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FCRA/FACTA and Other Hot Legal and Regulatory Compliance Issues

NEW GLBA MODEL PRIVACY NOTICE

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Timeline



- ANPR issued by federal banking agencies, FTC, CFTC and SEC (“Agencies”) on December 30, 2003
- Consumer testing and form development done between late 2004 and early 2006
- Section 728 of the Financial Services Regulatory Relief Act of 2006 required Agencies to develop an optional model form
- Proposed model form issued for comment on March 29, 2007 (further testing done in 2008 and 2009)
- Final model form issued on December 1, 2009 (74 Fed. Reg. 62890)

Background



- New form intended to simplify and provide more uniformity to GLBA privacy notices
- Covers GLBA disclosures and FCRA affiliate sharing disclosures
- Can also cover FCRA affiliate marketing disclosures if institution allows affiliate marketing opt out to be of unlimited duration
- Three sample forms:
 - Limited sharing with no opt-out right
 - Opt-out right by telephone and/or online only
 - Opt-out right by telephone, online or by mail

Safe Harbor



- Proper use of new model form will provide a compliance safe harbor for GLBA purposes
- Sample clauses in current privacy regulations will not provide a safe harbor if used in privacy notices that are delivered or posted on or after January 1, 2011
- Since the new model form is optional, institutions may continue to use the existing sample clauses or other language, but without the benefit of a compliance safe harbor
- No additional information can be added to model form, except as permitted

- Tabular format is consistent with other recent initiatives (e.g., new GFE and proposed TILA disclosures)
- Multi-panel pamphlet cannot be used
- On-Line Form Builder released on April 15, 2010. See, e.g.,
<http://www.federalreserve.gov/newsevents/press/bcreg/20100415a.htm>
- Form is 2 pages, but may be printed on both sides of a single sheet of paper (but mail-in opt out notice cannot include any text on the reverse side)
- Third page can be added in limited situations

Format (cont'd)



- Must be in a minimum 10-point font, with limited exceptions
- Must be “sufficient” leading (i.e., the space between lines)
- Additional optional “readability” guidance can be found at 74 Fed. Reg. 62899
- Institution’s logo may appear on the form
- Form may be translated into other languages
- Randomly generated “opt-out code” can be included

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.

- Last revised date must go in upper right corner in at least 8-point font
- Identify financial institution here
- If provided on behalf of multiple financial institutions, insert a common identity of the affiliated institutions

Information Collected

What?

The types of personal information we collect and share depend on the product or service you have with us. This information can include:

- Social Security number and [income]
- [account balances] and [payment history]
- [credit history] and [credit scores]

- This part is used to give examples of the types of information the financial institution may collect and share about its customers
- Must always list social security number
- Must also identify 5 other pieces of information by picking from a list of 23 different items found in the Instructions

Sharing of Information

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.

- Must again insert name of financial institution here
- This part of the form provides a general introduction to the more specific information sharing practices of the financial institution

The Table



Reason we can share your personal information	Does this information get shared?	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		

- This part of the form is a table that identifies 7 types of information sharing (the institution must again be identified at top of middle column)
 - The middle column must be answered with either a “Yes” or “No”
 - The right hand column must be answered with either:
 - “Yes” - If opt-out right required or voluntarily given;
 - “No” – If there is no opt-out right; or
 - “We don’t share” – If “No” is disclosed in the middle column

Institution's Everyday Business Purposes



Reason we can share your personal information	Does this information get shared?	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		

- This first category covers a broad range of ordinary course sharing with nonaffiliated parties (i.e., permitted sharing activities in Sections .14 and .15 of the privacy regulations)
- Also covers certain sharing with nonaffiliated service providers under Section .13, if an appropriate agreement is in place and customer has received initial privacy notice (e.g., market analysis or research)
- No opt-out right required (or appropriate) for this type of sharing

Institution's Marketing Purposes



For our marketing purposes— to offer our products and services to you		
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- This category covers the sharing of information with nonaffiliated service providers for the purpose of marketing the financial institution's products and services under Section .13 of the privacy regulations
- If an appropriate agreement is in place between the financial institution and the service provider and customer has received initial privacy notice, no opt-out right is required (although one can be voluntarily provided)

Joint Marketing



For joint marketing with other financial companies

- This category covers the sharing of information under joint marketing agreements between two nonaffiliated financial institutions under Section .13 of the privacy regulations
- If an appropriate agreement is in place between the institutions and customer has received initial privacy notice, no opt-out right is required (although one can be voluntarily provided)

Affiliate's Everyday Business Purposes



For our affiliates' everyday business purposes —
information about your transactions and experiences

- This category covers the sharing with affiliates of information that is not a “consumer report” under FCRA because it relates to the institution’s transactions or experiences with the customer (e.g., loan balance, monthly payment amount, etc.), as described in Section 603(d)(2)(A)(i),(ii) of FCRA
- No opt-out right is required (although one can be voluntarily provided)

Affiliate's Everyday Business Purposes



For our affiliates' everyday business purposes— information about your creditworthiness		
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- This category covers the sharing with affiliates of “creditworthiness” information about the customer (e.g., information from the customer’s loan application)
- This is the “other information” referred to in Section 603(d)(2)(A)(iii) of FCRA
- The customer must have the right to opt-out of this sharing (otherwise, the information may be considered a “consumer report”)

