

May 29, 2007

By electronic mail

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Interagency Proposal for Model Privacy Form Under Gramm-Leach-Bliley Act, Rel No. IA-2598, File No. S7-09-07

Dear Ms. Morris:

The Investment Adviser Association¹ welcomes the opportunity to comment on the Securities and Exchange Commission's proposed model privacy form and accompanying amendments to Regulation S-P.² The Commission issued the proposal jointly with seven other federal regulators to implement a federal law requiring these agencies to develop a model privacy form compliant with the Gramm-Leach-Bliley Act privacy provisions that would be clear and comprehensible to consumers.

The IAA supports the SEC's goal to make privacy notices more clear, comprehensible, and easily readable. However, we have serious reservations about the proposal as framed. While we recognize the conceptual appeal of making such notices comparable across the financial services industry, we are concerned that the proposal may sacrifice the accuracy and quality of the information provided to consumers. More specifically, we submit the following comments and recommendations:

1. The IAA generally supports a safe harbor for use of the model privacy form subject to the important modifications set forth below.
2. The SEC should not withdraw its guidance with respect to the Sample Clauses currently in widespread use among SEC-registered investment advisers.
3. The model form is too rigid to be accurate for all entities and should be modified in the following respects:

¹ The Investment Adviser Association (formerly the Investment Counsel Association of America) is a not-for-profit association that represents the interests of SEC-registered investment adviser firms. Founded in 1937, the Association's current membership consists of about 500 firms that collectively manage in excess of \$8 trillion in assets for a wide variety of individual and institutional clients. For more information, please visit our web site: www.investmentadviser.org.

² *Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act; Proposed Rule*, Rel. No. IA-2598, 72 Fed. Reg. 14940 (Mar. 29, 2007) ("Proposal").

- a. Firms should be permitted to customize the form to ensure that the content accurately reflects each firm's actual information collection and sharing practices and information safeguards; and
 - b. Firms should be permitted to omit certain terms in the model privacy form that do not apply to their information collection practices or their sources of information.
4. The format of the proposed form should be flexible enough to permit delivery on different size paper and presentation materials, through a number of methods, and included in various documents sent to clients.
 5. The Commission has underestimated the costs to advisers of developing, maintaining, and delivering the proposed model privacy form.
 6. The Commission should consider providing a streamlined annual notice option for situations where the firm: (1) shares and uses nonpublic personal financial information only in ways that do not trigger an opt-out right; and (2) has not materially amended its privacy policy during the preceding year.
 7. The Commission should not amend its current rule governing delivery of revised privacy notices.

Background

In 2000, the SEC adopted Regulation S-P, which implemented privacy notice requirements and restrictions on sharing consumer information as mandated by the Gramm-Leach-Bliley Act.³ Regulation S-P requires financial institutions, including all SEC-registered investment advisers, to adopt policies and procedures that are reasonably designed to protect the security and confidentiality of consumer records. The rule also requires an investment adviser to provide an initial notice of its privacy policy and practice upon entering into a customer relationship and prior to disclosing nonpublic personal information about a consumer to a nonaffiliated third party. Advisers are required to deliver annual notices to customers with whom an ongoing relationship exists and to permit customers, via an opt-out notice, to prevent disclosure of nonpublic personal information to certain nonaffiliated third parties. Compliance with Regulation S-P was mandatory as of July 1, 2001. On October 13, 2006, the Financial Services Regulatory Relief Act of 2006 was enacted, requiring certain agencies to develop jointly a model privacy form that is succinct, easily readable, and comprehensible to consumers.⁴ This current proposal is the result of those efforts.

As the SEC recognized in the Regulation S-P proposing release, due to the fiduciary relationship between an investment adviser and its client, investment advisers

³ See *Privacy of Consumer Financial Information (Regulation S-P)*, Final Rule, SEC Rel. No. IA-1883, File No. S7-6-00 (Jun. 22, 2000).

