

**SEC, CFTC AND OTHER FINANCIAL REGULATORS
PROPOSE MODEL PRIVACY NOTICES**

Eight federal agencies¹ have proposed amendments to their privacy rules that would provide a non-exclusive safe harbor for privacy notices distributed by financial institutions (the “Proposal”). The privacy rules have generally required financial institutions to provide initial and annual notices to their customers² since 2001, pursuant to requirements set forth in the Gramm-Leach-Bliley Act (“GLBA”). In 2006, the Agencies were directed by the Financial Services Regulatory Relief Act to propose a safe harbor model privacy form that could be used by financial institutions. The proposed model form is designed to meet the content and disclosure requirements of the Agencies’ privacy notice and opt-out notice rules.

This memorandum provides background on the privacy rules and summarizes the Proposal. An annotated copy of the proposed model form is attached as Appendix I. Descriptive highlights of the model form are included in Appendix II.

The proposed safe harbor includes a substantial number of detailed requirements in terms of the model form’s page layout, content, format, style, pagination and shading. **Financial institutions may have to make substantial adjustments to their privacy notices and related procedures if they wish to comply with the safe harbor.**

The deadline for comments is May 29, 2007.

I. Privacy Rule Refresher

Each of the privacy rules requires a financial institution to provide a privacy notice to its customers no later than when a customer relationship is formed and annually for as long as the relationship continues. The notice must include:

¹ The Agencies are:
Commodity Futures Trading Commission (“CFTC”)
Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
Federal Trade Commission
National Credit Union Administration
Office of the Comptroller of the Currency
Office of Thrift Supervision
Securities and Exchange Commission (“SEC”)

² A “customer” means a consumer who has a customer relationship with a financial institution. A “consumer” is an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes, and also means the legal representative of such an individual.

- (1) The categories of nonpublic personal information that the institution collects;
- (2) With respect to both current and former customers, the categories of nonpublic personal information that the institution discloses and the categories of affiliates and nonaffiliated third parties to whom it discloses such information other than pursuant to permitted exceptions;
- (3) Where the institution relies on the exception that permits sharing nonpublic personal information (pertaining to joint marketing), the categories of information disclosed, and the categories of third parties with which the institution has joint marketing contracts;
- (4) Where applicable, an explanation of the consumer's right to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties and the methods by which the consumer may opt out;
- (5) Disclosures required pursuant to the Fair Credit Reporting Act ("FCRA") (pertaining to the ability to opt out of certain sharing with affiliates) and the applicable opt-out notice;
- (6) The institution's policies and practices with respect to protecting the confidentiality and security of nonpublic personal information; and
- (7) Where applicable, a statement that the institution discloses nonpublic personal information to nonaffiliated third parties pursuant to the rule's exceptions.

Privacy notices must be clear, conspicuous and comprehensible.

II. Privacy Notice Research

The Agencies sponsored a research project on alternative forms of privacy notices with the goal of developing a privacy notice that would be easier for consumers to use and understand.³ That research has resulted in the model notice currently proposed, which the Agencies believe is easier to understand than most privacy notices currently being disseminated. The Agencies expect to conduct additional research after receipt of comments on the Proposal in order to further refine the model.

³ See Kleimann Communication Group, Inc., Evolution of a Prototype Financial Privacy Notice: A Report on the Form Development Project (Feb. 28, 2006) (Kleimann Report). For a copy of the full report, go to <http://www.ftc.gov/privacy/privacyinitiatives/ftcfinalreport060228.pdf>

III. Structure of the Proposed Model Form

The model form is standardized. One of the goals in developing the model form is to permit consumers to easily compare the privacy practices of different institutions. The safe harbor would be available only to institutions that do not vary the content or format of the model form, other than as described in the rule.

