



May 29, 2007

By Electronic Delivery

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

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

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

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

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

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Avenue, NW
Washington, DC 20580
Attention: Model Privacy Form,
FTC File No. P034815

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1-5
Washington, DC 20219
Docket Number OCC-2007-0003

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

Russell W. Schrader
Senior Vice President
Assistant General Counsel

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

Ladies and Gentlemen:

This letter is submitted on behalf of Visa U.S.A. Inc. in response to the proposed rules ("Proposal") by the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Federal Trade Commission ("FTC"), the National Credit Union Administration, the Office of the Comptroller of the Currency ("OCC"), the Office of Thrift Supervision, and the Securities and Exchange Commission ("SEC") (collectively, the "Agencies"), published in the Federal Register on March 29, 2007.¹ The Proposal requests public comment on proposed amendments to the

¹ Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act, 72 Fed. Reg. 14,940 (Mar. 29, 2007).

existing privacy rules (collectively, “Privacy Rule”)² implementing the Gramm-Leach-Bliley Act (“GLBA”),³ as recently amended by section 728 of the Financial Services Regulatory Relief Act of 2006 (“Regulatory Relief Act” or “Act”).⁴ More specifically, the Agencies essentially propose to mandate that financial institutions use a highly stylized “model form” privacy notice (“proposed model form”) in order to comply with the notice content requirements of the Privacy Rule. Visa appreciates the opportunity to comment on this important matter.

Section 728 of the Regulatory Relief Act was enacted to allow financial institutions to use a model form to satisfy the notice content requirements of the GLBA. By providing institutions the option of using either the model form or their own privacy notices, Congress intended to encourage financial institutions to use simpler and clearer privacy notices while retaining flexibility, and thereby minimize their compliance burden under the GLBA. Congress also sought to promote benefits to consumers by allowing institutions to use a model form that is “comprehensible to consumers, with a clear format and design” and “succinct, [using] an easily readable type font,” among other prescribed criteria, some or all of which might be adopted by financial institutions to improve their existing privacy notices.⁵ Yet, under the Proposal, the safe harbor provisions of the Privacy Rule would be limited to the use of the proposed model form, subject to strict language limitations and a requirement that it be printed on single sides of multiple pieces of 8.5 by 11-inch paper. Thus, financial institutions must navigate between the Scylla of providing their own privacy notices which, although accurate, might be found by the Agencies not to comply with the GLBA, and the Charybdis of providing the proposed model form, the cost of which would sink their resources for compliance with the GLBA and might even give rise to claims that statements included in the notice are misleading or deceptive. Congress clearly did not intend, through regulatory relief legislation, for financial institutions to be required to follow such a treacherous course.

Visa supports the goals of continuing to improve the language and formats of privacy notices, including through the use of an optional model form consistent with the Regulatory Relief Act, so that consumers are better informed about their choices. But Visa respectfully urges the Agencies to keep the existing safe harbor provisions of the Privacy Rule, to minimize costs and promote flexibility for compliance with the GLBA, and to allow the proposed model form to function as the model Congress intended—one that can be adopted in whole or in part so that financial institutions can more clearly, yet still accurately, describe their own particular information-sharing practices.

THE CURRENT SAFE HARBOR PROVISIONS MUST BE RETAINED

The current Privacy Rule provides a safe harbor to financial institutions to use “Sample Clauses”⁶ in their privacy notices if the clauses accurately describe the privacy policies and

² As the Agencies note, 72 Fed. Reg. at 14,942, their respective GLBA rules are consistent and comparable. For the sake of brevity, references to the Privacy Rule are to the rule adopted by the OCC. 12 C.F.R. pt. 40.

³ 15 U.S.C. §§ 6801-6809.

⁴ Pub. L. No. 109-351, 120 Stat. 1966 (2006).

⁵ *Id.* at 120 Stat. 2003 (to be codified at 15 U.S.C. § 6803(e)(2)(A)-(D)).

⁶ *See* 12 C.F.R. pt. 40, App. A.

practices that the institutions use, or reserve the right to use.⁷ In addition to serving as a safe harbor for financial institutions seeking such shelter, the Sample Clauses have provided guidance on the level of detail required to comply with the notice content requirements under the GLBA.

