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May 29, 2007

COMMENT

Eileen Donovan
Acting Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Jennifer J. Johnson, Secretary
Board of Governors
of the Federal Reserve System
20th Street & Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1280

Federal Trade Commission
Office of the Secretary
Room 135 (Annex C)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Attention: Model Privacy Form
FTC File No. P034815

Mary Rupp, Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandra, VA 22314-3428

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1-5
Washington, DC

Attention: Docket Number OCC-2007-0003

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2007-0005

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attention: File Number S7-09-07
Model Privacy Form

Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act

Dear Sir or Madam:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to comment on the proposed interagency model privacy form designed to be

[1] The Independent Community Bankers of America represents the largest constituency of community banks of all sizes and charter types in the nation, and is dedicated exclusively to representing the

used by financial institutions to disclose their information sharing practices with consumers. ICBA applauds the agencies for working to simplify the disclosure forms to provide more meaningful information for consumers and especially for working with consumers to develop the proposed revisions.

Background

The Gramm-Leach-Bliley Act (GLBA) requires financial institutions to provide initial and annual notices to customers about the information they collect and share. When the GLBA requirement was originally implemented, the banking agencies provided sample clauses for banks to use. The privacy rule does not prescribe any specific format or standardized wording for these notices but banks that use the sample clauses are considered in compliance. However, many banks find the sample clauses unduly complex and ignored by consumers.

Based on consumer research and required by the ICBA-supported Financial Services Regulatory Relief Act of 2006, the four federal banking agencies, the NCUA, the Federal Trade Commission, the Securities and Exchange Commission and the Commodity Futures Trading Commission have proposed new model forms banks may use – at their option – to disclose information sharing practices. ICBA strongly supports pending legislation that would eliminate the annual notice requirement for banks that do not change their privacy policies and only share information permitted by one of the statutory exceptions that do not require an opt-out, but even when such legislation passes bankers will need to provide an initial notice. The new model forms would provide an alternative mechanism for banks to notify customers about their privacy policies and procedures.

Summary of ICBA Comments

ICBA believes that the proposed revisions are a step in the right direction. While we continue to urge Congress to provide an exemption from the annual notice requirements in appropriate circumstances, simplified disclosures – especially those based on consumer testing – will help provide consumers with information they want and need.

While the proposed forms are an improvement over the existing sample clauses, additional flexibility is needed to make them truly useful and useable. Restricting the format of the form, especially requiring single-sided 8 ½ by 11 sheets of paper, will unnecessarily increase costs for printing and mailing without a clearly demonstrated

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interests of the community banking industry. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace.

With nearly 5,000 members, representing more than 18,000 locations nationwide and employing over 268,000 Americans, ICBA members hold more than $908 billion in assets, $726 billion in deposits, and more than $619 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

benefit to balance the increased costs. ICBA strongly recommends that the final rules provide guidance and parameters for companies to follow without being so prescriptive. A one-size-fits-all approach often leads to unnecessary and unintended consequences. ICBA also believes that there are redundancies in the proposed models that the agencies should seek to eliminate during the next phase of consumer testing.

Because many banks have developed disclosures relying on the sample clauses created by the regulators, ICBA believes the sample clauses should continue to be available. Because many currently used disclosures were developed in reliance on regulatory models, we recommend that the agencies allow at least two years before eliminating the safe harbor for the current sample clauses. We urge the agencies to post the new models on their websites to allow community banks to easily download and customize the forms for distribution. And finally, we agree that development of guidelines for Internet disclosures would be useful.

The Proposal

The proposed models are based on extensive research with small groups of consumers[2] and a separate requirement in last year's regulatory relief bill that model forms be comprehensible, clear and conspicuous and allow consumers to easily compare practices at different financial institutions. ICBA has long advocated consumer testing to develop meaningful disclosures. While the models were developed through consumer testing with small groups, the agencies anticipate completing the second phase of testing of the models with a broad, statistically significant cross-section of consumers before the rules are finalized.