- The proposed model form has either two or three pages, depending on whether the financial institution shares personal information in a manner that requires it to provide a third page with opt-out information.
- Each of the pages of the model form is printed separately and on only one side of an 8.5 by 11 inch piece of paper in portrait orientation.⁴
- The model form is printed on non-glossy, white or light-colored paper, using varying shades of ink of a dark or suitably contrasting color.
- The model form must use an easily readable type font. The Agencies cautioned that the use of highly stylized typefaces would not meet the safe harbor standard.
- Corporate logos and distinctive colors may be added to the model form as long as they do not interfere with the readability of the model form or with the space constraints of each page.
- The model form may not be incorporated into any other document.

The current safe harbor for notices based on “sample clauses” contained in most of the Agencies’ privacy rules would be phased out one year after a final rule is published.

Although the model form would provide a safe harbor, institutions could continue to use other types of notices that vary from the model form as long as these notices comply with the privacy rule. For example, an institution could continue to use a simplified notice as described in the privacy rule if it does not have affiliates and does not intend to share nonpublic personal information with nonaffiliated third parties outside of the exceptions provided in the rule.

⁴ During testing, consumers expressed a preference for a model form that allowed them to view the information on pages one and two, side by side. The proposed model form has the opt-out options and instructions on a separate third page. Staff of certain of the Agencies issued Frequently Asked Questions in December 2001 (Privacy FAQs), stating that a consumer should be able to detach a mail-in opt-out form from a privacy notice without removing text from the privacy policy. See F.4 of the Privacy FAQs, available at <http://www.ftc.gov/privacy/glbact/glb-faq.htm>

IV. Comments Requested

The Agencies have asked for comments on a number of issues (in detail) concerning the proposed model form, including the following:

A. Content of the Model Form

1. Are any aspects of the form not clear and conspicuous or comprehensible?
2. Can financial institutions accurately disclose their information sharing practices by using the standardized provisions and vocabulary in the proposed model form?
3. Are modifications to the opt-out form necessary for a financial institution to describe its information sharing practices accurately, facilitate consumer use of the opt-out form or offer additional opt-outs?
4. To what extent do financial institutions intend to incorporate the FCRA section 624 disclosure and opt-out for affiliate marketing in the model form?
5. Should financial institutions be required to alert consumers to changes in an institution's privacy practices as part of the model form?

B. Format of the Model Form

1. Should each page of the proposed model form be required to be on a separate piece of paper or would another format also allow consumers to readily see all the information in the model form at the same time?
2. Is the guidance on easily readable type font in the instructions helpful and/or sufficient for institutions that use the proposed model form?
3. What size paper would be appropriate for the model form while conforming to the guidance for easily readable type font and layout? Would other formats achieve the readability and ease of use preferred by consumers?
4. How, and to what extent, will logos and/or color be used by institutions that elect to use the model form?

C. Additional Information

1. To what extent are financial institutions likely to use the proposed model form?
2. Should the Agencies consider any particular approaches to additional consumer testing of the model form?

3. With respect to the proposal to replace the “sample clauses” with the proposed model form, (a) is the transition period after which use of these clauses no longer qualifies for a safe harbor sufficient, and (b) should any sample clauses be retained or should the Agencies develop new model clauses?
4. Should the Agencies develop a web-based design for those financial institutions that would like to use an electronic version of the proposed model form?
5. Should the Agencies develop and make available on their websites a readily accessible and downloadable model form with “fillable” fields for use by financial institutions that wish to use the model form to create their own privacy notices?
6. Should an SEC-regulated entity and an affiliated institution regulated by another Agency that intend to provide a joint privacy notice be able to choose to rely on either the SEC model privacy form or the model privacy form proposed by the other Agency?
7. Should the Agencies consider omitting account number information on the opt-out page for the model privacy form in order to better protect customers and make it easier to opt out? Alternatively, should the opt-out page on the model form contain a line for a truncated account number or other identifying information?
8. What are the expected costs of complying with the new rule, including phasing out the use of the “sample clauses”?

The SEC specifically requested comments on the following from its regulated entities:

1. Are the standardized provisions and vocabulary in the proposed model form for SEC-regulated financial institutions sufficient to allow accurate disclosure of information sharing practices?
2. Should financial institutions be able to omit certain terms that may not apply to their information collection practices or their sources of information?

