ABA Staff Analysis: Use of the Model Privacy Notice Format
November 2010

The federal banking regulators introduced a new model privacy form in late 2009. (Read final rule.) Regulators gave bankers a lag so that banks had time to have new notices ready for 2011. Most banks have decided what they are going to use beginning January 1 for new accounts and then again for their annual notice whenever it is customary to issue it.

While use of this model privacy notice form is optional, the agencies encourage banks to use the new form for a number of reasons. For example, the new form was extensively tested with consumers and is designed to allow consumers to easily grasp and compare information sharing practices at different institutions. As an added incentive, the agencies will discontinue the safe harbor for use of the sample clauses after the end of 2010. As a result, using the existing sample clauses correctly will no longer be automatically considered to comply with the requirements of the rule.

However, if a bank uses the existing sample clauses to send its annual privacy notice to existing customers during 2010, that safe harbor does continue until the next annual notice is sent during 2011. In other words, to retain the safe harbor for compliance for bank customers of the bank that received the annual privacy notice in 2010, it will not be necessary to send a new notice on January 1, 2011. It is important to recognize that the safe harbor for using the sample clauses ceases on December 31, 2010. While the rule did not change, and while sample clauses may still accurately reflect the bank’s information sharing practices, use of those clauses does not confer automatic compliance after the end of this year. This is important for banks that continue using the existing sample clauses for accounts opened after the first of the year.

When evaluating whether to continue to use the old sample clause language, you should consider the following risk management factors:

1. Why did you choose the sample clause language in the first place? If you wanted to obtain the safe harbor and recommended it to your management or board on that basis, loss of the safe harbor status is probably something you want the proper responsible authorities in the bank to understand in endorsing its continued use without the regulatory benefit.

2. Although it is not likely that the old sample clause language would be construed as violating the Privacy Rule requirements, it is clear that the banking agencies no longer believe that it is the best way of disclosing your privacy policy. Consequently, some examiners may be inclined to be critical of its continued use. If you are a compliance supervisory risk averse institution you should take this possible examiner skepticism into account in deciding how to proceed.

3. Many banks have prepared their own notices that have passed supervisory muster without a problem. In fact, some banks have opted to prepare customized disclosures to better explain how they share information. Your choices are not limited to safe harbor language. Given that the safe harbor is limited to regulatory compliance and given the historically minimal compliance risk experienced by those using non-safe harbor language, you may find that alternative disclosures are a viable choice for meeting your institution needs and accurately and understandably conveying your privacy policy to customers.

4. Although the new model form must be closely followed to obtain the safe harbor treatment, it is a voluntary option. You might find value in adopting substantial portions of the model, but believe that modifications of other parts better reflect your bank’s policies or operations. Again given the historic success of bankers in meeting the Privacy Rule’s disclosure requirements, revising the model form/table to better match your circumstances may be a viable option even if it does not receive the formal safe harbor treatment.

Additional guidance on the use of the form can be found on ABA’s topics page.

Questions? Contact Leslie Callaway or Rob Rowe for more information.

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