Even though privacy notices initially posed challenges for consumers, in part because of the language, varying formats, and novelty of the notices themselves, financial institutions have steadily revised their notices to make them better. The Agencies' efforts to reach out to consumers and test disclosures have been, and will continue to be, important for improving privacy notices. Financial institutions also have reached out to their customers and tested their own privacy notices, but often found the results to be ambiguous. Still, financial institutions have complied with the notice content requirements of the Privacy Rule, including through use of the Sample Clauses, and the Agencies do not suggest otherwise in the Proposal. As the techniques that make notices easier to read continue to be refined, the Agencies should allow financial institutions to use their own privacy notices or a model form developed under the Regulatory Relief Act to satisfy the GLBA.

Financial institutions have worked diligently to develop and improve their privacy notices to accurately describe their own policies and practices because providing accurate notices—which comply with the GLBA and the Privacy Rule—is an important element of customer relations and of dealing fairly with consumers. If the Agencies remove the safe harbor for using the Sample Clauses, one pillar supporting a financial institution's existing privacy policies and procedures would fall. In practice, for example, bank examiners are likely to question how a bank's continued use of a notice that is based on one or more of the Sample Clauses, and may incorporate elements from the proposed model form, can still constitute compliance with the Privacy Rule. The bank then will be forced to defend that notice or overhaul it, even though its underlying privacy policies and practices remain exactly the same, or may even have been simplified. Under such a GLBA enforcement scheme, which apparently is contemplated by the removal of the safe harbor, financial institutions that choose not to use the proposed model form would be uncertain as to whether their existing privacy notices may still be found to be in compliance with the GLBA, even though they have made no change in their privacy practices. In addition, a financial institution that has developed, and improved, its privacy notice by availing itself of the current safe harbor under the Privacy Rule, would suddenly bear the risk of claims that the notice is "unfair" under section 5 of the FTC Act,⁸ and, by extension, under similar state laws proscribing unfair or deceptive acts or practices ("state UDAP laws") *solely* because the language of that notice would no longer be deemed by the Agencies to warrant a safe harbor under the Privacy Rule.

The Regulatory Relief Act, which permits a financial institution to use, "at [its] option," a model form developed under the statute, should not be construed to force a financial institution that continues to use its existing privacy notice to fall out of compliance with the GLBA, even

⁷ 12 C.F.R. pt. 40, App. A; 12 C.F.R. § 40.6(e). The SEC's Privacy Rule, however, includes the Sample Clauses to "provide guidance concerning the SEC [P]rivacy [R]ule's application in ordinary circumstances," rather than a safe harbor, *per se*. 72 Fed. Reg. at 14,955. Nevertheless, the SEC also proposes to rescind the Sample Clauses and "no longer provide guidance regarding the [SEC Privacy Rule's] application to financial institutions subject to the SEC's [P]rivacy [R]ule." *Id.*

⁸ 15 U.S.C. § 45.

though there has been no change in the institution's privacy practices. Instead of flatly eliminating the existing safe harbor, the Agencies should take into account the benefits of an easy-to-read model form, as well as the benefits of allowing financial institutions various options to comply with the notice content requirements of the GLBA—dual goals that Congress itself has recognized should be promoted and are not mutually exclusive. Visa respectfully urges the Agencies to retain the existing safe harbor provisions of the Privacy Rule and permit the use of a new model form as an additional alternative as a model for compliance with the GLBA, as contemplated by the Regulatory Relief Act.

THE PROPOSED MODEL FORM WOULD IMPOSE SIGNIFICANT COSTS

The compliance difficulties posed by the removal of the existing safe harbor are magnified by the significant costs that would be incurred in using the proposed model form. The proposed model form would result in delivery costs that will greatly exceed the costs of delivering the current privacy notices. Apart from these costs, a financial institution will need to invest substantial resources to serve its customers in connection with the use of the proposed model form, including responding to customers who are trying to understand the changes to the institution's privacy practices and who find the highly stylized proposed model form to be confusing when compared to past privacy notices.

Increased Delivery Costs

The proposed model form will require financial institutions to bear the costs of printing the proposed model form on only one side of multiple sheets of 8.5 by 11-inch pieces of paper and mailing these forms. Documents printed on one side of 8.5 by 11-inch sheets of paper are commonly used for many purposes, but not for this one. Because of its size, the proposed model form typically will not be able to be provided with an account statement. Rather this form will typically require a separate mailing in a "business" sized envelope. Mandating a single-sided, multi-full-page privacy notice is inconsistent with the Regulatory Relief Act, which requires the model form to "be succinct, and use an easily readable type font"⁹ and, in virtually all cases, will increase the costs of providing the notices.

