a model form that is optional in name only. Thousands of financial institutions, particularly the smaller ones that NADA represents, will understandably feel compelled to adopt the model form to protect themselves against an administrative enforcement action. The agencies acknowledge this in their Initial Regulatory Flexibility Analysis ("IRFA"), where they state:

> The Agencies expect, however, that small financial institutions, particularly those that do not have permanent staff available to address compliance matters associated with the privacy rule, would be relatively more likely to rely on the model privacy form than larger institutions.

72 Fed. Reg. at 14,957.

This accurate statement underscores the illusory nature of the voluntariness of the model form as small institutions cannot be expected to risk retaining privacy notices whose language lacks safe harbor protection. Accordingly, we urge the agencies to retain the safe harbor protection for the Sample Clauses.

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[3] Pub. L. 109-351 (Oct. 13, 2006).

Certain Aspects of the Model Form May Be Inappropriate for Dealers

Certain aspects of the model form do not adequately describe the typical privacy practices of franchised automobile and truck dealerships. We are concerned that this may impair dealers' ability to use the model form. The following are some examples:

1) The first box under "Sharing practices" states: "We must notify you about our sharing practices when you open an account and each year while you are a customer." Two elements of this statement may confuse dealership customers. First, dealers typically do not "open an account" with their customers. Rather, they enter into retail installment sales contracts or lease agreements with customers that usually are assigned immediately to a third party finance source. Second, notwithstanding the fact that a dealer's assignment of a finance or lease agreement terminates the customer relationship for GLB purposes, most customers do not consider the relationship terminated since they return to the dealership service department for the performance of routine service and repair work on their vehicles. The current language creates a consumer expectation that the dealer will provide an annual privacy notice when the dealer is not required to provide one. Aside from the legal issues this may present, it also creates customer relations concerns for the dealership;

2) The third box under "Sharing practices" provides three bullet points that list examples of personal information that the financial institution collects. Several of these examples are either inapplicable or have limited applicability to dealerships. Customers typically do not open accounts, deposit money, or pay bills when they enter into finance or lease agreements with dealers. Customers do apply at dealerships for financing (not loans) and occasionally may use a commonly issued debit or credit card to the extent permitted by law. The inapplicability of most of these items at franchised automobile and truck dealerships likely will hinder customers' ability to understand the dealer's privacy policy;

3) Under the box entitled "If you want to limit our sharing," customers are provided with three methods for opting-out: by telephone, on the web, and by mail. The model form does not provide for hand delivery, which may be preferred by customers who have personal interaction with retail establishments. This arises in the dealership setting, where customers who must be afforded an opt-out opportunity may wish to execute and return an opt-out form prior to leaving the finance office; and

4) The model form does not contain or permit an entry for a customer to acknowledge receipt of the privacy notice. Although the FTC Privacy Rule does not require financial institutions to obtain such an acknowledgement (and it would be impractical to do so for many financial institutions that do not deliver their privacy notices in person), the Privacy Rule places the burden of delivering privacy notices on the financial institution, 16 C.F.R. § 313.9(a), and identifies hand delivery as a reasonable form of delivery, 16 C.F.R. § 313.9(b)(1)(i). To demonstrate compliance with this requirement, many dealers presently (i) request that their customers sign an Acknowledgement of Receipt of the privacy notice; and (ii) retain a copy of the signed privacy notice. To accommodate this sensible practice, the rule should permit financial institutions to include an

acknowledgement of receipt box on the privacy notice.

With regard to elements of the model form that may not accurately describe a financial institution's privacy practices, we request that the agencies (i) clarify whether these financial institutions will be afforded safe harbor protection if they use the model form;[4] and (ii) change the model form to reflect the items mentioned above or, alternatively, permit financial institutions to make changes that clarify their disclosure practices.

The Agencies Underestimate the Burden on Small Entities

In the IRFA, the agencies state: "Because the use of the model form issued in this proposal is optional, the Agencies do not expect that the rule will have a significant economic impact on a substantial number of small entities." 72 Fed. Reg. at 14,956. However, as noted above, the agencies state their contrary expectation that "small financial institutions, particularly those that do not have permanent staff available to address compliance matters associated with the privacy rule, would be relatively more likely to rely on the model privacy form than larger institutions. 72 Fed. Reg. at 14,957. This latter statement accurately describes the condition of most of our members. Despite the standardized formatting and language contained in the model form, financial institutions still will incur significant costs associated with appropriately tailoring the form to their business model (to the extent permitted by the final rule), review by outside counsel, training personnel who deliver it on how to respond to customer queries, and, most notably, the added costs associated with producing an additional one or two sheets of paper for every privacy notice given to a consumer.

Regarding the last cost element, NADA urges the agencies to permit financial institutions to print the first two pages of the model form on the front and back of the same sheet of paper. Most dealers today place their privacy notice on a single sheet of paper. While NADA understands the Agencies' desire to maximize consumer comprehension of the model form, 72 Fed. Reg. at 14,945, we believe this marginal benefit to consumers is outweighed by the open-ended costs financial institutions would incur by continuously having to reproduce and deliver the form. By any estimation, the cost would be considerable and largely unnecessary since a notation on the front side of the notice could direct the consumer, in a user friendly manner, to the information on the back side.

Assuming the agencies do not retain the Sample Clauses and their corresponding safe harbor protection, the agencies can reduce the burden associated with the model form by (i) permitting a transition to the new form of at least two years; (ii) developing an optional web-based design and model form with "fillable" fields; and (iii) continuing safe harbor protection for financial institutions that use Sample Clauses A-1, A-3, A-7, and other clauses that do not involve the opt-out right.

[4] We are mindful of the agencies' recognition in Footnote 26 "that some financial institutions may not collect each type of information in the 'What' box" and that this is "not to be modified to reflect an institution's particular practices." 72 Fed. Reg. at 14,952. However, it is not clear whether the agencies apply the same standard to the other boxes, and whether they recognize the confusion that may be created by the current language.

Other Considerations

Several of our members have expressed concern about the reference in the "What?" paragraph to sharing social security numbers even after a customer's account is closed. As noted above, dealers typically do not open "accounts" with their customers and generally do not share personally identifiable information obtained in the financing and leasing process with third parties that are not involved in processing the customer's transaction. Even though some context to this language is provided in the "How?" paragraph, this language could prompt customers to be more likely to "opt out" of disclosures than they otherwise would be if they better understood the financial institution's privacy practices. We therefore suggest better linkage between these two paragraphs and, in the "What?" paragraph, replacing the phrase "we continue to share information about you according to our policies" with "we only share information about you as permitted by law."

The agencies inquire into whether financial institutions need a social security number to process opt-out requests or whether the Agencies should consider omitting a line for such information on the opt-out page to better protect customers. We favor the latter approach as dealers generally do not require social security numbers for this purpose and would prefer not to have another form in the dealership with this sensitive information.

Conclusion

We appreciate the agencies' efforts to create and test a standardized privacy notice that financial institutions may safely rely upon and that consumers will better understand. We believe additional revisions and testing can further enhance the notice and alleviate many of the concerns expressed above. However, it is essential that the agencies forego effectively converting this optional process into a new federal mandate, as will be the case for small institutions and others that cannot afford to lose the safe harbor protection that the Sample Clauses currently provide. To the extent the Sample Clauses adequately describe an institution's privacy policy, it should not be forced to abandon them.

We appreciate the opportunity to comment. Please contact us if we can provide you with additional information that would be useful in your development of the joint final rule.

Sincerely,

Paul D. Metrey
Director, Regulatory Affairs