

Client Alert.

October 21, 2014

CFPB Issues Final Privacy Notice Rule

By Andrew Smith, Ryan Rogers, and Amanda Mollo

The CFPB has finalized its proposal allowing financial institutions to forgo mailing annual privacy notices by posting such notices online. Unfortunately, despite numerous pleas from the industry that the proposal would do little or nothing to ease the burden of annual privacy notices on most financial institutions, the CFPB issued the final rule with little or no substantive modification. Legislation currently pending in Congress would be far superior to the CFPB's rule, and hopefully the considerable momentum that has built up behind those legislative proposals will not be derailed by the CFPB's effort here.

The Gramm-Leach-Bliley Act (GLBA), implemented by the CFPB's Regulation P, requires financial institutions to provide an initial privacy notice to consumers when they establish the customer relationship with the individual, and to provide another copy of the privacy notice to customers each year.

On October 20, 2014, the CFPB issued a final rule ("Final Rule") addressing the annual privacy notice requirement under the GLBA and Regulation P.¹ The CFPB action follows a May 13, 2014 proposed rule ("Proposed Rule"), and regulatory "streamlining" initiative, in which the CFPB requested comment on a proposal "to allow financial institutions that do not engage in certain types of information-sharing activities to stop mailing an annual [privacy notice] if they post the annual notices on their Web sites and meet certain other conditions."²

Notwithstanding the CFPB's statements in the Supplementary Information to the Final Rule that it "will expand the permissible methods by which financial institutions subject to Regulation P may deliver annual privacy notices to their customers," the amendments to Regulation P are unlikely to ease the regulatory burden on many financial institutions, including those that incur significant cost in complying with the annual privacy notice requirement.

The Final Rule will be effective immediately upon publication in the *Federal Register*.

THE FINAL RULE

Under the Final Rule, which does not differ materially from the Proposed Rule, financial institutions are still required to deliver an initial privacy notice to consumers in writing; however, institutions are permitted to post their annual privacy notice online rather than mailing it to each customer, if the following conditions are met:

- The content of the notice most recently provided to the customer has not changed;
- The financial institution does not share the customer's nonpublic personal information (NPI) in a way that triggers a GLBA opt-out right;

¹ The Final Rule is accessible at http://files.consumerfinance.gov/f/201410_cfpb_final-rule_annual-privacy-notice.pdf.

² See 79 *Fed. Reg.* 27,214, 27,215 (May 13, 2014).

Client Alert.

- The financial institution has another channel for the opt-out disclosure required by the Fair Credit Reporting Act (FCRA); and
- The financial institution uses the CFPB's model privacy notice.

The Final Rule requires financial institutions that forgo mailing an annual notice to:

- Post their privacy notices online in an accessible and conspicuous way; and
- Notify customers in other required notices:
 - Where to find the online notice;
 - That the notice has not changed; and
 - That the notice will be promptly mailed upon request by calling a telephone number that the financial institution dedicates to that purpose.

CHANGES FROM THE PROPOSED RULE

In the Final Rule, the CFPB made modest adjustments to the Proposed Rule in response to comments received. A redline of the Proposed Rule reflecting changes in the Final Rule is accessible [here](#).

- **Alternative Delivery Following Changes to Notice.** The Final Rule clarifies that a financial institution is permitted to use the alternative delivery method for its next annual notice if the information the institution is required to convey in the notice has not changed, other than to eliminate categories of NPI it discloses or categories of third parties to whom it discloses NPI. Because financial institutions that disclose NPI to third parties outside of the GLBA exceptions must continue to provide notice, the provision permitting institutions to use the alternative delivery method where they have eliminated categories of information sharing appears to apply only where sharing of data with affiliated third parties or nonaffiliated service providers has been eliminated (e.g., under 12 C.F.R. § 1016.13).
- **Annual Disclosure.** The Final Rule permits institutions to notify customers annually about where to find the privacy notice on their web sites on an “account statement” or “coupon book,” in addition to notifying customers on disclosures that are required by law or regulation. The CFPB says in the Supplementary Information that an “account statement” would include “periodic statements or billing statements” not required or expressly and specifically permitted by law. The CFPB also says the term “account statement” is intended to be flexible enough to cover documents provided to customers by “a diverse array of financial institutions.” However, the CFPB cautions that “institutions should not include the notice of availability on such materials in a way that would cause the materials to fail to comply with applicable laws or regulations governing those materials.”
- **Clear and Conspicuous Standard for Annual Disclosures.** The Proposed Rule provided that the annual notice of availability of an institution's privacy policy must appear under a “Privacy Notice” heading that is in boldface type or is “otherwise emphasized.” The CFPB states in Supplementary Information that “otherwise emphasized” means the heading could appear in all capital letters or be underlined.

