



April 6, 2007

Chief Counsel's Office
Office of Thrift Supervision
1700 G Street NW
Washington, DC, 20552

Attention: OTS 2007-0005

Re: Model Privacy Notice

Dear Sirs and Madams,

Thank you for this opportunity to comment on the proposed Model Privacy Notice.

Millions of privacy notices are being printed and distributed each year, ostensibly to inform customers of a financial institution's privacy and procedures. It is generally believed that many of these notices go un-read and therefore the intended communication is not achieved. I therefore commend the efforts to standardize and simplify the Privacy Notice.

Summary

While striving for a notice that can be generally adapted to most institutions consumer privacy practices is a laudable task, the Model Notice appears to impose a more strict requirement for opt out when information is shared with affiliates than is intended by the Fair and Accurate Credit Transactions Act (FACTA). If an institution shares consumer information with an affiliate that is *not* 'a consumer report' and that information is to be used by the affiliate for marketing purposes, the model form directs that opt out rights are triggered. Such opt out requirements will substantially impair successful cross-selling of goods and services between an institution's customers and its affiliates and is beyond the underlying statute (FACTA).

Discussion

The Gramm-Leach-Bliley Act (GLBA) focused privacy restrictions on sharing non-public personal information with non-affiliated third parties. Consumers are given the ability to opt-out of information sharing with non-affiliated third parties. Therefore the then existing ability to share certain information with affiliates as vested with the Fair Credit Reporting Act was preserved. That, in turn, preserved one of the principal benefits of the financial modernization legislation for both consumers and financial institutions alike: the enhanced ability of affiliated companies to share information more efficiently and effectively for cross-marketing purposes.

On page one of the Model Notice, the first column headed “Reasons we can share your personal information” has a square stating “For our affiliates to market to you”. Moving to the right on that same row, the second column headed “Does [name of institution] share?” has an open square for institutions to state “yes” or “no”. Continuing to the right, the third column is headed “Can you limit this Sharing” has an open square for institutions to state “yes” or “no” or “we do not share”. According to the Notice instructions, whenever an institution indicates “yes” in the second column, the answer for the third column is to be “yes” (indicating that the customer has the ability to opt out or limit this sharing).

According to the instructions for this section of the model form [for our affiliates to market to you] “this provision applies to information shared among affiliates that is used by those affiliates for marketing, as contemplated by section 624 of the FCRA”. Section 624 ‘Affiliate Sharing’ (a) Special Rule for Solicitation for Purposes of Marketing, (1) Notice’ states: “Any person that receives from another person related to it by common ownership or affiliated by corporate control a communication of information that would be a consumer report [emphasis added], may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless [clear notice and the consumer choice to ‘opt out’ is provided].

The definition of a “consumer report” in section 603 of the FCRA “means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living which is used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 604’. The definition continues with exclusions that are subject to section 624 [Affiliate Sharing] and other provisions. It is suffice to note that many kinds of information that would be subject to GLBA (if it were being shared with a nonaffiliated third party) does not rise to the level of “consumer report” because of the content of the information and therefore should not trigger an opt out right when shared with an affiliate.

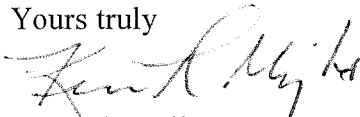
GLBA uses the defined term “nonpublic personal information” and FACTA uses the defined term “consumer report”. However the Model Notice uses an undefined term “personal information” which is ambiguous at best. The statutes made a clear distinction as to what information can be shared, but the Model Notice appears to lump all sharing into a single category.

Because the Model Notice simply provides that affiliate information sharing for marketing purposes triggers opt out, the Notice has a net that grabs *all* information and not just “consumer report” sharing. If an institution shares basic customer information (such as name, address, phone number, and e-mail address) with its affiliate to enable the affiliate to market its products and services, this information does not meet the definition of a consumer report. It would appear that some consumer information sharing for marketing purposes between an institution and an affiliate was designed within FACTA and such non-consumer report sharing would not trigger opt out rights.

Providing the consumer with opt out rights is not an easy or inexpensive program to design, establish and administer. However, designing an information sharing program that excludes consumer report information and allows affiliates to present their products and services to a greater number of persons retains the cross marketing abilities of GLBA and preserves the privacy intent of FACTA.

The Model Notice does not appear to adequately consider all information sharing possibilities. Or, saying it another way, the Model Notice may inappropriately expand the reach of FACTA and opt out rights to include all information sharing between an institution and an affiliate for marketing purposes. Therefore, I recommend that the affiliate sharing section of the Model Notice be modified to allow affiliates to obtain some customer information and market their goods and services without first granting an opt out right.

Yours truly



Kenneth Majka, CRCM
Vice President