Office of Thrift Supervision
Department of the Treasury
Montrice Godard Yakimov
Managing Director, Compliance and Consumer Protection
1700 G Street, N.W., Washington, DC 20552 • (202) 906-6173

November 17, 2009

MEMORANDUM FOR: **CHIEF EXECUTIVE OFFICERS**

FROM: Montrice Godard Yakimov
Managing Director
Compliance and Consumer Protection

SUBJECT: **Amended Privacy Rules and Model Privacy Notice**

The Office of Thrift Supervision, together with the other Federal Financial Institution Examination Council agencies,[1] Commodity Futures Trading Commission, Securities and Exchange Commission, and Federal Trade Commission (the "Agencies") are publishing final amendments to the rules that implement the privacy provisions of the Gramm-Leach-Bliley Act ("GLB Act"). These rules require financial institutions to provide notices to their customers that explain their information sharing practices. Subject to certain exceptions, the rules also provide that nonpublic personal information cannot be shared unless consumers are given a reasonable opportunity to opt out, and do not do so.[2] As part of the Financial Services Regulatory Relief Act of 2006, the Agencies were required to develop a model privacy notice that financial institutions may rely on as a safe harbor to provide these disclosures. The goal was to provide a model that is clear and comprehensible to consumers. As explained below, the Agencies have substantively agreed upon a model form that is incorporated into the privacy rules.

The Final Model Privacy Form

In developing the model privacy form, the Agencies conducted consumer testing and considered information provided by a wide range of stakeholders. For example, the Agencies took into account industry's request that the form be easy and simple to use. Consequently, the model privacy notice is laid out with a standardized menu of terms, but at the same time, it is customizable based on the type of entity sending the form and the kind of business it performs.

[1] These agencies are the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Federal Reserve Board, and the National Credit Union Administration.

[2] Additionally, the Fair and Accurate Credit Transactions Act of 2003, provides that information sharing among affiliates – including transaction and experience information and certain creditworthiness information – cannot be used by an affiliate for marketing purposes unless the consumer has received a notice of such use and an opportunity to opt out, and the consumer does not opt out. While some of the language of the model form differs from the language in OTS's affiliate marketing rule (12 C.F.R. pt. 571, subpart C and App. C), institutions may use the language as part of the model form.

To assist institutions with compliance, the Agencies have provided three versions of the final model form: (1) model form with no opt-out; (2) model form with telephone and web opt-out only; and (3) model form that includes a mail-in opt-out form. Finally, in response to concerns expressed by some consumers about identity theft, institutions are encouraged to use a truncated form of an account number other than a Social Security Number on privacy notices. Institutions are also encouraged to find other ways to identify accounts to which the privacy opt out applies, such as using a truncated account number or a randomly assigned identification code.

Sample Clauses

The existing privacy rules contain an appendix with sample clauses that were originally designed to illustrate the kind of information that needed to be conveyed to consumers in privacy notices.[3] Institutions that now use the sample clauses in their privacy notices are provided with a safe harbor for compliance with the privacy notice requirements.[4] However, during testing, the sample clauses were found to be less effective and more difficult for consumers to understand than the proposed model notice. In particular, consumers were confused by phrases such as "as permitted by law" or "as legally required," which are used in the sample clauses.

To address these issues, the safe harbor permitted for notices based on the sample clauses has been eliminated in the amended privacy rules. However, to ease the compliance burden for institutions that currently have privacy notices based on the sample clauses, the final rule has been designed to: 1) provide thirty days from the publication date before the rule is effective and 2) permit institutions to rely on the safe harbor for annual notices that are delivered during a transition period. This period will begin on a date that is thirty days after the final rule was published and will end approximately one year later on December 31, 2010.[5]

Disclosing That Information is Shared for Routine Business Purposes.

While the final model privacy notice provides a legal safe harbor, institutions may use other types of notices, so long as they comply with the privacy rules. Where an institution designs its own notice, the privacy rules have always permitted an abbreviated disclosure about the sharing of nonpublic personal information to third parties for routine business purposes.[6] Currently, the abbreviated disclosure that receives a safe harbor in this situation is a statement noting that an institution shares such information "as permitted by law."[7] However, as noted above, research has shown that use of this phrase raises questions for consumers.

---

[3] See 12 C.F.R. part 573, App. A.
[4] See id. and 12 C.F.R. § 573.2.
[5] Since institutions are required to send notices annually to their customers, institutions may continue to rely on the safe harbor for annual notices that are delivered during the transition period until the next annual privacy notice is due one year later. For example, if an institution provides a notice using the sample clauses on or before December 31, 2010, it could continue to rely on the safe harbor for one additional year until its next annual notice is due.
[6] See 12 C.F.R. §§ 573.14 and 573.15.
[7] See 12 C.F.R. § 573.6.

To encourage institutions that design their own notices to move away from this language, the amended privacy rules provide institutions with alternatives for describing how they share such information. Thus, OTS supervised institutions are permitted to state that they disclose it to other nonaffiliated companies:

(1) For everyday business purposes, such as (include all that apply) to process transactions, maintain account(s), respond to court orders and legal investigations, or report to credit bureaus; or

(2) As permitted by law.

Joint accountholders

Where institutions allow joint accountholders to express different opt-out preferences, institutions have long been required to provide all joint accountholders with a means to express their preferences on the same form, rather than submitting separate forms individually. [8] While the model form is designed to require each joint accountholder to submit his/her own form to express different opt-out preferences, OTS supervised institutions are encouraged to allow joint accountholders the option of expressing different opt-out preferences through a single telephone call.

Please direct questions to Ekita Mitchell, Consumer Regulations Analyst, at 202-906-6451 or ekita.mitchell@ots.treas.gov.

Attachment

[8] See Privacy Rule Frequently Asked Questions issued December 2001, available on the internet at: http://www.ftc.gov/privacy/glbact/glb-faq.htm (staff guidance issued by the Board, FDIC, FTC, OCC, OTS, and NCUA).