



# BITS

FINANCIAL SERVICES  
R O U N D T A B L E

May 20, 2009

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

RE: Release No. 34-59769; File No S7-09-07 on Model Privacy Form

Dear Ms. Murphy:

The Financial Services Roundtable, including BITS, (“Roundtable”) appreciates the opportunity to comment on the Securities and Exchange Commission’s (“SEC”) proposal on the Interagency Proposal for Model Privacy Form under the Financial Services Modernization Act (“Gramm-Leach Bliley” or “GLB”).<sup>1</sup> The Roundtable reiterates its comments from its previous comment letter on a model privacy form and also offers comments on the methodology used to validate the model privacy notices.<sup>2</sup>

## **Interagency Proposal for Model Privacy Form**

Members of the Roundtable have been long-standing proponents of simplified privacy notices.<sup>3</sup> The Roundtable urged Congress to simplify privacy notices. In 2007, the Roundtable submitted a comment letter to the Agencies in regards to the public comment period. We believe these previously submitted comments are still relevant and want to take this opportunity to highlight comments we have made in previous submissions to the SEC and the other federal financial regulators.<sup>4</sup>

We recognize the importance of understanding how consumers absorb information related to its format and support research that reveals effective means of conveying this information. The research conclusions emphasize the common goal shared by Congress, the Agencies, the financial services industry, and consumers – the creation of a simple, consumer-friendly privacy notice.

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<sup>1</sup>The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$85.2 trillion in managed assets, \$980 billion in revenue, and 2.3 million jobs. BITS is the technology and operations division of The Roundtable. BITS provides intellectual capital and fosters collaboration to address emerging issues where financial services, technology, and commerce intersect.

<sup>2</sup> See <http://www.bits.org/downloads/Comment%20letters/FSRBITSPrivacyShortFormcommentletter.pdf>.

<sup>3</sup> In 2001, Roundtable members presented a series of recommendations on short-form privacy notices at a workshop sponsored by the Federal Trade Commission. Industry recommendations on short-form privacy notices were presented during the Federal Trade Commission’s Industry Workshop on “Effective Financial Privacy Notices” on December 4, 2001.

<sup>4</sup> See <http://www.bits.org/downloads/Comment%20letters/FSRBITSPrivacyShortFormcommentletter.pdf>.

Greater flexibility in content requirements is needed to better meet the variety of industry privacy policies and practices, and to help financial services firms comply with applicable state privacy laws. A less prescriptive format is needed to lower compliance costs for financial services firms. Uniform requirements among federal regulatory agencies are needed to enable diversified financial services firms to use just one form for all customers. Accommodating these concerns would greatly enhance the utility of the model form and the customer's ability to understand it. Greater flexibility is also important in the form in which notices are delivered. This is particularly important as the devices that individuals access information from are evolving. For example, the growth in electronic financial services through the Internet and World Wide Web provide means for hyperlinks and other interactive technologies that provide individuals more detailed information or to ask questions. Greater flexibility would allow companies to deliver privacy notices that are customized to the detail and degree of explanation provided to fit the differing individual needs.

Based on our interpretation of the SEC notice, the research is based on notice models that did not take into account public comments in 2007. We believe that performing quantitative testing of the model form without having first addressed concerns raised during the 2007 comment period may produce results that are inaccurate and/or incomplete. For example, if an original question was structured as a "yes" or "no" response but is now revised to allow for a descriptive response, would the same number of people still prefer the tabular version over the current or sample clause versions of the form? If the goal of the studies is to determine the comprehensiveness of the different formats of privacy notices, providing them with notices that are not completely accurate will only hamper the underlying goal of providing customers with clear and concise information regarding their privacy rights. Assuming our interpretation of the SEC notice is correct, **we urge the Agencies to reissue the proposed model for comments** after the form has been revised to take into account issues raised in this and the previous comment period, as well as, the consumer testing results.

The following are additional comments that we raised in 2007 and believe are still relevant and important for the SEC to consider.

