

**SEC, CFTC, FTC, AND OTHER FINANCIAL REGULATORS
AMEND THEIR GLBA RULES AND ADOPT MODEL PRIVACY FORM**

On November 16, 2009, the federal agencies that regulate financial institutions (the “Agencies”) released a “Final Rule,”¹ which adopts an optional model privacy form (the “Model Form”) that financial institutions may use to comply with their privacy notice obligations under the Gramm-Leach-Bliley Act (the “GLBA”) and other federal privacy laws. The Final Rule will be effective 30 days after its publication in the *Federal Register*. The Model Form establishes a new safe harbor for complying with the Agencies’ privacy rules. As of January 1, 2011, the Model Form will replace the “Sample Clauses” that are currently contained in the Agencies’ privacy rules and that are used by many financial institutions in their GLBA notices as a safe harbor (or as “guidance” for SEC-regulated entities).²

Although the Model Form’s safe harbor protection is an important feature, the Model Form also contains some significant limitations, which are noted below. 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.

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, 2007,³ solicited comments, and, using an outside firm, undertook quantitative consumer research on the proposed

¹ The Final Rule (*see* <http://www.sec.gov/rules/final/2009/34-61003.pdf>) 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 The SEC implements the GLBA privacy requirements through “Regulation S-P,” which the SEC adopted in 2000. Regulation S-P applies to registered investment companies, registered investment advisers, registered broker-dealers, and registered transfer agents. Investment advisers not registered with the SEC or the CFTC, and investment companies not subject to SEC or CFTC regulation, such as hedge funds and private equity funds, are subject to the FTC’s financial privacy rules. Any fund operated by a commodity pool operator that is registered with the CFTC or an investment adviser registered with the CFTC as a commodity trading adviser will be subject to the CFTC’s financial privacy rules. If a person or entity is registered with both the CFTC and the SEC, compliance with Regulation S-P will also satisfy the CFTC’s financial privacy rules. In addition, introducing brokers and future commodity merchants that are registered by notice with the SEC will be deemed to be in compliance with Regulation S-P if they are in compliance with the CFTC’s financial privacy rules.

³ 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.

model form.⁴ 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 Final Rule includes three versions of the Model Form: (1) without opt-out; (2) with opt-out by telephone and/or online; and (3) with opt-out by telephone, online, and/or mail-in form.

Key Aspects of the Final Model Form

Differences from 2007 Version. The final version of the Model Form differs in several respects from the version proposed by the Agencies in 2007. Key differences include the following: (1) the Model Form may be incorporated into another document, provided that it meets all requirements of the GLBA privacy rules and Model Form instructions; (2) the Model Form with opt-outs can now be presented on either one double-sided page or two separate pages instead of the proposed three-page display; (3) an institution must select from a menu of terms the types of information it collects and shares; and (4) a “revised [month/year]” notation has been added to alert consumers of the last date upon which an institution’s GLBA notice was modified.

Safe Harbor Protection. 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 onto the Model Form. Proper use of the Model Form requires that institutions accurately answer the questions about their information collection and sharing practices, provide information on how to limit such sharing, and honor any requests to limit such information received. Thus, while the Model Form itself is a safe harbor, financial institutions will still 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.

Phasing Out Sample Clauses. The Model Form will ultimately replace the Sample Clauses contained in the Agencies’ privacy rules, and financial institutions will not be able to rely on the safe harbor currently provided by the Sample Clauses incorporated into GLBA notices that are delivered to consumers or posted online on or after January 1, 2011.⁵ The Sample Clauses will be removed entirely from the Agencies’ rules on January 1, 2012.

Limited Flexibility to Modify the Model Form. The instructions to the Model Form limit the categories of information that can be included in an institution’s GLBA notice. As such, the Model Form might not allow an institution to accurately reflect all of its practices, including its collection and use of information. A number of commenters objected to the proposed model form as inflexible and suggested a less standardized approach. For example, commenters argued that the proposed form did not enable an institution to reflect practices that are *beyond* the scope

⁴ 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, please see <http://www.ftc.gov/privacy/privacyinitiatives/ftcfinalreport060228.pdf>.

⁵ The SEC’s privacy rule provides only *guidance* and not a safe harbor.

of the form and raised concerns that the Agencies would pursue enforcement actions because of these omissions. The Agencies did not offer much guidance in response to these comments, except to reiterate that use of the Model Form is optional and that institutions can continue to use alternative formats.