* * * *

The deadline for comments is May 29, 2007. Comments may be submitted to any one of the Agencies. They need not be submitted to all of the Agencies.

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If you have any questions regarding this memorandum, please contact Rita M. Molesworth (212-728-8727, rmolesworth@willkie.com), Gabriel Acri (212-728-8833, gacri@willkie.com) or the Willkie attorney with whom you regularly work.

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Proposed Model Privacy Form

F A C T S	WHAT DOES [name of financial institution] DO WITH YOUR PERSONAL INFORMATION?¹	
Why?²	Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.	
What?	<p>The types of personal information we collect and share depend on the product or service you have with us. This information can include:</p> <ul style="list-style-type: none"> • Social Security number and income • account balances and transaction history • <i>[assets, investment experience,]</i>³ credit history, and credit scores. <p>When you close your account, we continue to share information about you according to our policies.</p>	
How?	All financial companies need to share customers' personal information to run their everyday business—to process transactions, maintain customer accounts, and report to credit bureaus. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons [name of financial institution] chooses to share; and whether you can limit this sharing.	
Reasons we can share your personal information⁴	Does [name of financial institution] share?	Can you limit this sharing?
For our everyday business purposes— to process your transactions, maintain your account, and report to credit bureaus		
For our marketing purposes— to offer our products and services to you		
For joint marketing with other financial companies		
For our affiliates' everyday business purposes— information about your transactions and experiences		
For our affiliates' everyday business purposes— information about your creditworthiness		
For our affiliates to market to you		
For nonaffiliates to market to you		
Contact Us⁵	Call [toll-free telephone] or go to [web address]	

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¹ Title.

² Key Frame (Why, What, How).

³ Italicized text appears only in the SEC's proposed model form. Otherwise, the text of each of the Agencies' model forms is identical.

⁴ Types of sharing permitted (a.k.a. disclosure table).

⁵ Contact Information.

F A C T S

WHAT DOES [name of financial institution] DO WITH YOUR PERSONAL INFORMATION?⁶Sharing practices ⁷

How often does [name of financial institution] notify me about their practices?	We must notify you about our sharing practices when you open an account and each year while you are a customer.
How does [name of financial institution] protect my personal information?	To protect your personal information from unauthorized access and use, we use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings.
How does [name of financial institution] collect my personal information?	We collect your personal information, for example, when you <ul style="list-style-type: none"> • open an account or deposit money • <i>[buy or sell securities.]</i>⁸ pay your bills, or apply for a loan • use your credit or debit card We also collect your personal information from others, such as credit bureaus, affiliates or other companies.
Why can't I limit all sharing?	Federal law gives you the right to limit sharing only for <ul style="list-style-type: none"> • affiliates' everyday business purposes—information about your creditworthiness • affiliates to market to you • nonaffiliates to market to you State laws and individual companies may give you additional rights to limit sharing.

Definitions⁹

Everyday business purposes	The actions necessary by financial companies to run their business and manage customer accounts, such as <ul style="list-style-type: none"> • processing transactions, mailing, and auditing services • providing information to credit bureaus • responding to court orders and legal investigations
Affiliates	Companies related by common ownership or control. They can be financial and nonfinancial companies. <ul style="list-style-type: none"> • <i>[affiliate information]</i>
Nonaffiliates	Companies not related by common ownership or control. They can be financial and nonfinancial companies. <ul style="list-style-type: none"> • <i>[nonaffiliate information]</i>
Joint marketing	A formal agreement between nonaffiliated financial companies that together market financial products or services to you <ul style="list-style-type: none"> • <i>[joint marketing]</i>

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⁶ Title.⁷ Frequently Asked Questions.⁸ Italicized text appears only in the SEC's proposed model form. Otherwise, the text of each of the Agencies' model forms is identical.⁹ Definitions.