Affiliate's Marketing Purposes



For our affiliates to market to you		
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- This category covers the FCRA Section 624 affiliate marketing rule
- Applies to both transactional/experience information and “other” information
- This section can be omitted from the form if:
 - There are no affiliates or information not disclosed;
 - The affiliates do not use the information in a manner that requires an opt-out; or
 - The affiliate marketing notice is separately provided

Nonaffiliate's Marketing Purposes



For nonaffiliates to market to you		
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- This category covers information sharing with nonaffiliated parties under Section .10(a) of the privacy regulations that is not covered by one or more of the exceptions in .13, .14 and .15
- This is the basic kind of information sharing with nonaffiliated parties that GLBA was intended to address
- The customer must have the right to opt-out of this sharing

Methods of Opting Out

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>
Questions?	Call [phone number] or go to [website]

- Should only be included if customer has an opt-out right based on the table
- If opt-out cannot be done by mail, use the version that provides for only telephone and/or online opt-outs, as applicable
- New customer must have at least 30 days to opt-out

Methods of Opting Out (cont'd)



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>
Questions?	Call [phone number] or go to [website]

- Online opt-out method must include either specific web address of the opt-out page or a general web address that provides direct link to opt-out page
- Online opt-out should not be the only method of opt out available unless customer has consented to receive disclosures electronically (i.e., would not be a “reasonable” means to opt out for a customer with no Internet access)

Mail-in Opt-Out Form



Mail-In Form		
Leave Blank OR (If you have a joint account, your choice(s) will apply to everyone on your account unless you mark below.) <input type="checkbox"/> Apply my choices only to me)	Mark any/all you want to limit: <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.	
	Name _____ Address _____ City, State, Zip _____	Mail to: [Name of Financial Institution] [Address1] [Address2] [City], [ST] [ZIP]

- Not required; may limit opt-out methods to telephone and Internet
- Should be omitted if mail-in opt out unavailable
- Joint account information only required if institution provides joint accountholders with choice to opt out for only one accountholder

Mail-in Opt-Out Form (cont'd)



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> <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.</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"> <tr> <td>Name</td> <td></td> </tr> <tr> <td>Address</td> <td></td> </tr> <tr> <td>City, State, Zip</td> <td></td> </tr> <tr> <td>Phone</td> <td></td> </tr> </table>	Name		Address		City, State, Zip		Phone	
Name									
Address									
City, State, Zip									
Phone									

- Instructions contain specific text to be used to describe opt-out rights based on the type of information sharing
- Opt out options should only be given for responses answered with a “Yes” in the third column of the table

Who is Providing Notice?



Who we are	
Who is providing this notice?	[insert]

- Can be omitted where form is only provided by one institution and that institution is clearly disclosed at top of page 1
- Must be completed if form provided on behalf of multiple financial institutions
- If the list of institutions exceeds more than 4 lines, must describe the general types of institutions jointly providing the notice and then specifically list them at bottom of page 2 in at least 8-point font

Information Safeguards



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]

- Can add up to 30 additional words to provide further information about safeguarding practices

Collection of Information



<p>How does [name of financial institution] collect my personal information?</p>	<p>We collect your personal information, for example, when you</p> <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] <p>[We also collect your personal information from other companies.]</p> <p>OR</p> <p>[We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.]</p>
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- Must use 5 terms from a list of 33 in the Instructions to describe situations when information is collected
- Must also use specific text to disclose if information collected from credit bureaus, affiliates and/or other companies

Why Can't I Limit All Sharing?



Why can't I limit all sharing?

Federal law gives you the right to limit only

- 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.]

- If state privacy laws are discussed in the “Other important information” box at the bottom of page 2, this section must include the additional bracketed text

Joint Account Information



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.]

- This question must be omitted if no opt-out right is available based on the institution's particular sharing practices
- If opt-out available, must use sample language to disclose whether right automatically applies to all accountholders or less than all accountholders

Affiliates Definition



Definitions	
Affiliates	Companies related by common ownership or control. They can be financial and nonfinancial companies. ■ <i>[affiliate information]</i>

- Must use specific *italicized* language from the Instructions to disclose here whether the financial institution has affiliates and whether information is shared with those affiliates

Nonaffiliates Definition



Nonaffiliates	Companies not related by common ownership or control. They can be financial and nonfinancial companies. ■ <i>[nonaffiliate information]</i>
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- Must use specific *italicized* language from the Instructions to disclose here whether the financial institution shares with nonaffiliated third parties so that those third parties can market to the customer

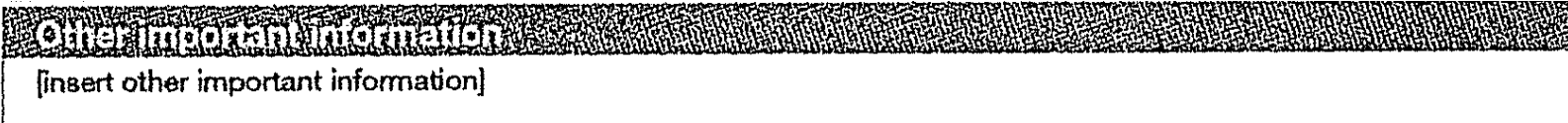
Joint Marketing Definition



Joint marketing	A formal agreement between nonaffiliated financial companies that together market financial products or services to you. ▪ <i>[joint marketing information]</i>
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- Must use specific *italicized* language from the Instructions to disclose here whether the financial institution shares with nonaffiliated financial institutions for joint marketing purposes

Other Important Information



- This box is optional
- Can run on to a third page
- Only the following types of information may appear in it:
 - State/international privacy law information; and/or
 - An acknowledgment of receipt form