Using the new forms is optional, but banks that use the model will have a "safe harbor" and be considered in compliance with the disclosure requirements. As an incentive to use the new models, though, the agencies propose to eliminate the safe harbor for the current sample clauses.

Using the Proposed Models

An informal survey of ICBA member banks found that many are likely to use the model forms to ensure compliance with the rule's requirements. Most found the new forms more consumer-friendly than the existing sample clauses. The proposed revisions are likely to benefit community banks since comparison between different institutions will be easier, making it more readily apparent that community banks are less likely to share information other than as permitted by existing statutory exceptions.

However, while ICBA finds certain advantages in the proposed models, there are a number of concerns about the format that need to be addressed – primarily the physical bulk of the form and the costs for printing and postage to distribute an 8 ½ x 11 single-side form. A one-page form that provides the information would likely be simpler and more likely read by consumers. The longer the form, the more likely it will still be

[2] As noted in the interagency report on model privacy notices issued in early 2006, a second phase of testing with greater numbers of consumers designed to produce statistically significant information has not been finalized but is expected to be conducted in the near future. *Evolution of a Prototype Privacy Notice,* February 28, 2006.

ignored by most consumers and therefore the less likely the revisions will achieve their goal. Given the limited consumer testing used to develop the models, the agencies must ensure that consumers will actually read the models during the next consumer testing phase.

Overall, though, ICBA believes that the proposed models will allow community banks to accurately disclose their information sharing practices since most community banks limit their information sharing to that permitted by existing statutory exceptions.[3]

Since many community banks do not share information in ways that permit a consumer to opt out, a brief statement needs to be added to the models explaining that not all financial institutions will offer customers an opt-out. The existing sample clauses often confuse community bank customers, in part due to statements on opting out by consumer activists and consumer reporters who fail to explain that not all banks must offer an opt-out because they already limit information sharing. To alleviate this confusion, ICBA recommends a brief sentence to explain that opting out is not always available.[4]

ICBA also believes that as long as community banks and other small companies are compelled to provide an annual privacy notice, the agencies should develop a simplified alternative for those companies that only share information under the existing exceptions. While the models are very useful, since so many community banks will likely place a "no" or "not applicable" in many boxes, a very streamlined form for those institutions would be both useful and economical.

Format of the Model

The regulatory relief act requires that model forms be comprehensible, clear and conspicuous and allow consumers to easily compare privacy practices of different companies. The proposed models are two or three 8 ½ x 11 pages printed on one side. Banks would be limited in the amount of additional information they could include but could insert the bank's name and logo, contact information and information about affiliates, non-affiliates and joint marketing partners. The statute also requires the model form to use an easily readable type font; the agencies propose 10-point font for the minimum type size as well as providing specific requirements for the spacing between lines depending on the type of font. And, while many fonts could be used, the proposal cautions that banks using highly stylized type will not meet the model form's standard.[5]

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[3] Companies that share information with affiliates and other companies are likely to find the models difficult – if not impossible – to use because the proposal greatly restricts flexibility for disclosures.

[4] As drafted, the model forms do not explicitly provide such a statement. A logical point to insert such a statement would be on the second page of the model on the last line of sharing practices after the sentence beginning "state laws and individual companies…" The proposed addition could read, "Some companies limit how they share information about you and so are not required to give you the option to opt out."

[5] Three years ago, when the Federal Reserve proposed similar specific requirements, ICBA raised concerns about the lack of flexibility and the potential regulatory burden inherent in such highly proscriptive rules.

ICBA recommends the final rule be sufficiently flexible to allow individual companies to present the information in ways that are most meaningful for their own customers. There are many ways to style disclosures to be easily read. Underlining, use of all capital letters, different font styles, bolding and so forth can all be used effectively to provide clear disclosures. Homogenization through regulation creates an inflexibility that will make the disclosures less effective since all disclosures will look alike and therefore will be less likely to be read by consumers. Regulatory restrictions also prevent banks from experimenting to develop more effective disclosures that are appealing and welcome to consumers. A brightly colored folder would get more attention than a bland 8 ½ x 11 sheet on buff paper. If the forms are so bland that consumers ignore them, the potential impact is less meaningful disclosure. And, the more the disclosures look alike, the more difficult it will be for consumers to distinguish individual companies.