[OPT-OUT FORM]

F A C T S	WHAT DOES [name of financial institution] DO WITH YOUR PERSONAL INFORMATION?
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If you want to limit our sharing

Contact us	<p>By telephone: [toll-free telephone] — our menu will prompt you through your choices</p> <p>On the web: [web address]</p> <p>By mail: mark your choices below, fill in and send form to:</p> <p>[mailing address]</p> <p>Unless we hear from you, we can begin sharing your information 30 days from the date of this letter. However, you can contact us at any time to limit our sharing.</p>
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Check your choices

<p><i>Your choices will apply to everyone on your account.</i></p>	<p>Check any/all you want to limit: (See page 1)</p> <p><input type="checkbox"/> Do not share information about my creditworthiness with your affiliates for their everyday business purposes.</p> <p><input type="checkbox"/> Do not allow your affiliates to use my personal information to market to me. (I will receive a renewal notice for this use for marketing in 5 years.)</p> <p><input type="checkbox"/> Do not share my personal information with nonaffiliates to market their products and services to me.</p>											
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="background-color: #cccccc; width: 30%; padding: 2px;">Your name</td> <td style="width: 40%;"></td> <td rowspan="5" style="width: 30%; padding: 5px; vertical-align: top;"> Mail to: [mailing address] </td> </tr> <tr> <td style="background-color: #cccccc; padding: 2px;">Your address</td> <td></td> </tr> <tr> <td style="background-color: #cccccc; padding: 2px;"></td> <td></td> </tr> <tr> <td style="background-color: #cccccc; padding: 2px;"></td> <td></td> </tr> <tr> <td style="background-color: #cccccc; padding: 2px;">Account number</td> <td></td> </tr> </table>	Your name		Mail to: [mailing address]	Your address						Account number		
Your name		Mail to: [mailing address]										
Your address												
Account number												

DESCRIPTIVE HIGHLIGHTS OF THE PROPOSED MODEL PRIVACY FORM**Page One: Background Information and the Disclosure Table**

Page one of the proposed model form has four parts:

- (1) The title;
- (2) A “key frame,” which asks and answers “Why,” “What” and “How” questions;¹
- (3) A *disclosure table*; and
- (4) The institution’s contact information.

The *disclosure table* provides information about the financial institution’s sharing practices and the consumer’s opt out rights.² The reasons for sharing are grouped into three main categories. The first three reasons describe what financial institutions do with their consumers’ personal information. The next three reasons describe what a financial institution’s affiliates do with that information. The last reason describes what nonaffiliated companies may do with the personal information, other than acting as a service provider to, or acting jointly with, the financial institution (that is, outside the exceptions provided in the rules). This generally means marketing by the nonaffiliated company. Sharing by a financial institution for any of the last three reasons listed in the *disclosure table* triggers an opt-out right.

In the middle column of the *disclosure table*, each institution must provide in each box a “Yes” or “No” response that accurately reflects its information sharing policies and practices with respect to the reason listed in the left column. Each institution also must complete each box in the right column as to whether a consumer can limit such sharing. If an institution answers “No” to sharing for a particular reason in the middle column, it must answer “We don’t share” in the corresponding right column. If an institution answers “Yes” to sharing for a particular reason in

¹ The Agencies recognize that some financial institutions may not collect each type of information described in the “What” box. As reflected in the introductory clause, which states that the “information [collected] can include * * *,” the standardized terms are designed to reflect the range of information typically collected by financial institutions required to provide privacy notices under the GLBA and FCRA, rather than the specific information collected by each particular institution, and, therefore, are not to be modified to reflect an institution’s particular practices. The SEC’s model privacy form reflects modified terms in the “What” box that are intended to include the range of information typically collected by broker-dealers, investment advisers and investment companies. CFTC Staff have informed us that they would consider modifying the “What” box if they received comments from futures industry members that modifications are desired.

² The language used in the disclosure table is based on Kleimann’s research. The simplified phrases describing information sharing practices were refined during the consumer testing process to allow consumers to better understand the information sharing and use possibilities. As the Agencies observed, the laws governing the disclosure of consumers’ personal information are not easily translated into short, comprehensible phrases that are also legally precise. Thus, the table in some cases uses more easily understandable short-hand terms to describe sharing practices that are required to be included in the notice.

the middle column, it must, in the right column, answer either “No” if it does not offer an opt-out or “Yes (Check your choices, p. 3)” if it does offer an opt-out. Except for the sixth row (“For our affiliates to market to you”), an institution must list all reasons for sharing, and complete the middle and right columns of the *disclosure table*.