*Inclusion of Certain Supplemental Information.* The proposed model form is more limited in scope than the notices currently used by many Roundtable member companies. While the scope of the form is consistent with the goal of creating a simple notice, flexibility in the content would allow firms to accurately describe their actual practices and thereby enhance the utility of the form for firms and consumers. "Yes" and "no" boxes simply are not sufficient to accurately describe the privacy policies and practices of most Roundtable member companies. Additional information is needed to provide consumers with a meaningful disclosure.

Also, we are concerned about the risks that may arise under state unfair and deceptive practice laws if the form does not describe an institution's privacy policies and practices fully and accurately. We recommend that individual financial services firms be permitted to add supplemental information to the form to make the disclosure more meaningful and complete. Specifically, we recommend that institutions be able to include information that: (i) is related to a customer's privacy rights other than those established in the GLB or the Fair Credit Reporting Act ("FCRA"); (ii) accurately explains privacy practices; and/or (iii) satisfies applicable state law requirements. The inclusion of such information will permit institutions to disclose their privacy policies and practices more fully and accurately.

Firms also should be permitted to include information required under state laws. This is particularly important for insurance firms. Insurers are subject primarily to state law, and in order for them to use the model, it is imperative that they be able to address various state requirements. For example, many state

insurance authorities require privacy notices for insurance companies to include information on the collection and use of medical information. Without the ability to provide information about state law, insurers will find it impossible to use this form and to comply with state law. It also is important for all financial institutions to be able to include information about other state laws, such as the Vermont and California laws. Otherwise, consumers will not be able to receive all applicable privacy related information in a single notice.

Expanding the notice to permit institutions to include such supplemental information will make the notice more accurate, useful, and less confusing to consumers, but should not detract materially from the goal of a simple, more uniform notice.

*Conformance with FCRA and GLB.* We recommend that the form be revised to conform to the requirements of the FCRA concerning the sharing of information between and among affiliates for marketing purposes. We also recommend removal of references to a 30-day waiting period after which an institution may begin sharing information since no such waiting period is required in FCRA or the GLB.

*Sample Clauses.* We strongly recommend that the existing sample clauses not be replaced with the proposed model form. We make this recommendation for several reasons. First, retaining the existing clauses is consistent with Section 728 of the Financial Services Regulatory Relief Act of 2006, upon which the model is based. When Section 728 was crafted, Congress was aware of the existing sample clauses, and did not require that the model be a replacement for them. Instead, Section 728 expressly states that the model form is to be an “option” for financial services firms. Thus, the model should be a supplementary means to meet privacy notice requirements, not a substitute for existing compliance forms. Second, many firms, including some Roundtable member companies, have invested significant resources into their current privacy notices, and would prefer to use those forms. If institutions use the sample clauses, we believe they should be subject to safe harbor. Those firms should be able to continue to select the most appropriate means to comply with the notice requirements. Internationally, there are a number of documents published on making privacy laws and enforcement more effective. We recommend that regulators and the industry continue to monitor these publications.

## **Comments on the Macro International Study**

We commend the Agencies for sponsoring research to develop a prototype privacy notice that consumers can understand and to quantitatively test the extent to which the new prototype notice is more effective and usable for consumers. While we appreciate the opportunity that the SEC has provided to comment on this research, we urge the SEC to continue to work in concert with the other regulatory agencies so that all the regulators that administer rules related to privacy develop the same or substantially similar privacy rules.

According to the Macro International study, the research goals were to better understand consumer comprehension of privacy to assess the communication effectiveness of several competing notice formats. The project used four variations of the privacy notice form. Macro International found the Kleimann Communication Group (KCG) Table notice, which appears to be a slightly revised version of the model form in comparison with the Sample Clause notice, is superior for harder tasks that require complex comprehension. We are concerned that the current form that the study favors – the KCG Table Notice – is not sufficiently flexible. The prescriptive nature of the proposed model form will make it impossible for most institutions to explain their privacy policies and practices fully and accurately. For example, inconsistencies between the proposed model form and the terms of the FCRA will confuse and mislead

customers. Furthermore, the lack of uniform requirements by different regulators will prevent affiliates in a diversified company from using the same form.