Client Alert.

- **“Prompt” Mailing of Notices.** The Proposed Rule provided that financial institutions must mail current privacy notices to those customers who request it by telephone “promptly.” According to the CFPB, commenters on the Proposed Rule requested guidance on the meaning of the term “promptly” and suggested timeframes between five days and 30 days. Under the Final Rule, financial institutions must mail notices within 10 calendar days—not business days—of the customer’s request.

THE FINAL RULE WILL NOT PROVIDE THE PROMISED RELIEF TO FINANCIAL INSTITUTIONS

As we noted in our alert on the Proposed Rule,³ legislative proposals pending in Congress would provide an exception to the annual written notice requirement for any financial institution that “provides nonpublic personal information in accordance with” the GLBA and Regulation P, has not updated its privacy policy since its last written disclosure, and provides online access to its most recent disclosure to all customers.⁴ These proposals are superior to the CFPB’s narrowly tailored Final Rule because the CFPB’s approach requires financial institutions to use the Model Form and prohibits sharing FCRA information with affiliates, effectively denying relief to all but the smallest financial institutions. In contrast, legislative proposals in Congress would provide the needed regulatory relief, without regard to whether a financial institution provides an FCRA affiliate sharing opt-out or uses the CFPB Model Privacy Notice.

Although use of the Model Privacy Notice is a requirement for financial institutions seeking to use the alternative delivery method, the Final Rule does not provide any clear guidance to financial institutions on how they can modify the Model Privacy Notice—for example, by including disclosures required under state law—and still take advantage of the alternative delivery method. Many financial institutions use the CFPB’s Model Privacy Notice, and many of these institutions have slightly modified the Model Form to tailor it to their specific circumstances. The CFPB has made clear that such modifications, however minor, may mean that the financial institution will not be entitled to the safe harbor afforded by the Model Privacy Notice.⁵ As long as the notice is consistent with the requirements of the GLBA Privacy Rule, however, the regulators should not take issue with the notice.⁶

Notwithstanding pleas from the industry that most larger financial institutions were unable to comply in all respects with the Model Form, but still were offering compliant privacy notices, the CFPB effectively punted on the issue, stating that “financial institutions may consult counsel on how to comply so as to limit the risk of government enforcement” for departing from the Model Privacy Notice. Also, by establishing a narrow mailing window—10 calendar days—within which a privacy notice must be sent in response to a customer’s request, the Final Rule will serve to discourage institutions from using the online posting alternative.

The Final Rule is disappointing because it fails to provide meaningful relief to industry participants. The CFPB’s rationale for structuring the Final Rule in the way that it has also appears to reflect a policy choice that information sharing, in and of itself, is bad for consumers. That is, the CFPB apparently believes that the conditions under the Final Rule will serve to

³ See CFPB’s Promise to Ease Privacy Notice Burdens Needs Clarification (May 12, 2014), accessible at <http://www.mofo.com/~media/Files/ClientAlert/140512CFPBsPromisetoEasePrivacyNoticeBurdens.pdf>.

⁴ See Eliminate Privacy Notice Confusion Act, H.R. 749, 113th, Cong. (passed Mar. 12, 2013); Privacy Notice Modernization Act of 2013, S. 635, 113th Cong. (introduced Mar. 21, 2013).

⁵ See 12 CFR part 1016, App. B(1)(b) (“Institutions seeking to obtain the safe harbor through use of the model form may modify it only as described in these Instructions.”).

⁶ See 74 Fed. Reg. 62890, 62890 (Dec. 1, 2009) (final rulemaking notice) (“While the model form provides a legal safe harbor, institutions may continue to use other types of notices that vary from the model form so long as these notices comply with the privacy rule.”).

Client Alert.

constrain the information-sharing practices of many financial institutions and cause them to refrain from sharing information among affiliates and to use the Model Form. It is unfortunate that the CFPB has chosen to use an opportunity for regulatory relief as a means for implementing policy judgments that are not articulated in the GLBA's legislative history.

If online posting of annual notices is the right result for consumers—for example, by reducing costs, eliminating clutter, and enhancing consumer access to and the likelihood of reading such notices—there should be no strings attached. However, by crafting a narrowly tailored rule and imposing several needle-hole requirements, the CFPB is essentially discouraging financial institutions from adopting a sensible and consumer-friendly alternative.

Contact:

Andrew M. Smith

(202) 887-1558

andrewsmith@mofo.com

Ryan H. Rogers

(202) 887-1507

rrogers@mofo.com

Amanda J. Mollo

(202) 778-1609

amolloy@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology, and life sciences companies. We've been included on *The American Lawyer's* A-List for 11 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.