⁴ Pub. L. 109-351 (Oct. 13, 2006), 120 Stat.1966.

generally do not disclose client information to other parties.⁵ Further, thousands of investment advisory firms are not affiliated with any other financial institution.⁶ Accordingly, many investment advisers use the Sample Clauses provided as guidance by the SEC in Appendix A to Regulation S-P. These advisers have relied upon the Sample Clauses because they accurately and sufficiently describe their privacy policies and practices. As noted below, it would be counterproductive to remove the Sample Clauses simply due to the development of a model privacy form. We understand the Sample Clauses are working well for thousands of investment adviser firms that are not affiliated with other entities and that do not share consumer records with third parties other than as permitted by law.

1. The IAA generally supports a safe harbor for a Model Privacy Form.

Unlike other financial institution regulators, the SEC did not previously establish a safe harbor for the use of certain language in privacy notices; we commend the Commission for proposing to do so at this time.⁷ Thus, we support the proposed provision stating that use of the model form “constitutes compliance with the notice content requirements of [Regulation S-P] although use of the [form] is not required.” Establishing a safe harbor may serve as a useful incentive for financial services firms to adopt a model privacy form.

Although, as discussed below, the model form may not provide accurate information as currently proposed, a model form with more flexibility may provide efficiencies for large financial institutions and comparability across services and products for consumers. Investment advisory firms that are part of larger financial complexes appreciate the opportunity to be able to deliver the same privacy disclosures in a uniform way to their clients. These financial institutions may include investment advisers, brokers, banks, mutual funds, or custodians. It would be efficient for such institutions to use one notice applicable to all accounts at each firm, if feasible. To that end, an adviser and an affiliated institution regulated by another agency should be able to choose to rely either on the SEC model privacy form or the model privacy form proposed by the other agency.⁸

⁵ *Privacy of Consumer Financial Information*, SEC Rel. No. IA-1856, 65 Fed. Reg. 12354, at 12366 (Mar. 8, 2000).

⁶ *See Evolution/Revolution 2006: A Profile of the Investment Adviser Profession* at 10 (stating that approximately 42% (4,369) of all investment advisers are not affiliated with any other financial industry entity) (available at www.investmentadviser.org).

⁷ The IAA (then ICAA) also supported the concept of a safe harbor in its comment letter regarding proposed Regulation S-P. *See Letter from David Tittsworth, Executive Director, ICAA, to Jonathan G. Katz, Secretary, SEC* (Mar. 31, 2000).

⁸ *See Proposal*, 72 Fed. Reg. at 14956 (requesting comment on this issue). Similarly, unaffiliated financial institutions currently have the ability under Regulation S-P and other Gramm-Leach-Bliley regulations to provide joint notices. *See Regulation S-P*, sections 248.9(f) and (g). Unaffiliated financial institutions should be permitted to use a joint model privacy form under the pending proposal as well.

2. The SEC should not withdraw its guidance regarding Sample Clauses.

The Commission proposes to use the model privacy form to replace the Sample Clauses currently found in Appendix A of Regulation S-P. The Commission states that “[r]esearch to date indicates that the language in the Sample Clauses is confusing, and accordingly, the Agencies propose to eliminate the Sample Clauses from the privacy rule.”⁹ Many advisers, particularly smaller advisers with no affiliates, adopted the Sample Clauses for their privacy notices. Indeed, advisers that use the Sample Clauses have been able to create notices that are more succinct and simplified than the model privacy form currently proposed by the agencies. It will be burdensome and unnecessary for small advisers to change their notices, particularly when they do not share information other than routinely to service their clients’ accounts. Removal of the Sample Clauses would also leave advisers that choose not to use the model form with insufficient guidance in developing their notices. Accordingly, we request the Commission to retain the Sample Clauses currently permitted under Regulation S-P.

At a minimum, the Commission should withdraw the statement in the proposing release that research “indicates” that the Sample Clauses are “confusing.” The proposal provides no explanation or citation as to why the language the Commission adopted in 2000 is now deemed to be confusing. We respectfully submit that the Sample Clauses as tailored by advisers are more accurate than the standardized language currently proposed. The Commission’s statement may call into question the validity of firms’ current and continued use of the Sample Clauses. Thus, there will be a strong disincentive to continue using existing and accurate disclosures relied upon by advisers and their clients alike for more than six years.