We believe the research does not adequately take into account concerns with data security practices as it relates to information sharing. The conclusions of the quantitative testers on the performance of the Model Form in comparison to other notice formats did not address information sharing in the context of a financial institution's practices and policies on protecting the confidentiality and security of information shared. No scenarios reflected the subjective safeguarding measures a financial institution may employ to protect consumer information, regardless of the amount of information shared, or the number or type of affiliates and unaffiliated third parties a consumer's information is shared with. Increasingly, consumers are concerned about how an entity safeguards information as how much of their information is disclosed or to whom an entity shares their information.

The following are technical comments on the methodology used to validate the model privacy notices.

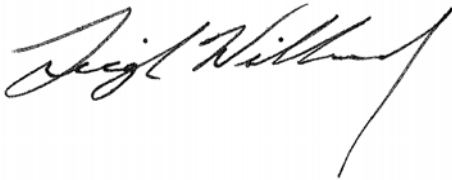
- The sample notices appear to be for banks given that the word “bank” was used almost 50 times in 41 questions. There is no evidence of any testing to determine if there would be a difference if the notices applied to insurance, brokerage, mutual fund products, or a financial institution with products in all these areas. Failure of the KCG analysis to include customers from these other sectors raises a practical weakness in the validation of the survey for non-bank financial institutions.
- The standard protocol would require the population involved in the test to reflect the group of people who actually will receive these privacy notices. Nowhere in the study is there any evidence the sample group demographically reflects the set of customers who will receive privacy notices. Fluency in English was a requirement, but not all customers will actually be fluent in English. If English fluency were a valid criterion for selection, it was not validated in any manner.
- The testing was done at five locations across the country, with four being in major metropolitan areas. However, there is no evidence that the participants chosen at these sites accurately reflect the population who receives privacy notices (e.g., were the malls in demographically diverse locations?).
- The concept of “true opt-outs” is discussed on page 10 of the Report. The analysis of the testing suggests that those participants who preferred the higher sharing bank and gave the availability of an opt-out as the reason must have mistakenly believed they were choosing a lower sharing bank. A mistaken belief is one possible answer, but an equally possible explanation is some error in the testing process that could draw into question other conclusions of the study. The results may indicate that “true opt-out” may not be a valid construct in the study and therefore should not be used in any conclusions.
- The survey included a number of open-ended questions. The process of converting responses to open-ended questions requires consistency around the determination of what is cogent and relevant. There is no explanation in the study as to what protocols were used to ensure this consistency during the coding and categorization process. This is especially true given that these surveys were done at five different location across the country, which suggests the possibility this analysis took place separately.
- On page 17 of the Report, the authors state that the “table” is the key feature that improved performance. It is not clear how they arrived at this conclusion other than the notice using a table was preferred. There is no empirical evidence, however, that the table was the distinguishing factor.

## Conclusion

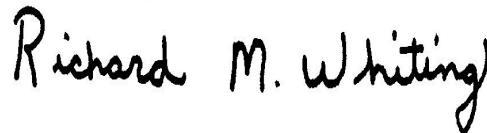
Roundtable members support the objectives of simplified and easy-to-understand privacy notices and appreciate efforts to study the comprehension of the form by consumers. It is critical that consumers receive clear and concise information about how financial institutions protect and use information. We have substantial concerns with the proposed form because it will make it impossible for most financial institutions to explain their privacy policies and practices fully and accurately. Inconsistencies between the proposed form and the terms of the FCRA will confuse and mislead customers. Greater flexibility in content requirements is needed to better meet the variety of industry privacy policies and practices, and to help financial services firms comply with applicable state laws. A less prescriptive format is needed to lower compliance costs for financial services firms. Uniform requirements among federal regulatory agencies are needed to enable diversified financial services firms to use just one form for all customers. Additionally, the proposed model should be a compliance option for financial services firms, not a substitute for the model clauses contained in the existing regulation.

Thank you for your consideration. If you have any questions about this letter, or any of the issues raised by our comments, please do not hesitate to call us at (202) 289-4322.

Sincerely,



Leigh Williams  
BITS President



Richard M. Whiting  
Executive Director and General Counsel  
The Financial Services Roundtable