ICBA does agree that some guidelines are helpful and also prevents creative presentation that obscures important information. However, the final rule should not be so restrictive as to eliminate all flexibility and originality.

Single Sided Format. The proposal would require information be printed only on one size of a page. According to the agencies, this requirement would let consumers view each page of the form simultaneously. ICBA does not agree that a single sided format is necessary and would unnecessarily increase costs without significantly providing benefits for consumers. And, the more pages to the disclosure, the less likely consumers will read the entire form – making the changes counterproductive. It is also troublesome that the proposal is recommending a change that would increase postage costs when the U. S. Postal Service recently increased the costs for mailing.[6]

At a minimum, requiring the forms to be printed on one side will substantially increase costs for printing and postage – and these costs will be passed along to consumers. While preliminary research with a limited number of consumers showed a preference for single-side printing to allow comparison of information, nothing indicates whether consumers were asked or would be willing to pay extra for this benefit. A simple statement printed on the bottom of the front that states, "see reverse side for sharing practices and definitions," possibly printed in all capital letters, should be sufficient for most consumers.

ICBA also disagrees with the requirement that the forms be restricted to 8 ½ x 11 sheets of paper. This inflexibility and one-size-fits-all mandate is the very type of regulation that increases regulatory burden and costs. Absent some clear demonstration that 8 ½ x 11 paper produces a benefit that outweighs the costs – which is not present – ICBA urges the agencies not to include such inflexibility in the final rule. As long as the information is presented clearly and can easily be read by consumers, the size of the paper should be irrelevant.[7]

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[6] Requiring multiple pages and single-sided printing is also decidedly unsound from an environmental perspective.

[7] Dictating the specific printing formula in the rule is similar to a mandate the National Credit Union Administration required for disclosures for conversion of a credit union to a mutual

ICBA strongly recommends that the final rule allow individual banks to determine the best format to use to present information and that the rule not restrict banks to a specific size of paper or single-sided printing. The final rule should be flexible enough to allow banks to determine the size of the paper and whether to produce it in a brochure or other format.

Using a Table Format. ICBA believes that presenting the information in a table format make the disclosures easier to read and understand.[8] It presents the information in a more concise and logical order and is clearer than most privacy notices used today. It also clearly presents information about what is shared and what the consumer can control. However, ICBA also finds that some of the information is unnecessarily repeated – perhaps leading to the need for three pages. Elimination of repetitive information would help streamline and shorten the model. This is something that ICBA recommends the agencies further explore during the next phase of consumer testing.

Use of Colors. To ensure the disclosures are "clear and conspicuous," the proposal specifies that banks must use either white or a light color paper, such as cream, with black or suitable contrasting ink to make the form easy to read. Other colors, such as colors for the bank's logo, could be used as long as they do not detract from the basic information in the model.

ICBA believes it is important to allow individual banks to customize the notices in ways that allow individual banks to differentiate themselves from their competitors. Allowing banks to vary color schemes or add the logos is therefore very important. One of the goals of the revisions is to allow consumers to easily compare the information sharing practices of different banks. If all forms are identical in form, color and format, it will defeat that goal because all the forms will look alike and it will make it difficult to easily identify individual institutions. Consumers should be able to easily identify and distinguish which disclosure is issued by which bank. Each bank should be given enough flexibility to determine how it will customize its disclosure since the bank is in the best position to determine how to most appropriately communicate with its own customers and its own market.