The Commission requests comment whether to retain Sample Clauses A-1, A-3, and A-7, or develop model clauses to replace those sample clauses for use as a safe harbor for firms that provide the simplified notice described in section 248.6(c)(5). The simplified notice provision permits certain advisers to simply state that they do not disclose nonpublic personal information to affiliates or nonaffiliated third parties except as permitted by law. We strongly recommend maintaining the viability of this provision by retaining the Sample Clauses.

If the Commission nevertheless determines to eliminate the Sample Clauses from Regulation S-P, we respectfully request additional transition time to continue to rely on the Sample Clauses for existing clients. We understand that for advisers with certain delivery cycles, a minimum of fifteen months transition time would be required.

⁹ Proposal, 72 Fed. Reg. at 14955.

3. Requirements for the Model Privacy Form must be sufficiently flexible to be accurate for each adviser.

The Commission has requested comment regarding whether the standardized provisions and vocabulary in the proposed model form are sufficient to allow firms accurately to disclose their information sharing and collection practices. We respectfully submit that the standardized language is not flexible enough to permit accurate disclosure of investment advisers' practices. We have serious concerns about the SEC's development of a form to be used in order to achieve a disclosure safe harbor where some of the form's language may be inaccurate or unclear to clients, yet cannot be altered according to the terms of the proposed rule. For example:

- The box on proposed page 2 describing how the financial institution collects personal information is so inaccurate for most investment advisers as to be misleading. For example, the sentence stating “[w]e also collect your personal information from others, such as credit bureaus, affiliates, or other companies” is simply inapplicable to many investment advisers. Thousands of advisers have no affiliates and require no credit reports. Credit bureau information is generally unnecessary for financial relationships that involve no use of credit, such as traditional investment advisory relationships. Similarly, investment advisers typically do not make loans and do not take payment in the form of credit or debit cards and therefore do *not* collect information from clients when they “apply for a loan” or “use [a] credit or debit card.”
- The language on page two of the notice also states that the financial institution uses security measures that comply with federal law including “computer safeguards and secured files and buildings.” Regulation S-P is flexible in requiring investment advisers to have policies reasonably designed to safeguard client information and does not specifically require “secured files and buildings.” We suggest permitting insertion of the word “may” before the word “include.” Alternatively, it would be helpful for consumers if advisers could provide their own example of what such security measures include. Otherwise, the disclosure of every institution is identical and consumers have nothing to compare among firms.
- Other generic financial institution phrases sprinkled throughout the form are inapplicable to advisers, including information about how customers “pay their bills,” “use debit or credit cards,” “credit history,” “credit scores,” “credit bureaus,” and “creditworthiness.”
- The “what?” box on page one contains the sentence: “When you close your account, we continue to share information about you according to our policies.” This is simply inaccurate and misleading for the vast majority of advisers, who will not “continue to share information” after the advisory relationship ends. A more accurate sentence is: “We will protect the information of our former clients to the same extent as our current clients.” The SEC's current guidance is also more accurate: “If you decide to close your account(s) or become an inactive

customer, we will adhere to the privacy policies and practices as described in this notice.”

Compounding these inaccurate statements is the statement in the first box on page one: “Please read this notice carefully to understand what *we* do” (emphasis added). There is similar language in the boxes on page two. However, this form does not inform clients about what the particular adviser does – it merely informs clients what advisers, brokers, investment companies, and other entities generically may do. Similarly, the header for the first set of boxes on page two reads: “Sharing practices.” However, nothing in this set of boxes informs the client of the adviser’s sharing practices.