If Additional Opt-Outs are Offered.

The third column in the *disclosure table* is intended to provide flexibility for financial institutions to include additional opt-out choices that are not required by federal law. For example, a financial institution may give its customers the opportunity to limit sharing for joint marketing. In that case, the financial institution would answer the question “Can you limit this sharing?” in the far right column with “Yes (Check your choices, p. 3)” and would describe the additional opt-out choice on its opt-out form, for example, by stating, “Do not share my personal information with other financial institutions to jointly market to me.” Likewise, if a financial institution wanted to offer its customers the opportunity to opt out of its own marketing, it could provide for that option by answering “Yes” in the appropriate box of the disclosure table and by describing the opt-out choice on the opt-out form, for example, by stating “Do not share [or use] my personal information to market to me.” To obtain the safe harbor for use of the proposed model form, an institution that uses the *disclosure table* to indicate any additional opt-out choice would have to include the opt-out form on page three to provide consumers with a method for opting out, as further described below.

Page Two: Sharing Practices and Definitions

The second page provides additional explanatory information that, in combination with the information on page one, ensures that the notice complies with the privacy rule. The top of page two includes Frequently Asked Questions (FAQs) about the nature and type of information sharing by a financial institution. The bottom of page two includes definitions, some of which must be completed with institution-specific information. For example, an institution that has affiliates must identify the categories of its affiliates after the definition. Likewise, an institution that has no affiliates can explain after the definition that it does not have affiliates.

Sharing Practices

The FAQ box regarding sources of information does not permit a financial institution to customize the sources of information it collects. As with the standardized terms describing information the institution collects on page one, the disclosure is intended to include the range of information sources typically used by institutions subject to the GLBA and FCRA rather than the information sources used by each particular institution. The SEC’s model form reflects additional terms in this box that are intended to include the range of sources of information typically used by broker-dealers, investment advisers and investment companies. CFTC Staff have informed us that they would consider modifying the FAQ responses if they received comments from futures industry members that modifications are desired.

Definitions

The financial institution must customize the space below the last three definitions at the bottom of page two. This specific information must be in *italicized lettering* to set it off from the standardized definitions.

- (i) Affiliates. The financial institution must identify the categories of its affiliates or state “[name of financial institution] has no affiliates” in italicized lettering where [affiliate information] appears. A financial institution that shares with affiliates must use, as applicable, the following format: “*Our affiliates include companies with a [name of financial institution] name; financial companies such as [list companies]; and nonfinancial companies, such as [list companies].*”
- (ii) Nonaffiliates. If the financial institution shares with nonaffiliated third parties outside the exceptions in the privacy rules, the institution must identify the types of nonaffiliated third parties with which it shares or state “[name of financial institution] does not share with nonaffiliates so they can market to you.” in italicized lettering where [nonaffiliate information] appears. A financial institution that shares with nonaffiliated third parties as described here must use, as applicable, the following format: “*Nonaffiliates we share with can include [list categories of companies such as mortgage companies, insurance companies, direct marketing companies, and nonprofit organizations].*”
- (iii) Joint Marketing. The financial institution must identify the types of financial institutions with which it engages in joint marketing or state “[name of financial institution] doesn’t jointly market.” in italicized lettering where [joint marketing] appears. A financial institution that shares with joint marketing partners must use, as applicable, the following format: “*Our joint marketing partners include [list categories of companies such as credit card companies].*”

Page Three: The Opt-Out Form

The third page of the proposed model provides an opt-out form, for use by those financial institutions that share personal information in a manner that triggers consumer opt-out rights. Institutions using the proposed model form must include page three (as a separate page) in their notices only if they:

- share or use information in a manner that triggers an opt-out right; or
 - choose to provide opt-out rights beyond what is required by law.
- (i) *Contact us*. This section describes three common methods by which a consumer exercises an opt-out right; by telephone, on a website and by mail. Financial institutions may customize this section to provide for the particular opt-out methods and options the institution provides. For example, if an institution offers

opting out by telephone and a website but not by mail, it would provide only telephone and website information as shown in the model form in the “Contact us” box. An institution may change the number of days in the lower right-hand section of the “Contact us” box only if the institution waits more than 30 days after providing the notice before sharing information.

