

**SEC, CFTC, FTC, AND OTHER FINANCIAL REGULATORS
RELEASE MODEL CONSUMER PRIVACY NOTICE ONLINE FORM BUILDER**

On April 15, 2010, the federal agencies that regulate financial institutions (the “Agencies”) released an “Online Form Builder” that financial institutions can download and use to develop and print customized versions of the optional model privacy form (the “Model Form”) that was released in a Final Rule by the Agencies on November 16, 2009.¹ Financial institutions may use the Model Form to comply with their privacy notice requirements under the Gramm-Leach-Bliley Act (the “GLBA”).² As of January 1, 2011, the Model Form will replace the “Sample Clauses” that are currently contained in the Agencies’ privacy rules, and will serve as the only safe harbor for financial institutions under the privacy rules (or as “guidance” for SEC-regulated entities).³

Background

The Financial Services Regulatory Relief Act of 2006 directed the Agencies to jointly develop a model form that financial institutions could use for the provision of privacy disclosures under the GLBA. The Agencies published a proposed model privacy form on March 29, 2007,⁴ solicited comments, and, using an outside firm, undertook consumer research on the proposed model form.⁵ After reviewing the comments (many of which were critical of the contents of the proposed form) and evaluating the consumer research, the Agencies amended their privacy rules to include the Model Form.

The Model Form provides safe harbor protection to the financial institution using it. It is important to note, however, that the safe harbor: (1) does not apply if a financial institution modifies the Model Form in ways not permitted by the Final Rule; and (2) does not extend to the *institution-specific information* that is inserted into the Model Form. Proper use of the Model Form requires that institutions accurately answer the questions about their information collection

¹ The Final Rule (*see* <http://www.sec.gov/rules/final/2009/34-61003.pdf>), which was published in the Federal Register on December 1, 2009 (*see* 74 F.R. 62890), was released jointly by the Office of the Comptroller of the Currency, Treasury; the Board of Governors of the Federal Reserve System; the Federal Deposit Insurance Corporation; the Office of Thrift Supervision, Treasury; the National Credit Union Administration; the Federal Trade Commission (the “FTC”); the Commodity Futures Trading Commission (the “CFTC”); and the Securities and Exchange Commission (the “SEC”).

² *See* 15 U.S.C. § 6803.

³ The Sample Clauses will be removed entirely from the Agencies’ rules on January 1, 2012.

⁴ Interagency Proposal for Model Privacy Form under the Gramm-Leach-Bliley Act, 72 Fed. Reg. 14940 (proposed Mar. 29, 2007), *available at* www.sec.gov/rules/proposed/2007/34-55497fr.pdf.

⁵ *See* Kleimann Communication Group, Inc., *Evolution of a Prototype Financial Privacy Notice: A Report on the Form Development Project* (Feb. 28, 2006). For a copy of the full report, please see <http://www.ftc.gov/privacy/privacyinitiatives/ftcfinalreport060228.pdf>.

and sharing practices, provide information on how to limit such sharing, and honor any requests to limit such information sharing. Thus, while the Model Form itself is a safe harbor, financial institutions will nevertheless be subject to enforcement actions if the information they use to complete the Model Form is inaccurate and/or does not fully comply with the GLBA and the Agencies' privacy rules.

Key Aspects of the Online Form Builder

The Agencies indicated in the Final Rule that a link would be included on each of their websites to an online form builder accessible by all financial institutions, so that such institutions could easily create a unique, customized privacy notice using the Model Form template. The Online Form Builder, which is currently available at http://www.federalreserve.gov/bankinfo/privacy_notice_instructions.pdf, consists of four different versions of a PDF template form, each of which is two pages long and has a set of blank spaces where financial institutions can insert their own content tailored to their specific privacy practices.⁶ The version of the form that a given financial institution should use will depend on: (1) whether that financial institution will provide an opt-out in its GLBA notice; and (2) whether the financial institution chooses to provide information about its affiliate marketing practices under the Fair Credit Reporting Act (the "FCRA") and its FACT Act amendments (or the SEC's affiliate marketing rule, Regulation S-AM, in the case of financial institutions regulated by the SEC).⁷ The four versions of the form templates correspond to the possible combinations of these two contingencies.

Possible Difficulties with the Online Form Builder

Despite the one-page, easy-to-follow instructions that accompany the form templates, the Online Form Builder appears to have some limitations that may impact some financial institutions' ability to use the form. Specifically:

- Because the templates are in PDF form, each blank space in which a financial institution can insert information tailored to its particular privacy practices is of a set length. If a financial institution has an especially long name, a long list of affiliates, and/or a long contact URL, the financial institution may not be able to fit these items within the spaces allotted.

⁶ Although the Final Rule indicated that the Agencies would release two versions of the Online Form Builder (an initial Online Form Builder and then a more robust Online Form Builder later in the year), the Agencies' press release that accompanied the Online Form Builder did not indicate whether a more robust version will in fact be released later this year.

⁷ Recognizing the limitations of the Model Form in addressing the complexities of the FCRA, the Agencies made it optional for financial institutions to include the FCRA opt-outs in the Model Form. Therefore, financial institutions have the choice to comply with the affiliate marketing rules either by using the Model Form or by sending a separate privacy notice to affected customers.

- There is no version of the template form that includes an opt-out by mail-in form, which was an option provided to financial institutions in the Agencies' Final Rule. If a financial institution wants to send its customers a GLBA notice that includes a mail-in opt-out choice, that financial institution will have to create the mail-in form on its own, modeling it on the sample mail-in form included in the Final Rule.

If the Online Form Builder is not workable for a particular financial institution given these or other difficulties, the financial institution could always utilize the Model Form in other ways, such as by creating a Word Document template. However, in using a Word Document version of the Model Form, the financial institution must be careful to follow the directions for completing the Model Form in the Agencies' Final Rule, including by keeping it to a certain length and ensuring that no language is added to the Model Form that is not contemplated in the Final Rule. More detailed guidance on the content required to be included in each of the sections of the Model Form is available at <http://www.sec.gov/rules/final/2009/34-61003.pdf> and in the Willkie client memorandum dated November 25, 2009.

Implications

While the Online Form Builder may make it easier for financial institutions to create their own customized versions of the Model Form, such institutions must first decide whether they wish to use the Model Form.

Given that the date on which the Model Form will replace the Sample Clauses is fast approaching, financial institutions should begin to consider whether they should use the Model Form. Although the Model Form's safe harbor protection is an important feature, the Model Form also contains some significant limitations.⁸ Therefore, companies are advised to carefully weigh the pros and cons of using the new Model Form in light of their own current privacy practices and GLBA notices before deciding whether to switch to the Model Form.

Even if a financial institution decides not to use the Model Form, it should nonetheless review its current GLBA notices and consider whether changes are required to reflect the key elements of the Final Rule and the Model Form, as well as the principal findings of the focus group research reported by the Agencies, in order to ensure the institution's ongoing compliance with the GLBA privacy rules.

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If you have any questions regarding this matter, please contact Frank Buono (202-303-1104, fbuono@willkie.com), Rita Molesworth (212-728-8727, rmolesworth@willkie.com), Pamela Strauss (202-303-1154, pstrauss@willkie.com), Marc Ponchione (202-303-1282, mponchione@willkie.com), Melissa Troiano (202-303-1183, mtroiano@willkie.com), Marc Lederer (212-728-8624, mlederer@willkie.com), or the Willkie attorney with whom you regularly work.

⁸ These limitations are discussed in detail in the Willkie client memorandum dated November 25, 2009.

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April 21, 2010

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