We strongly submit that investment advisers should be able to customize the information in the applicable boxes. This would assist consumers in more readily comparing various financial institutions’ practices, rather than cause confusion. The boilerplate approach provides virtually no information to consumers, except with respect to sharing among affiliates and non-affiliates for other than everyday business purposes. If the Commission does not permit customization, we recommend permitting the use of phrases more appropriately applicable to investment advisers. For example, in the “what” box on page one, information collected may include home address, telephone number, financial information, investment objectives, and transaction and holdings information.¹⁰ The SEC could provide appropriate alternatives that varying financial institutions could elect to use, as appropriate to their firms.¹¹

The Commission has also requested comment on whether firms should be permitted to omit terms that do not apply to their information collection practices or their sources of information. Omitting such terms would help streamline the model form and increase client comprehension. And, if the Commission does not permit customized answers, we strongly recommend that firms be permitted to omit inapplicable terms. Omission of inapplicable terms would then be the only method by which firms could avoid distributing inaccurate or misleading notices to consumers.

4. The format of the proposed form should be more flexible.

As proposed, the format and delivery of the model privacy form is too rigid. The proposal presents no compelling reason for using 8.5x11 paper other than the statement that interviewers chose to use that size paper and interviewees liked it.¹² In addition,

¹⁰ The Commission could also include an “other” box which could be checked by firms and include anything else distinctive applicable to their particular businesses.

¹¹ Another benefit of flexibility arises from the need of global firms to comply with privacy disclosure requirements that vary by jurisdiction. Advisers should be permitted to include in their notices more specific information collected (e.g. mother’s maiden name) as appropriate to comply with privacy requirements imposed by the European Union, U.K. Financial Services Authority, or other jurisdictions.

¹² It is not clear from the proposal whether interviewees received the privacy policy as a stand-alone document or whether they were provided a more realistic experience, such as opening an envelope with a

prohibiting the notice from being incorporated into any other document is too limiting and substantially raises the cost for advisers to prepare and deliver the notices. Many organizations, including the federal government, deliver important information to citizens regularly on various sized paper in many formats. We strongly recommend more flexibility in the format of the document, such as permitting the use of firms' logos, colored inks, colored paper and various sizes of paper. Advisers should also be permitted to add administrative information to the form, such as an effective date or revision date, document codes, and bar codes on the opt-out form. Further, we specifically encourage the SEC to permit a tri-fold brochure that could provide the model privacy form on three facing pages.

We also recommend more flexibility with respect to electronic delivery, web site availability, and including the disclosures in other documents prepared by the financial institution. The Regulation S-P delivery provisions currently provide flexibility in delivery of notices that include permitting personal delivery, mail delivery, and electronic delivery.¹³ Advisers use and deliver privacy notices in many formats on paper and through electronic media. These alternatives should be preserved to the extent possible including the use of web site notices, electronic delivery, and acknowledgements for notices delivered electronically in connection with electronic delivery of advisory services. Advisers should also be permitted to continue to include their privacy notices as part of their investment adviser brochures and Form ADV and its required disclosures, all as currently permitted under Regulation S-P.¹⁴

Further, the Commission should provide additional flexibility regarding how firms may identify entities (both affiliated and unaffiliated)¹⁵ that are providing a joint notice. For example, advisers should have the opportunity to use a short form name or group of names throughout the form, while more specifically identifying the companies covered in a legend or footnote the first time the name of the financial institution is required.

complete set of account opening materials. One adviser's market research suggests that in this latter scenario, clients did not prefer to receive multiple separate sheets of paper.

¹³ Regulation S-P, section 248.9.

¹⁴ See *Staff Responses to Questions about Regulation S-P, updated as of Jan. 23, 2003*, available at www.sec.gov/divisions/investment/guidance/regs2qa.htm. These interpretations permit advisers to include privacy notices in other documents given to clients, such as brochures, Form ADV Part II, and other methods.

¹⁵ See n.8, *supra*.