In addition, the page-size and printing requirements may actually reduce the likelihood that a financial institution's customer will view a model form because that type of privacy notice typically will not accompany account information that the customer recognizes as important. A model form should be adaptable so that the page size and printing have features in common with other important documents that a financial institution provides to its customers; moreover, the financial institution itself is in the best position to determine the page-size and print format that would cause the model form to be noticed by its customers. Accordingly, Visa urges the Agencies to develop reasonable page-size and printing parameters that would allow financial institutions to provide the form with account statements to increase the likelihood that it will be read by its customers.

⁹ Pub. L. No. 109-351, § 728, 120 Stat. 1966, 2003 (to be codified at 15 U.S.C. § 6803(e)(2)(D)).

Customer Confusion

The new, strictly limited language of the proposed model form could well confuse customers about the existing information-sharing practices of their financial institutions. Financial institutions using the proposed model form would confront the added cost of losing the trust of their customers who are likely to feel, when faced with deciphering entirely new privacy notices, that their institutions are changing their underlying privacy policies. Financial institutions would also confront the high costs of responding to questions from their customers who see the privacy notice as a contract or promise that is being changed in ways that they cannot understand.

More fundamentally, the mandated language of the proposed model form does not accommodate the policies and practices that *thousands* of financial institutions currently have in place.¹⁰ In the Proposal, the Agencies recount the difficult experiences of institutions, “particularly those with complex information-sharing practices,” in complying with the GLBA notice content requirements.¹¹ The plain fact is that the language contained in the proposed model form does not adequately capture these complex privacy policies and practices, and the Agencies would prohibit financial institutions from modifying the form to do so.¹² To be clear on this point, use of the proposed model form actually would *prevent* a financial institution using the model form contemplated by the Regulatory Relief Act to accurately describe its own particular privacy policies and practices.

THE PROPOSED MODEL FORM IS NOT ACCURATE

Unless the Agencies preserve the existing safe harbor of the Privacy Rule, financial institutions may lose the ability to provide accurate privacy notices. For example, the proposed model form prohibits financial institutions from describing various disclosures of information as being “permitted by law,” even though that succinct statement accurately describes their actual practices and is expressly permitted by the Privacy Rule.¹³ Instead, financial institutions would be required to describe a wide range of disclosures, as being “actions necessary by financial companies to run their business and manage customer accounts,”¹⁴ which does not encompass all of the exceptions in the GLBA.

The proposed model form also requires institutions to describe a customer’s right to opt out, under section 624 of the Fair Credit Reporting Act (“FCRA”),¹⁵ of the use (mischaracterized as sharing) of information by affiliates for marketing purposes, but nowhere includes a statement that affiliates are still permitted by statutory exceptions to do so under certain circumstances. As a result, if a customer checks the box on the proposed model form stating “Do not allow your

¹⁰ See 72 Fed. Reg. at 14,956-57 (describing the thousands of “small” financial institutions that would be subject to the Proposal).

¹¹ 72 Fed. Reg. at 14,943.

¹² 72 Fed. Reg. at 14,952 (The Agencies explain the use of “simplified phrases describing information sharing practices” that, despite certain virtues, might not be accurate for particular financial institutions.).

¹³ See 12 C.F.R. § 40.6(b).

¹⁴ 72 Fed. Reg. at 14,950.

¹⁵ 15 U.S.C. § 1681s-3.

affiliates to use my personal information to market to me,”¹⁶ the language of the form would suggest that all of the financial institution’s affiliates will stop marketing to him or her; and that all information sharing among affiliates relating to marketing, as described on the first page of the proposed model form, will stop. Yet even a financial institution like *Neptune* (one of the hypothetical entities used in the Proposal), and its affiliates, would be permitted—under both the GLBA and the FCRA—to disclose certain information about its customer and market to that customer, under certain circumstances, such as when the customer has a pre-existing business relationship with a *Neptune* affiliate.¹⁷ By using the proposed model form, however, *Neptune* and its affiliates, including those that also have relationships with the same customer, might be viewed as having waived the right to share information, as permitted by the GLBA, and to use the information to market to the customer, as permitted by the FCRA, because that form flatly states: “[f]ederal law gives you the right to limit sharing only for . . . affiliates to market to you[.]”¹⁸ And if *Neptune* or its affiliate does share or use information about its customer as permitted by law, it will engage in a practice that is inconsistent with the customer’s decision to opt out as described in the proposed model form.