- (ii) *Check your choices.* Institutions must display the applicable opt-out options in the “Check your choices” box shown on page three. If an institution chooses not to offer an opt-out by mail, it must delete the boxes for name, address, account number and mailing directions in the lower right-hand corner of the model form. Financial institutions that offer only one or two of the opt-out options listed on the model form must list only those options that apply to their practices and correspond accurately to the disclosures on page one. Thus, if an institution does not share in a manner that requires an opt-out for sharing with nonaffiliates, it must not include that opt-out option on page three of the model form. Institutions requiring information from consumers on the opt-out form other than an account number should modify that designation in the “Check your choices” box. Institutions that require customers with multiple accounts to identify each account to which the opt-out should apply should modify that portion of the model form.
- (iii) *Section 624 opt-out.* Section 624 of the FCRA provides that credit and other information that may be shared among affiliates cannot be used 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. If a financial institution’s affiliates use information for marketing pursuant to section 624, and the institution elects to consolidate that opt-out notice in the model form, it must include that disclosure and opt-out election in the model form. Institutions would not be required to include a reference to this provision, however, until a final rule for section 624 is issued and becomes effective.

Appearance of the Model Form

Typeface

In addition to the requirements that the proposed model form be comprehensible, clear and conspicuous, and allow for easy comparison of privacy practices among financial institutions, the model form must use an easily readable type font. The model notice reflects consideration of a number of typographical factors in the design. Type size, type style,³ leading (spacing between lines of type, measured in points), x-height,⁴ serif versus sans serif, upper and lower case type,

³ Experts differ on the question of the most desirable type style.

⁴ The “x-height” is the height of the lower-case “x” in relation to full height letters, such as a capital G, and is considered critical to type legibility.

along with the page layout all play a role in designing a typeface that is highly readable. The Proposal states that consumers who saw the prototype notice during the research process commented on how easy the type was to see and read.

The Agencies cautioned that the use of highly stylized typefaces would not meet the model form safe harbor standard. The Agencies did not, however, propose to mandate a particular type style or x-height in order for a financial institution to be within the safe harbor.⁵

Printing, Logos, and Color

Financial institutions would be permitted to add their logos and distinctive colors to the model notice and remain within the safe harbor. A corporate logo could be included on any of the pages, so long as the logo does not interfere with the readability of the model form or space constraints of each page.

The model form used in the consumer testing was printed on 8.5 by 11 inch non-glossy paper, using varying shades of black ink to achieve black and gray tones as shown in Appendix I. The Agencies proposed printing each page of the model form in portrait orientation on one side of an 8.5 by 11 inch piece of paper so that each page of the model form can be viewed simultaneously.

The Agencies also proposed that the model form be on white or light-colored paper (such as cream) with black or a suitable contrasting color ink. Spot color would be permitted to achieve visual interest, so long as the color contrast is distinctive and the color does not detract from the form's readability.

⁵ The Agencies included in the Proposal the following general guidelines for type style in the model form:

- (1) for typefaces with a smaller x-height, an 11-point or 12-point font should be used;
- (2) for typefaces with a larger x-height, a 10-point font would be sufficient.

Fonts that satisfy the type style and x-height guidelines for the proposed model form include:

- (1) sans serif fonts such as Tahoma, Century Gothic, Myriad, Avant Garde, Bk Avenir Book, ITS Franklin Gothic, Arial, and Gill Sans; and
- (2) serif fonts such as the Chaparral Pro Family, Minion Pro, Garamond, Monotype Bodoni, and Monotype Century.