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SECURITIES & CORPORATE COUNSEL

Legal Risk Management Tip

October 2007

Explanation and Assessment of the Newly Proposed Uniform Privacy Policy

The extensive requirements for a privacy policy set out by the Gramm-Leach-Bliley Act (“GLBA”) continues to spark discussions among federal enforcement agencies to create one uniform privacy policy to alleviate client confusion. Today’s financial institution privacy notices are overwhelming and extensive which generally results in clients ignoring the privacy notice insert. To combat this, on October 13, 2006 Congress enacted the *Financial Regulatory Relief Act* (“FRRRA”) which requires enforcement agencies to “jointly develop a model form which may be used at the option of the financial institution.” In response to the FRRRA, the agencies have created a proposed model form that would be voluntary in use but would provide a safe harbor for those financial institutions which use it.

The Proposed Model Form

The content of the Model Form is highly standardized. The first page contains a title bar with the institution’s contact information as well as personal information that financial institutions generally collect. Next, a disclosure table and a list of the types of sharing that the federal government allows are provided. Then the client is informed as to the type of sharing with which the financial institution is involved and accordingly whether the client can “opt out” of certain sharing practices.

The second page of the notice consists of Frequently Asked Questions (“FAQs”) on sharing practices and a definitions section for key fundamental privacy terms. Notably, however, all FAQs and definitions are not customizable even if the privacy notice’s FAQs and definitions section do not accurately describe the financial institution’s actual practices.

The third page contains an opt-out notice. Only firms that are required by law to provide opt-out notices must include this portion of the form. As with the other pages of the Model Form, customization options are limited.

Effective Dates

Under the proposed rule, those institutions who choose to use the Model Form are eligible to apply the safe harbor, both currently and upon publication of the final rule. However, “sample [privacy disclosure] clauses” provided for under current rules only fall under the safe harbor for one year. Consequently, financial institutions will need to remove the “sample clauses” within that year in order to preserve the safe harbor.

Quid Pro Quos - Advantages and Disadvantages

The uniform policy model comes with a series of advantages, including:

- Ease of client understanding
- Compliance with the GLBA
- Uniform basic information and disclosures applicable to most financial institutions

However, there also are some disadvantages to consider, including:

- Potentially higher risk of exposure due to “standardization” of the Model Form which does not provide customization fields to disclose unique practices of your firm
- In some cases, the Model Form may be too simplistic for complex financial institutions
- May result in a higher opt-out rate

Self-Assessment Considerations

Whether to use the Model Form will depend upon several factors, including weighing the privacy and safeguarding practices of your financial institution against the risk of adopting an un-customized privacy notice. Financial institutions should consider which areas within the privacy notice requires customization and whether this is the type of exposure the business is willing to accept. If it appears that there are several exposed areas over which the Model Form does not cover, it may be better to continue personalizing and developing your own privacy policy. If not, consider the benefits of adopting the more simplistic Model Form.

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