Financial institutions that provide the proposed model form to their customers yet continue to make disclosures or use information about their customers, as allowed under the GLBA and the FCRA, would be making disclosures that are inconsistent with principles that the FTC has relied upon in implementing the unfair and deceptive acts and practices prohibition in section 5 of the FTC Act and, by extension, state UDAP laws, as well as guidance provided by the banking agencies for avoiding unfair and deceptive practices. Moreover, the Agencies’ new safe harbor only relates to compliance with the GLBA. Accordingly, Visa respectfully urges the Agencies to retain the current safe harbor of the Privacy Rule in order to allow financial institutions to be able to continue to provide accurate privacy notices to their customers and to obtain the benefits that Congress intended under the Regulatory Relief Act.

THE PROPOSED AFFILIATE-MARKETING NOTICE IS PREMATURE

The proposed model form includes elements of a notice to be required under section 624 of the FCRA, which regulates the use of information received by an affiliate for marketing purposes.¹⁹ However, the final rule implementing the affiliate-marketing requirements of the FCRA has not been adopted.²⁰ The sections of the proposed model form that are designed to apply to an affiliate’s opt-out notice to meet the affiliate-marketing requirements will be separately regulated by a final rule under the FCRA. As a result, even though the use of the model form developed under the Regulatory Relief Act should allow a financial institution to comply with the notice content requirements of the GLBA, there is no basis to determine whether, or to what extent, affiliated institutions will need to use the proposed model form to comply with the FCRA. Accordingly, Visa believes that, at this stage, the public does not have a reasonable opportunity to comment on this aspect of the Proposal and respectfully urges the

¹⁶ 72 Fed. Reg. at 14,948 (The same issue is raised by the reprinted version of this proposed model form, which appears at 72 Fed. Reg. 16,875, 16,876 (Apr. 5, 2007)).

¹⁷ 15 U.S.C. § 1681s-3(a)(4).

¹⁸ 72 Fed. Reg. at 14,947.

¹⁹ 15 U.S.C. § 1681s-3.

²⁰ 72 Fed. Reg. at 14,952 n. 29.

Agencies to re-propose appropriate parts of the model form under the Regulatory Relief Act, consistent with the final affiliate-marketing rule eventually adopted under the FCRA.

THE REQUIREMENTS OF THE APPENDIX SHOULD BE CLARIFIED

To assure that financial institutions have a bona fide option to use their own privacy notices or the model form, consistent with the mandate of the Regulatory Relief Act, the Agencies should clarify that institutions using their own privacy notices are permitted to pick and choose elements of the model form. Accordingly, the Agencies should expressly state in the Appendix that a financial institution, at its option, may include in its own privacy notice elements of the model form, including the format and language. Correspondingly, the Appendix should expressly state that the use of some, but not all, of the elements of the model form shall not be a basis for determining that the privacy notice used by a particular financial institution does not satisfy the notice content requirements of the Privacy Rule.

In addition, the proposed model form is, in several respects, inconsistent with the requirements of the Privacy Rule itself because it adds new disclosure requirements that are not contained in the Rule. To avoid creating the inference that the language and format that must be used in the model form also must be included in a financial institution's own privacy notice, the Appendix should expressly state that the requirements contained in the Appendix shall not be construed as modifying any other requirement of the Privacy Rule.

THE MODEL FORM SHOULD BE SIMPLE AND INFORMATIVE

The Proposal highlights an inherent tension between educating consumers so that they can make informed choices about the information-sharing practices of financial institutions and simplifying those choices. Where the initial privacy notices provided by financial institutions were often overly detailed and complex, the proposed model form errs on the other side by oversimplifying the information-sharing practices that institutions actually use. Visa believes that by eliminating the existing safe harbor of the Privacy Rule and mandating the use of a highly stylized model form, the Proposal sacrifices the benefits of promoting greater consumer understanding about information-sharing practices through accurate privacy notices. Nothing in the Regulatory Relief Act requires a strict tradeoff between simplicity and accuracy. Rather, Congress intended a model form that can be adapted to suit varied information-sharing practices so that a particular institution may, at its option, use the model form in whole or in part to comply with the notice content requirements of the GLBA.

* * * *

We appreciate the opportunity to comment on this important matter. If you have any questions concerning these comments or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact me, at (415) 932-2178.

Sincerely,

Russell W. Schrader
Senior Vice President and
Assistant General Counsel