

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
750 FIRST STREET NE SUITE 1100
WASHINGTON, D.C. 20002
(202) 326-6018
(202) 408-6998
<http://www.naag.org>

LYNNE M. ROSS
Executive Director

PRESIDENT
CARLA J. STOVALL
Attorney General of Kansas

February 13, 2002

PRESIDENT-ELECT
W.A. DREW EDMONDSON
Attorney General of Oklahoma

VICE PRESIDENT
BILL LOCKYER
Attorney General of California

IMMEDIATE PAST
PRESIDENT'S DESIGNEE
MIKE FISHER
Attorney General of Pennsylvania

Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Ave. NW
Washington DC 20580

Re: GLB Act Notice Workshop – Comment P014814

Dear Mr. Secretary:

Pursuant to the notice published by the Regulatory Agencies¹ charged with enforcing Title V of the Gramm Leach Bliley Act (“GLB”), 15 U.S.C. § 6801 *et seq.*, in connection with their Public Workshop on Financial Privacy Notices (“Workshop”),² the Attorneys General of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virgin Islands, Washington, West Virginia, Wisconsin, Wyoming, the Corporation Counsel of the District of Columbia, and the Hawaii Office of Consumer Protection (hereinafter “States”) submit the following comments regarding the questions posed and addressed at the Workshop held December 4, 2001, in Washington, D.C.

The States urge the Regulatory Agencies to protect consumer privacy rights regarding GLB notices by requiring all financial institutions to issue uniform, standard notices in a brief format and to develop the new notice requirement based on scientific expertise. Absent these changes, the States do not believe that Congressional intent regarding consumers’ rights to control personal financial information will be effectuated.

The States make these comments based upon their experience in the enforcement of consumer protection laws, and upon the studies, surveys, and research developed since July 2001, the initial deadline for sending the notices under GLB. Based upon this experience and review of relevant studies, the States have drawn several conclusions:

¹ Office of the Comptroller of the Currency; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; Office of Thrift Supervision; National Credit Union Administration; Federal Trade Commission; Commodity Futures Trading Commission; and Securities and Exchange Commission [hereinafter “Regulatory Agencies”].

² 66 Fed. Reg. 49742 (2001).

- C The States believe that the financial institutions' efforts to comply with GLB's notice requirement, to inform consumers of their privacy rights by July 1, 2001, were unsuccessful. This is evidenced by the low opt-out rate -- less than 5% -- which the States believe is due to consumers' inability to understand the meaning and significance of the notices, and not to their approval of information sharing policies.
- C The States believe that informed consumer choice would be achieved more readily with standardized notices, either in a format modeled after Food and Drug Administration food labels or using icons developed to represent consistent privacy choices throughout the financial services industry.³ There is a consensus among state enforcers, consumer advocates, and many in the financial services industry⁴ that some abbreviated form of notice in plain English would help reduce consumer confusion and facilitate informed choice.
- C The States believe that relying on empirical data available from behavioral scientists and communications experts is the best approach to developing short, standardized GLB notices that will lead to greater consumer understanding of their privacy rights.

The States' recommendations, to develop a short form notice that is limited in size and complexity, are not incompatible with longer, more complete explanations by the financial institutions of their information handling practices. The States understand that financial institutions would like to retain the flexibility to craft their own, individualized privacy policies. The States envision the short, standardized notice as the initial notice that would be sent to consumers, which then could be supplemented by a longer, individualized notice.⁵

SHORT FORM

The States urge the Regulatory Agencies to adopt a short form GLB notice to rectify some of the many problems that consumers faced when they received the first set of notices required under GLB. It is clear that millions of consumers did not read or understand the dense text and long discussion contained in thousands of privacy notices developed by financial institutions prior to the initial July 1, 2001 deadline. If consumers did not read or understand the privacy notices, then they were unable to exercise their rights under GLB through informed choice.