5. The Commission has underestimated the costs of implementing the Model Privacy Form.

The Commission states that firms electing to use the model privacy form “could incur some small incremental costs” in changing from existing notices to the new form.¹⁶ To deliver these notices annually to all customers on two or three separate sheets of paper, rather than one booklet or brochure or incorporating the notice into other documents, will needlessly add significant costs to current preparation and delivery expenses both initially and on an ongoing basis. Initially, advisers will incur the cost of re-writing their disclosure, reviewing revised notices internally and with counsel, republishing brochures or notices, reprinting, and delivery. In addition, advisers will have to revise and reprint any documents that currently incorporate the privacy notice (e.g. Form ADV).

We have gathered information from larger investment advisory firms and their affiliates indicating that the additional cost of printing and mailing the model privacy form alone could range from \$100,000 to more than \$300,000 per mailing. Such firms estimate a range from \$.09 for printing and mailing the two-page model form to \$.24 per package for a three-page form. Some estimates project an additional flat charge of \$300-\$1,500 per lot depending on quantity. These estimates do not include reprinting and revising other forms that currently include the privacy notice.

Further, the Commission’s cost estimates do not account for revising or preparing new explanatory material for employees and re-training employees regarding the new form. Some advisers may incur costs in preparing scripts and responses for call centers charged with responding to questions from clients who may be confused by the new form.¹⁷

Given that investment advisory firms have not experienced significant client complaints about the privacy notices, it is not likely that the benefits of using the proposed model form would outweigh the costs either for advisers or their clients.

6. The Commission should consider permitting firms to deliver a streamlined annual notice.

Many investment advisers do not share non-public personal financial information other than as permitted without triggering opt-out rights and make no material changes in their policies year to year. The Commission should consider permitting firms to use a short abbreviated disclosure that would simply convey to clients that the firm’s policies

¹⁶ Proposal, 72 Fed. Reg. at 14959.

¹⁷ One financial services firm’s estimate of the cost of responding to each such call is \$.75 per minute. Assuming a five-minute call at \$3.75 per call, such costs could add up significantly for a large entity that mails hundreds of thousands of notices, even if only a small fraction of clients place phone calls.

and procedures have not changed during the past year. The notice could refer clients to the firm's web site for the full privacy policy or provide information regarding how clients could request a copy of the firm's full policy. The Commission could permit this annual notice to be included prominently in other documents given to customers during the year.

Advisers are required by Regulation S-P to provide each client a full privacy notice when the client establishes a relationship with the adviser. If there are no changes during the year, the firm has no new information to convey to clients except that the financial institution continues to keep confidential all customer personal financial information. Under these circumstances, providing a full-blown two-page model privacy form annually is excessive, and not particularly helpful, for both the customer and the financial institution. The SEC should prepare a short text box that advisers meeting the conditions could use to comply with the annual privacy notice, either separately or within another document.

7. The Commission should not amend its current rule governing delivery of revised privacy notices.

The Commission has asked for comment about whether financial institutions should be required to alert clients to changes in an institution's practices as part of the model form regulations. Regulation S-P currently requires delivery of a revised notice if the firm intends to disclose a new category of nonpublic personal information to any nonaffiliated third party, disclose such information to a new category of nonaffiliated third party, or disclose such information about a former client to a nonaffiliated third party if the former client has not had the opportunity to opt-out regarding that disclosure.¹⁸

This rule is sufficiently clear and robust to protect consumers' nonpublic personal information against unannounced changes in privacy practices and procedures. Thus, we respectfully submit that this aspect of the rule does not need to be changed.

¹⁸ Regulation S-P, section 248.8.

Conclusion

We appreciate the opportunity to provide our views on these important issues and would be pleased to provide any additional information the Commission or its staff may request. Please do not hesitate to contact Paul Glenn, IAA Counsel, or the undersigned with any questions regarding these matters.

Respectfully submitted,

A handwritten signature in cursive script that reads "Karen L. Barr".

Karen L. Barr
General Counsel

Cc: The Honorable Christopher Cox, Chairman
The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Annette L. Nazareth
The Honorable Kathleen L. Casey

Mr. Andrew J. Donohue, Director, Division of Investment Management
Mr. Robert E. Plaze, Associate Director, Division of Investment Management