MBA Minnesota Bankers Association
The Champion for Minnesota Bankers
LEGAL COMPLIANCE BULLETIN

In This Bulletin

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I. Federal Regulators Issue Model Privacy Notice Form

Eight federal agencies, including the FDIC, OCC, OTS, and Federal Reserve, have jointly issued a final model privacy notice form as required under the Gramm-Leach-Bliley Act (GLBA). The model form will be incorporated into each agency's regulatory rules and laws.

The GLBA requires financial institutions to disclose their information sharing practices to their customers and inform customers of their right to opt out of certain practices. The Financial Services Regulatory Act of 2006 amended the GLBA, requiring regulatory agencies to develop an optional model privacy notice form. Financial institutions using this form qualify for the safe harbor and are considered to be in compliance with the GLBA notice and disclosure requirements. After publishing a proposed form in 2007, the agencies have now released a final model form.

The use of the model form is optional. Financial institutions can continue to use their existing disclosures as long as the notice complies with the GLBA requirements. However, those that use the model form ensure compliance and inclusion in the safe harbor.

The model form becomes effective on December 31, 2009. Use of the model form after the effective date will qualify for the safe harbor. The existing sample clauses found in the privacy regulations will remain and their use will also be covered by the safe harbor through January 1, 2011. Use of the sample clauses after January 1, 2011, is allowed but will no longer qualify for the safe harbor. The sample clauses will be completely removed from the privacy regulations in January 2012.

There are two versions of the model form – one with opt-out information and one without opt-out information. The model form consists of two pages. The first page includes the title, introductory section, disclosure table, and customer service contact information. The second page includes customer frequently asked questions, an outline of collected information, and space for other important information such as state and international requirements. The agencies will post a link on their websites to a form builder with drop-down menus in the near future to assist institutions in developing the appropriate disclosures.

The model form may be incorporated into another form as long as it meets the notice requirements. The agencies recommend using white or cream-colored paper with black ink. It must be in at least 10-point font, clear and conspicuous, and easily read. A financial institution may include its logo as long as it does not interfere with readability. However, the use of slogans or images other than logos is prohibited. The notice may be delivered in paper form or electronically if the customer has previously agreed to electronic delivery.

The final rule, including the model privacy notice form, is available at http://edocket.access.gpo.gov/2009/pdf/E9-27882.pdf.

II. Department of Commerce Letter on Participations and LLCs

The Department of Commerce recently opined (click here to read letter) on a Minnesota state bank's ownership of a minority ownership interest in a Minnesota limited liability company (LLC) formed solely to hold other real estate owned received in satisfaction of debts incurred in connection with loan participations.

The letter states that pursuant to Minn. Stat. § 48.15, subd. 2, Minnesota state banks are authorized to hold a minority ownership interest in an LLC formed solely for the purpose of holding other real estate received in satisfaction of debts incurred in connection with participation loans, subject to the following conditions:

1. Prior to exchanging its interest in Real Property for an ownership interest in an LLC, the state bank's board must determine that the exchange is in the best interests of the bank and would improve the ability of the bank to recover or otherwise limit its loan loss. The basis for the determination must be documented.

2. Within 30 days after making the exchange, the state bank must notify the Deputy Commissioner in writing that the exchange has been made.

3. The LLC arrangement must be structured in a manner to provide at least as favorable a position with respect to limitations on liability as provided for by the participation agreement originally entered into by the bank for the purpose of making the underlying loan.

4. The state bank must ensure that the LLC complies with the provisions of Minn. Stat. §§ 48.21 and 500.24 and Minnesota Rules, Part 2675.2170, which relate to the handling of foreclosed real estate, including appraisals, and maximum holding periods for the other real estate.

III. FASB 166 and Accounting for the Sale and Purchase of Loan Participations

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The Financial Accounting Standards Board has issued Statement of Financial Accounting Standards No. 166 effective for fiscal years beginning after November 15, 2009. While much of Statement No. 166 relates to the accounting for securitization transactions and is beyond the scope of this article, Statement No. 166 has a direct and immediate impact on the accounting for the sale and purchase of loan participations initiated after the effective date.

Statement No. 166 continues much of what was provided earlier for loan participations in Statement No. 140. Loans that are participated in a manner that meets the requirements of Statement No. 166 may be removed from the balance sheet of the lead bank and added to the balance sheet of the participant. A loan participation that does not meet the requirements of Statement No. 166 does not transfer any portion of the loan to the participant, but instead must be treated as a secured borrowing by the lead bank from the participant. FDIC regulation 12 C.F.R. §360.6 effectively incorporates these accounting rules by providing that loan participations that satisfy the accounting rules will be honored in an FDIC receivership or conservatorship of the lead bank, while loan participations that do not satisfy the accounting rules may not be honored. (The FDIC announced on November 13, 2009, that participations entered into through March 31, 2010 will be honored under 12 C.F.R. §360.6 even if documented under the accounting rules in effect before Statement No. 166 became effective.)

What does Statement No. 166 require in order for a loan participation to be given sale treatment? In general, in order to be given sale treatment, the participation interest must satisfy the extensive definition of a "participating interest" newly added in Statement 166 and must be "isolated" from the lead bank. The new definition appears to require pro rata treatment of all loan owners in all circumstances so that LIFO loan participations permitted in the

past may no longer be permitted. Under Statement 166, most provisions that would give the lead bank the right or obligation to repurchase the participation interest or the right to restrict the participant's disposition of the participation interest would disqualify the transaction from sale treatment. Some limited lead bank rights are permitted, such as a right to consent to a disposition of the loan participation (as long as that consent cannot unreasonably be withheld) and a right of first refusal to repurchase the loan participation upon a proposed disposition by the participant.

Statement No. 166 is complex. Its application to a particular bank transaction will require consultation with the bank's accountants and lawyers.