While acknowledging the good faith efforts evidenced by those privacy notices,⁶ the States believe that the dense, high reading level text of most notices resulted in consumer confusion and inability to exercise informed choice. As reported in the Privacy Rights Clearinghouse study of 34 privacy notices,⁷ the average notice was written at a third- or fourth-year college reading level, while the average consumer reads at a junior high level. Recent surveys demonstrate that consumers either never see and read such complicated opt-out notices, or they don't understand them. A survey conducted by the American Bankers Association⁸

³ See Privacy Council Comment dated November 19, 2001 regarding "Trust Page," in effect, a privacy "food label."

⁴ See, e.g., Comment, Alliance of American Insurers, November 27, 2001. See also Comment, Covington & Burling for Financial Services Coordinating Council, December 4, 2001.

⁵ The positions taken in these comments are consistent with the comments of thirty-four Attorneys General in March 2000. See Letter from thirty-four Attorneys General to Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, Office of Thrift Supervision and Federal Deposit Insurance Corporation accompanying Comments to the Joint Agencies' Proposed Rules (March 31, 2000). This Letter is available at http://www.naag.org/features/privacy_comments.cfm.

⁶ The States recognize that most financial institutions took great time and expense to draft privacy notices in an effort to comply with the requirements of GLB. Most financial institutions did not employ communications experts in this endeavor, however.

⁷ See Mark Hochhauser, Ph.D., "Lost in Fine Print II: Readability of Financial Privacy Notices," Privacy Rights Clearinghouse, May 2001, available at <http://www.privacyrights.org/ar/GLB-Reading.htm>.

⁸ <http://www.aba.com/Press+Room/bankfee060701.htm>.

found that 41% of consumers did not recall receiving their opt-out notices, 22% recalled receiving them but did not read them, and only 36% reported reading the notice. Another survey, conducted by Harris Interactive for the Privacy Leadership Initiative (“Harris Survey”),⁹ found that only 12% of consumers carefully read GLB privacy notices most of the time, whereas 58% did not read the notices at all or only glanced at them. These surveys indicate that, when confronted with long, dense notices in small type, consumers do not have enough time or patience to read them or become confused once they attempt to read them.

The Harris Survey identified the most important information that consumers need in order to exercise informed choice about the sharing of their financial information: 1) how does this financial institution share my personal information with third parties?; and 2) what do I have to do to remove my personal information from the shared database?¹⁰ The Harris Survey also found that 8 out of 10 consumers would prefer shorter notices that contain more than this information.¹¹

A short form notice should provide consumers with the information they need in a format they prefer and can understand. Short notices should be simple and easy to understand. To achieve this they must use plain English. Moreover, the short form notice should have a common look to allow consumers to compare different notices and learn what information to expect the notices to contain. The States recommend use of standardized formats for these short notices, as discussed below.

STANDARDIZATION OF FORMAT AND CONTENT

The States believe readability and consumer comprehension will be greatly enhanced if the Regulatory Agencies require financial institutions to use a standard form for the short form notice to describe consumer rights under GLB. Whether the final result is an FDA “food label”-type format or an icon-based format similar to that suggested by Trustee, research has demonstrated that a template format or use of simplified factors improves understanding and allows comparisons between companies.¹² Requiring each institution to provide consumers the same statement to explain those rights would be consistent with other federal laws that require material disclosures through a prescribed format to achieve industry-wide consistency and ensure maximum consumer comprehension.¹³

Consistency will also benefit industry by cutting down compliance costs and enhancing competition by easing consumer comparison among financial service providers. In addition, it will address consumer distrust of information sharing practices documented by the Privacy Rights Clearinghouse and others.¹⁴

The States believe that the format for the short form notice should be largely set by the Regulatory Agencies, and there should be little or no flexibility in the prescribed content. The States anticipate that the format chosen will include a concise, plain language explanation of the types of information shared and how a consumer can exercise his or her opt-out right. It should also include definitions of terms, such as “affiliate,” to the extent that such definitions are necessary to understand the content of the notice. In addition, phrases such as “as permitted by law” should be disallowed because they are so confusing. The text font, size, and background must be specifically prescribed to assure readability.