The Information Presented

Page One. The first page provides background information and a table that describes the types of information sharing allowed by federal law, which types of sharing the bank does, whether the consumer can opt out from information sharing, and the bank's contact information. The top half of the page is basic generic information while the bottom half is bank-specific presented in a table format similar to the Schumer Box used for Truth-in-Lending Act disclosures. The table provides information about the

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savings association in Texas; pundits referred to that as the "origami requirement" and the agency was roundly criticized by the magistrate in that case. *Community Credit Union v. NCUA, E. D. Tex., August 2005.*

[8] The Federal Reserve is currently working to revise information in credit card disclosures. Consumer testing by the Federal Reserve found that tabular disclosures are very useful and informative.

bank's specific information sharing policies and provides important context about what information sharing a bank actually does relative to what it could do. According to the agencies, this is the "heart" of the model notice.

On the bottom half of the model, it states that the bank may share information with affiliates for everyday business purposes. It states the bank will share "information about your transactions and experiences." Since the statement "transactions and experiences" may not be clear for the average consumer, including examples to clarify what transactions and experiences are would help. Again, this is an element that the agencies may want to further explore during the next phase of testing.

Pages Two and Three. The second page provides additional explanatory information that, when combined with the disclosures on the first page, ensures the model provides all the elements required by the GLBA. Some of the definitions, such as information about a bank's affiliates, are bank-specific. If a bank does not have affiliates, it would explain on this page that "[*Bank*] has no affiliates."

The third page is the opt-out form for use by banks that share information in a way that gives consumers this right. If a bank is not required to offer an opt-out, this page is not required. The page lists three common ways customers can opt out: telephone, Internet, or mail (a bank would only list the method or methods for opting out that it offers). The model also provides flexibility for banks that offer additional opt-out choices beyond those required by the existing privacy rules, such as the ability to opt out of joint marketing.

ICBA does not currently have any comments on page two of the disclosure or the opt-out form.

Elimination of the Existing Safe Harbor

The proposed models are intended to replace the existing sample clauses provided by the regulatory agencies that banks currently use. Because research and commentators have found the existing language confusing – what some have called "landfill fodder" since many consumers ignore the notices – the agencies propose to eliminate the existing sample clauses and the safe harbor for using them from the privacy rule once the new model forms are finalized. However, because most banks use some variation of the sample clauses in their existing privacy notices, the proposal would allow a one-year transition period once the model forms become final. After that one year period, a bank using the existing language would no longer be automatically in compliance with the disclosure requirements.

ICBA is concerned about eliminating the safe harbor for the existing sample clauses in only one year. Many community banks developed privacy notices in reliance on the sample clauses crafted by the federal regulators. While it is true the sample clauses have been criticized for the legalese used to explain a consumer's rights, for over six years banks have relied on the approval by the federal regulators in using the clauses. If the models are as effective as the agencies believe, that will serve as added incentive for banks to begin using the new models as soon as possible.

To let banks transition from the existing regulatory regime to the new model notices, ICBA agrees that a transition period is appropriate. However, we recommend that since the existing safe harbor for use of the sample clauses is based on models designed by the federal regulatory agencies that a longer transition period be allowed. ICBA believes that two years instead of the one year proposed would be less burdensome transition. A two-year transition will allow banks to adjust policies and procedures much better within the constraints of the annual notice requirement. For example, some banks also distribute the disclosures in other languages such as Spanish, and two years will allow better time to develop appropriate translations since they are not provided by the regulators. In addition, since banks furnish the annual notice at different times during the year, a one year transition may be awkward for banks depending on when they mail their annual notices. For example, if the final rule becomes effective in October and the bank normally distributes its privacy notices in December, the proposal would actually only allow two months for the bank to change procedures to comply with the new requirements. A two-year transition would help ease this burden.

After two years, eliminating the safe harbor for the existing clauses will encourage all banks to use the new models and will help move towards more standardized disclosures.

Model Internet Disclosures

The agencies have asked whether a special disclosure form should be designed for the Internet. Since Internet and online banking are steadily increasing, ICBA believes it would be useful for the agencies to issue specific guidelines for Internet disclosures. This is especially important if the final rule outlines specific parameters for fonts, other print styles and general overall format for the printed disclosures. However, any guidelines for the Internet – as with the final guidelines for the printed disclosures – should allow enough flexibility for individual banks to tailor the disclosures to their own market and audience. For example, banks are starting to explore technologies that allow on-line banking using mobile phones, and any disclosures must be able to be presented using the new technology. In addition, technology is constantly changing, and any guidelines must be flexible enough to allow for new technologies not currently in use. It would also be helpful for the agencies to provide templates in electronic format that can be easily adapted by banks to their own online banking systems.