Use of Phrase “Personal Information” in Model Form. The Model Form uses the term “personal information” throughout as opposed to the terms that are actually used by the GLBA and Fair Credit Reporting Act (“FCRA”) regulations, such as “nonpublic personal information,” “personally identifiable financial information,” “eligibility information,” “transaction and experience information,” or “credit-related information.” This attempt at greater simplicity in the Model Form may cause problems with accuracy. For example, the affiliate marketing rule restricts the *use* by one affiliate of certain “eligibility information” received from another affiliate for marketing purposes.⁶ Eligibility information is a narrower class of information than the undefined “personal information,” so use of the latter term in the Model Form suggests that the institution is subject to an even *broader* set of restrictions on the type of information that can be shared and used for marketing purposes among its affiliates. Likewise, the GLBA rules restrict the sharing and use of “nonpublic personal information,” which is defined more narrowly as personal *financial* information.⁷ Thus, if an institution were to adopt the Model Form, it could be viewed as being subject to a broader set of sharing and use restrictions for a broader category of information than is actually the case under the GLBA. Moreover, the broader, less precise language of the Model Form -- which might not accurately reflect the actual practices of the financial institution -- could create questions regarding compliance under other portions of the GLBA or under federal or state laws relating to deceptive practices.

Components of the Model Form. The Model Form is a two-page standardized form.⁸ The Final Rule includes specifications for page layout, format, and style. Attached to this memorandum is a copy of the Model Form version that allows for opt-outs by telephone, online, or a mail-in form (this version of the Model Form is also accessible separately here: <http://www.ftc.gov/privacy/privacyinitiatives/PrivacyModelForm.pdf>). Below is a brief overview of the key aspects of each component:

- *Title:* The Model Form has the title “What Does [Name of Financial Institution] Do With Your Personal Information?” The Agencies explained that, based on focus group research, titles such as “privacy notice” or “privacy policy” discouraged consumers from reading the notice, because consumers think this language implies that the institution is not engaged in information sharing.

⁶ See 16 C.F.R. § 680.21.

⁷ See 15 U.S.C. § 6809(4).

⁸ In cases where there is no more room available on the second page, the Model Form permits a third page to be used to include either the limited information that is permitted to be provided in the “Other Important Information” box (see below) or the names of all the institutions to be listed in the “Who is providing this notice?” box. The Final Rule does not require use of a specific paper size.

- *Key Frame:* The key frame is standardized language used to convey “why,” “what,” and “how” information is collected. The Agencies compiled a list of terms from which institutions must select to describe “what” types of personal information they collect. Institutions must include the term Social Security number.
- *Disclosure Table with Sharing and Opt-Out Information:* The disclosure table describes the most common forms of sharing done by financial institutions, including sharing for “everyday business purposes” (e.g., processing transactions, maintaining account(s), responding to court orders and legal investigations, or reporting to credit bureaus). An institution must indicate in which of the listed types of sharing it is actually engaged. If an institution does not currently engage in a particular sharing practice but wishes to reserve the right to do so in the future, the institution must answer “yes” to whether it engages in that practice.

In the last column of the disclosure table, an institution must inform consumers whether they can opt out of each type of sharing listed in the disclosure table if the institution (1) shares information in a way that triggers an opt-out requirement under the GLBA; or (2) chooses to provide an opt-out *beyond* what is required of it by law. The disclosure table also includes language addressing the opt-outs required by the FCRA and its FACT Act amendments regarding affiliate sharing and affiliate use of certain information for marketing.⁹ However, recognizing the limitation of the Model Form in addressing this complex area, the Agencies concluded that an institution can choose to comply with the affiliate marketing rule requirement either by using the Model Form or by sending a separate privacy notice to affected customers.¹⁰ The bottom of the disclosure table indicates how a consumer can exercise his or her right to opt out (e.g., by calling a certain telephone number, visiting a certain website, or submitting the mail-in form). Note that the Model Form indicates that the financial institution will not share any of the consumer’s personal information for at least 30 days, even though the institution may actually have the right to share certain information sooner, such as if the information is not subject to an opt-out choice.

- *FAQs:* The section on *security* includes a standardized sentence stating that an institution uses measures that include “computer safeguards and secured files and buildings.” Up to 30 additional words of institution-specific information on safeguards practices may be included. The section on how personal information is collected requires an institution to select five terms from a menu of terms (e.g., open an account, apply for a loan) and include a standardized statement, as applicable, that it collects information from credit bureaus, affiliates, or other companies. With respect to joint accountholders, institutions must identify whether the opt-out will apply to all holders on an account, or to just one.

⁹ See 15 U.S.C. § 1681s-3; Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (Dec. 4, 2003) (the “FACT Act”).

¹⁰ Compliance with the notice requirements under the SEC’s new affiliate marketing rule, Regulation S-AM, can also be accomplished through the use of the Model Form. However, if an institution intends to limit the opt-out duration of its affiliate marketing, then the Model Form cannot be used and a separate affiliate marketing opt-out notice must be sent when required.