⁹ <http://www.ftc.gov/bcp/workshops/glb>.

¹⁰ Hochhauser, *supra* n.7. Harris Survey, *supra* n.9.

¹¹ *Id.*

¹² See Alan Levy, Ph.D., "Lessons from Nutrition Labeling: Content, Format & Evaluation," Food and Drug Administration.

¹³ See, e.g., RESPA, Truth in Lending Act, 15 U.S.C. § 1681*et seq.*; Home Owners Equity Protection Act, 15 U.S.C. § 1639 *et seq.*

¹⁴ See “2001: The GLB Odyssey: We’re Not There Yet,” Privacy Rights Clearinghouse.

Moreover, the Regulatory Agencies should prohibit any marketing statements in the short form notice. Thus, for example, the short form notice should contain no statement that a consumer's privacy is important to the institution. As mentioned above, the notice should contain only a statement of the types of information shared and the method by which the consumer can exercise his or her GLB rights to opt-out of this information sharing.

The Regulatory Agencies should require financial institutions to establish multiple, standard methods by which consumers can opt-out of information sharing. These methods should include the Internet, a letter, the telephone, or other electronic means of communicating the consumer's desire to opt-out. Serious consideration should be given to the practical suggestion of many consumers, reported by Privacy Rights Clearinghouse,¹⁵ that one website or toll-free number be established to opt-out of all financial institutions' information sharing.

Standardization will respond to consumer preferences with respect to privacy notices. As the Harris Survey reports, most consumers would prefer a summary or checklist type of presentation to give them a quick understanding of an institution's information sharing practices and opt-out rights and procedures.

BENEFITS OF RELYING ON SCIENTIFIC EXPERTISE

The States recognize that a great deal of work needs to be done before the Regulatory Agencies can settle on the best format and content for the short notices. The States respectfully suggest that the Regulatory Agencies engage in extensive testing of all potential formats for the short form notice before implementation. Such testing should include focus groups and consumer surveys, at the very least, to test various strategies for the short form notices. Yet, even before testing specific potential formats, behavioral science and communications experts have offered several techniques that should be employed in developing the short form notice. Many of these techniques have been discussed above. Research has demonstrated the effectiveness of writing at a junior high reading level¹⁶ and using examples to explain complex concepts. Similarly, using different messages in different media to tell us the same thing is an effective approach; plain language works, as does collaboration through focus groups and other similar techniques.¹⁷

Lessons may be learned from the FDA food labels. In testing to develop the appropriate label, the FDA defined effectiveness as "performance" in terms of ease of use and accuracy for specific uses rather than as "preference."¹⁸ The GLB privacy rights are concrete and capable of being expressed in similar ways.

CONCLUSION

The States welcome the opportunity to contribute to the dialogue surrounding the communications challenge presented by GLB privacy notices.¹⁹ We urge the Regulatory Agencies to quickly develop short,

¹⁵ *Id.*

¹⁶ *Supra* n.11.

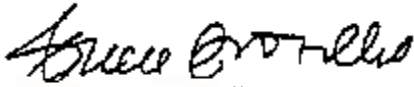
¹⁷ *See* Hochhauser, *supra* n.7.

¹⁸ *See* Alan Levy, Ph.D., "Lessons from Nutrition Labeling: Content, Format & Evaluation," Food and Drug Administration.

¹⁹ The recommendations made in these comments, and signed on to by the Attorneys General listed below, should be understood in the context that there are some Attorneys General who have supported and continue to support an approach which protects consumer privacy unless the consumer has "opted-in" to the sharing of such information. GLB took a different approach, requiring consumers to "opt-out" if they do not wish to have private information shared. Those Attorneys General who prefer "opt-in" over "opt-out" do not wish their inclusion in the submission of these comments to be interpreted as an endorsement of "opt-out" over "opt-in"; rather, these Attorneys General believe that, if "opt-out" is going to be utilized, it should be utilized in that manner which is most protective of the consumer.

standard notices based on behavioral and communications expertise and to promulgate requirements for standard, short form notices based on those findings.