Easy Access to Model Forms

ICBA believes it would be helpful for the agencies to post the model forms on the agencies' websites. Posting the models will make them readily available for banks to download and customize for printing. By providing a downloadable template, the agencies also will alleviate some of the burdens faced by community banks transitioning to the new models, a step especially helpful for community banks since they have limited resources. This will help with the transition and will also encourage banks to adopt the model disclosures. Therefore, this is a step ICBA fully supports.

Special Privacy Notices

One question that has been raised is whether a bank should be required to send a special notice or take other steps when it changes its privacy practices. The purpose behind the special notifice would be to draw attention to the change. ICBA believes this would be appropriate – but only if the annual notice requirement is eliminated. If a bank changes policies and procedures that affect a customer, the customer should be notified and given an opportunity to take any appropriate steps. This is especially true if the change allows information to be shared that was not previously shared.

Under existing law, the annual privacy notice does little to inform consumers. However, if the annual notice is eliminated and a bank must notify a customer about changes to information sharing policies and procedures – similar to notices about changes in interest rate or other terms for credit cards – it is more likely the customer will pay attention to the notice. This one step will help make the disclosures more meaningful.

Social Security Numbers for Opt-Out

Recently, a great deal of attention has been paid to the overuse of Social Security Numbers and the commensurate increase in identity theft. Currently some banks request customers to provide their Social Security Number as a means to opt out. Depending on how the bank's software programs are configured, a Social Security Number may be the easiest mechanism to accurately identify the customer. While some banks report having a Social Security Number is not needed to allow a customer to opt out, and that it can be accomplished using a name and address or account number, ICBA believes that banks should still be permitted to request the Social Security Number.

It is important to recognize that banks are required to maintain Social Security Numbers on their customers for a variety of reasons, such as compliance with federal law[9] or to report income on interest-earning accounts to the Internal Revenue Service. Therefore, ICBA opposes banning use of Social Security Numbers for opting out, but recommends that the agencies consider issuing an advisory to encourage banks to consider alternatives when and where possible. Before going beyond an informal advisory, though, ICBA recommends that the agencies thoroughly explore the issue, especially in light of pending legislation in Congress that would impact the use of Social Security Numbers in many contexts.

Conclusion

ICBA commends the agencies for working with consumers to develop these model privacy disclosure forms. The models are an improvement over the existing sample clauses. While it is appropriate to encourage companies to use the new models in place of the existing sample forms, ICBA recommends a longer period – at least two years – to allow companies to transition from existing disclosures to the new models, especially since many community banks currently use the sample clauses that were developed by the regulatory agencies.

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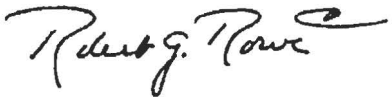
[9] All banks are required under the Customer Identification Program rules issued under the USA PATRIOT Act to obtain a Social Security Number. 31 CFR 103.121.

While the new models are an improvement, elements of the proposal are too prescriptive. Additional flexibility is needed before the rules are finalized. For example, requiring the forms be printed on 8 ½ by 11 sheets and only on one side will be unnecessarily expensive to print and mail. In addition, ICBA urges the agencies to develop an additional streamlined form that can be used by the many community banks that do not offer an opt-out and that only share information under one of the existing statutory exceptions.

Thank you for the opportunity to comment. ICBA looks forward to continuing to work with the agencies to develop streamlined privacy disclosure forms that provide consumers with meaningful and useful information about the information sharing practices of community banks. If you have any questions or need additional information, please contact the undersigned by telephone at 202-659-8111 or by e-mail at robert.rowe@icba.org.

Sincerely,



Robert G. Rowe, III
Regulatory Counsel

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