- *Definitions:* If an institution shares personal information with *affiliates*, then it must include an illustrative list of such companies. If an institution shares personal information with *nonaffiliates*, then it must list categories of companies (*e.g.*, broker-dealers, mortgage companies, insurance companies) with which it shares information. If an institution shares personal information with nonaffiliates or other financial institutions for *joint marketing*, the institution must describe the categories of entities with which it shares information.
- *Other Important Information:* This optional section may be used *only* for (1) information about state and/or international privacy law requirements, if applicable; and/or (2) an acknowledgment of receipt form.

Scope of Notices. An institution using the Model Form must provide one notice for all of its products or provide separate notices for products subject to different information-sharing practices. If the notice is being jointly provided by more than one institution, the notice must identify those multiple institutions.

Online Form Builder. The Agencies will be providing a link on each of their websites to an online form builder accessible by all institutions, so that they can easily create a unique, customized privacy notice using the Model Form template. This should be available in late 2009, with a more robust version in late 2010.

Other Key Amendments to the Agencies' Privacy Rules

With regard to the description of nonaffiliated third parties subject to the GLBA's exceptions that needs to be included in a privacy notice, the FTC's amended rule provides that "it is sufficient to state that you make disclosures to other nonaffiliated companies for your everyday business purposes, such as to process transactions, maintain account(s), respond to court orders and legal investigations, or report to credit bureaus." The FTC's amended rule allows an institution to continue to use the current rule's language "as permitted by law" for privacy notices provided on or before December 31, 2010. The other Agencies' amended rule provides that "it is sufficient to state that you make disclosures to other nonaffiliated companies: (1) For your 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."

Practical Implications

The Model Form uses language and an approach that are quite different from those of the Sample Clauses on which many financial institutions currently rely in order to achieve compliance and safe harbor protection under the GLBA privacy rules. Financial institutions should carefully review the Final Rule and consider whether the benefits of the safe harbor afforded by use of the Model Form outweigh the drawbacks, including, among other things, a potential reduction in the institution's flexibility in accurately describing its information-sharing practices and opt-outs and the potential costs associated with transitioning to the Model Form. Even if a financial institution decides not to switch to 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 compliance with the GLBA privacy rules.

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FACTS

WHAT DOES [NAME OF FINANCIAL INSTITUTION] DO WITH YOUR PERSONAL INFORMATION?

Why?	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 [payment history] ■ [credit history] and [credit scores]
How?	All financial companies need to share customers' personal information to run their everyday business. 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 information	Does [name of financial institution] share?	Can you limit this sharing?
For our everyday business purposes— such as to process your transactions, maintain your account(s), respond to court orders and legal investigations, or 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		

To limit our sharing	<ul style="list-style-type: none"> ■ Call [phone number]—our menu will prompt you through your choice(s) ■ Visit us online: [website] or ■ Mail the form below <p>Please note:</p> <p>If you are a <i>new</i> customer, we can begin sharing your information [30] days from the date we sent this notice. When you are <i>no longer</i> our customer, we continue to share your information as described in this notice.</p> <p>However, you can contact us at any time to limit our sharing.</p>
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Questions?	Call [phone number] or go to [website]
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Mail-in Form		
<p>Leave Blank OR [If you have a joint account, your choice(s) will apply to everyone on your account unless you mark below.]</p> <p><input type="checkbox"/> Apply my choices only to me]</p>	<p>Mark any/all you want to limit:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Do not share information about my creditworthiness with your affiliates for their everyday business purposes. <input type="checkbox"/> Do not allow your affiliates to use my personal information to market to me. <input type="checkbox"/> Do not share my personal information with nonaffiliates to market their products and services to me. 	<p>Mail to:</p> <p>[Name of Financial Institution] [Address1] [Address2] [City], [ST] [ZIP]</p>
Name		
Address		
City, State, Zip		
[Account #]		

Who we are	
Who is providing this notice?	[insert]
What we do	
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. [insert]
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] ■ [pay your bills] or [apply for a loan] ■ [use your credit or debit card] [We also collect your personal information from other companies.] OR [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 only <ul style="list-style-type: none"> ■ sharing for affiliates' everyday business purposes—information about your creditworthiness ■ affiliates from using your information to market to you ■ sharing for nonaffiliates to market to you State laws and individual companies may give you additional rights to limit sharing. [See below for more on your rights under state law.]
What happens when I limit sharing for an account I hold jointly with someone else?	[Your choices will apply to everyone on your account.] OR [Your choices will apply to everyone on your account—unless you tell us otherwise.]
Definitions	
Affiliates	Companies related by common ownership or control. They can be financial and nonfinancial companies. <ul style="list-style-type: none"> ■ [affiliate information]
Nonaffiliates	Companies not related by common ownership or control. They can be financial and nonfinancial companies. <ul style="list-style-type: none"> ■ [nonaffiliate information]
Joint marketing	A formal agreement between nonaffiliated financial companies that together market financial products or services to you. <ul style="list-style-type: none"> ■ [joint marketing information]
Other important information	
[insert other important information]	