Sincerely,



Bruce M. Botelho
Attorney General of Alaska



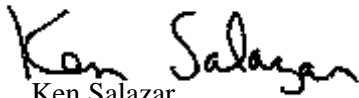
Janet Napolitano
Attorney General of Arizona



Mark Pryor
Attorney General of Arkansas



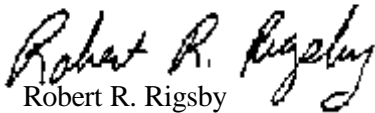
Bill Lockyer
Attorney General of California



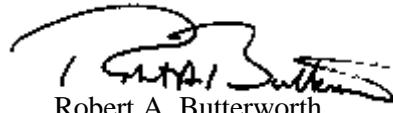
Ken Salazar
Attorney General of Colorado



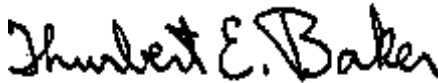
Richard Blumenthal
Attorney General of Connecticut



Robert R. Rigsby
Corporation Counsel of
the District of Columbia



Robert A. Butterworth
Attorney General of Florida



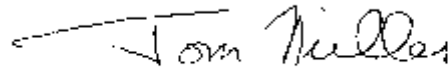
Thurbert E. Baker
Attorney General of Georgia



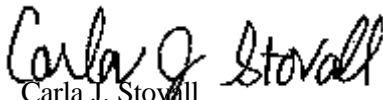
Acting Executive Director²⁰
State of Hawaii
Office of Consumer Protection



Alan G. Lance
Attorney General of Idaho



Tom Miller
Attorney General of Iowa



Carla J. Stovall
Attorney General of Kansas



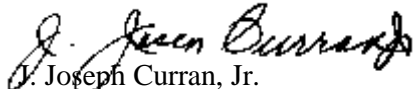
A.B. "Ben" Chandler III
Attorney General of Kentucky

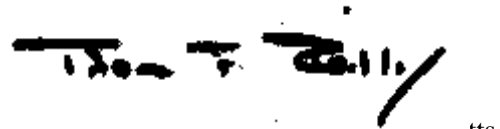



Attorney General of Louisiana

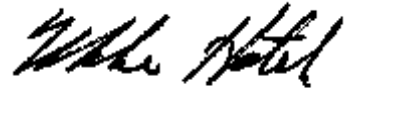


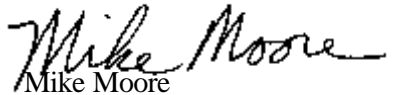
G. Steven Rowe
Attorney General of Maine



J. Joseph Curran, Jr.
Attorney General of Maryland

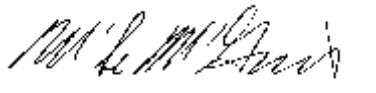

Attorney General of Massachusetts

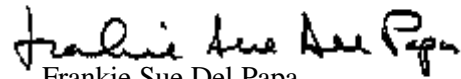

Jennifer Granholm
Attorney General of Michigan

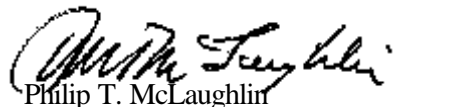

Attorney General of Minnesota

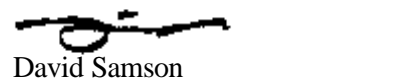

Mike Moore
Attorney General of Mississippi



Jeremiah W. Nixon
Attorney General of Missouri

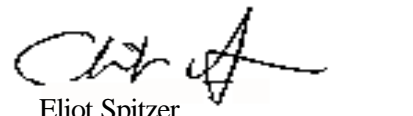

Attorney General of Montana



Frankie Sue Del Papa
Attorney General of Nevada

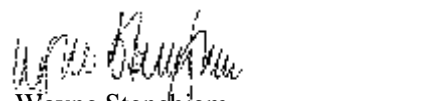

Philip T. McLaughlin
Attorney General of New Hampshire

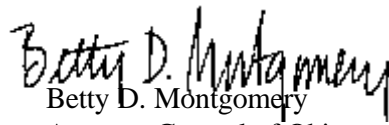

David Samson
Attorney General of New Jersey

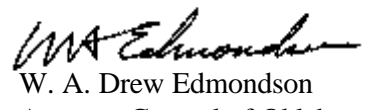

Patricia Madrid
Attorney General of New Mexico

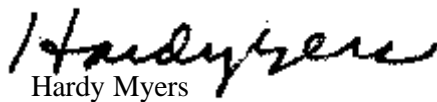

Eliot Spitzer
Attorney General of New York

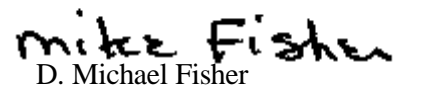

Roy Cooper
Attorney General of North Carolina

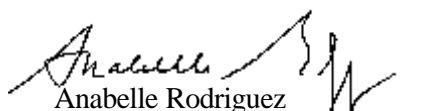

Wayne Stenehjem
Attorney General of North Dakota



Betty D. Montgomery
Attorney General of Ohio

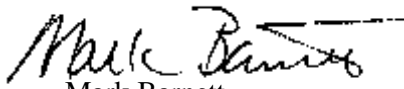

W. A. Drew Edmondson
Attorney General of Oklahoma


Hardy Myers
Attorney General of Oregon


D. Michael Fisher
Attorney General of Pennsylvania


Anabelle Rodriguez
Attorney General of Puerto Rico


Sheldon Whitehouse
Attorney General of Rhode Island



Mark Barnett
Attorney General of South Dakota



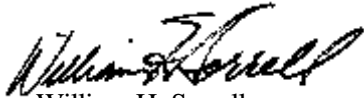
Paul Summers
Attorney General of Tennessee



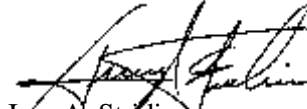
John Cornyn
Attorney General of Texas



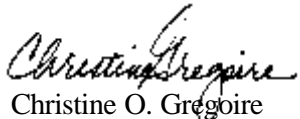
Mark Shurtlett
Attorney General of Utah



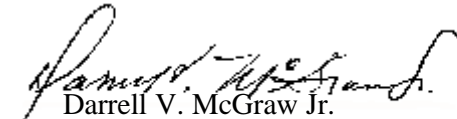
William H. Sorrell
Attorney General of Vermont



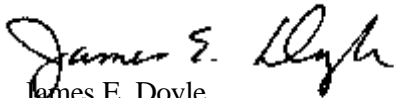
Iyer A. Stridiron
Attorney General of the Virgin Islands



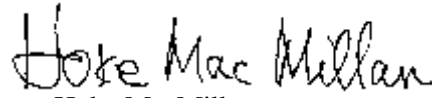
Christine O. Gregoire
Attorney General of Washington



Darrell V. McGraw Jr.
Attorney General of West Virginia



James E. Doyle
Attorney General of Wisconsin



Hoke MacMillan
Attorney General of Wyoming

²⁰Of the states listed, Hawaii is not represented by its Attorney General. Hawaii is represented by its Office of Consumer Protection, an agency which is not a part of the state Attorney General's Office, but which is statutorily authorized to represent the State of Hawaii in consumer protection actions. For the sake of simplicity, the entire group will be referred to as the "Attorneys General," and such designation as it pertains to Hawaii, refers to the Executive Director of the State of Hawaii Office of Consumer Protection.