

PROJECT HISTORY - 2017

PRIVACY OF CONSUMER FINANCIAL AND HEALTH INFORMATION REGULATION (#672)

1. Description of the Project, Issues Addressed, etc.

This project was to: 1) review the *Privacy of Consumer Financial and Health Information Regulation* (#672) to determine what, if any, changes should be made to the model regulation to be more consistent with the amendments to Regulation P (Privacy of Consumer Financial Information), which create an alternative electronic delivery option of privacy notices by financial institutions to consumers; and 2) review the sample privacy notices of Model #672, which provide a safe harbor of compliance with state privacy notice requirements, to determine what, if any, changes should be made to the sample privacy notices to be more consistent with the privacy model notice form issued by federal regulatory agencies for use by financial institutions as a safe harbor of compliance with the privacy notification requirements of the federal Gramm-Leach-Bliley Act (GLBA).

2. Name of Group Responsible for Drafting the Model and States Participating

The Privacy Disclosures (D) Working Group was responsible for reviewing all pertinent documents and determining if any changes to Model #672 were needed. The states participating were Washington (chair), Colorado (vice chair), California, Connecticut, Maine, Maryland, Massachusetts, Missouri, Ohio, Oklahoma, Pennsylvania, Vermont, Virginia and West Virginia.

3. Project Authorized by What Charge and Date First Given to the Group

When this Working Group was created in 2015, this project was authorized by the following charges: “Review the *Privacy of Consumer Financial and Health Information Regulation* (#672) to determine what, if any, changes should be made to the model regulation to be more consistent with the amendments to Regulation P (Privacy of Consumer Financial Information), which create an alternative electronic delivery option of privacy notices by financial institutions to consumers, and to review the sample privacy notices of the *Privacy of Consumer Financial and Health Information Regulation* (#672), which provide a safe harbor of compliance with state privacy notice requirements, to determine what, if any, changes should be made to the sample privacy notices to be more consistent with the privacy model notice form issued by federal regulatory agencies for use by financial institutions as a safe harbor of compliance with the privacy notification requirements of the federal Gramm-Leach-Bliley Act.”

4. A General Description of the Drafting Process (e.g., drafted by a subgroup, interested parties, the full group, etc.). Include any parties outside the members that participated.

After soliciting input from regulators, industry and consumer subject matter experts, NAIC staff worked with the Working Group chair to draft proposed revisions to Model #672.

5. A General Description of the Due Process (e.g., exposure periods, public hearings or any other means by which widespread input from industry, consumers and legislators was solicited)

Background

The issue of privacy disclosures and the development of disclosures had been discussed by various working groups at the NAIC since 2004. The following process describes the discussion, which has occurred since 2015 when the Privacy Disclosures (D) Working Group was given its charges.

August 2015 (NAIC 2015 Summer National Meeting)

The Working Group chair provided a briefing on past activities. The Working Group discussed the electronic delivery of privacy notices and the sample privacy notices in Model #672.

November 2015 (NAIC 2015 Fall National Meeting)

Brenda J. Cude (University of Georgia) and Sonja Larkin-Thorne (Consumer Advocate) gave a presentation and recommended: 1) the NAIC GLBA Notices Bulletin, adopted by the NAIC in 2010, be archived; 2) the sample privacy notices in Model #672 be sunset and replaced with the federal model privacy form; and 3) establish electronic delivery of privacy notices as the default delivery method when no delivery method is selected by a consumer. Industry comments on the consumer recommendations were made by Robbie Meyer (American Council of Life Insurers—ACLI).

April 2016 (NAIC 2016 Spring National Meeting)

Following a 30-day exposure period of proposed revisions to Model #672, the Working Group discussed comments received from industry, insurance regulators and consumer representatives. In response to the federal Fixing America's Surface Transportation Act (FAST Act), which was enacted into law on Dec. 4, 2015, the proposed revisions to Model #672 included amendments to Section 6 to eliminate the requirement for financial institutions to provide annual privacy notices if certain conditions are met. This was done to be consistent with the FAST Act, which included an amendment to the GLBA to eliminate the requirements for financial institutions to provide annual privacy notices if certain conditions were met.

The Working Group adopted revisions to Section 6 of Model #672 at this meeting. At the same time, the Working Group adopted an NAIC Model Bulletin to address the FAST Act amendments to the GLBA annual privacy notice requirements. This bulletin was adopted for potential issuance by a state to clarify that a "licensee" subject to the GLBA annual privacy notice requirements is no longer required to provide an annual privacy notice if certain conditions are met.

The Market Regulation and Consumer Affairs (D) Committee adopted the bulletin at this national meeting. The Market Regulation and Consumer (D) Committee did not adopt the revisions to Section 6 of Model #672 since the Working Group was continuing to make further revisions to the model.

August 2016 (Open Conference Call)

The Working Group discussed the process for the NAIC Executive (EX) Committee and Plenary to adopt the NAIC GLBA Privacy Notices Bulletin during the NAIC Summer National Meeting. The Working Group decided to continue meeting in a series of conference calls going forward rather than meeting at national meetings.

September and October 2016 (Open Conference Calls)

The Working Group discussed revisions to Model #672, which would replace the sample privacy notices in Model #672 with the federal model privacy form.

November 2016 (Open Conference Call)

After a 30-day exposure period, the Working Group had an extended period of negotiating and wordsmithing between regulators, industry and consumer representatives during the November call.

The Working Group adopted revisions to replace the sample privacy notices, which provide a safe harbor of compliance with the privacy notice content requirements, with the Federal Model Privacy Form. The federal model privacy form was issued by federal regulatory agencies for use by financial institutions, such as banks and security investment companies, as a safe harbor of compliance with the privacy notification requirements of GLBA. As part of this adoption, the Working Group added Appendix B, which provides instructions on the use of the federal model privacy form.

December 2016 (NAIC 2016 Fall National Meeting)

During the 2016 Fall National Meeting, the Market Regulation and Consumer Affairs (D) Committee adopted the revisions to Model 672.

6. A Discussion of the Significant Issues (items of some controversy raised during the due process and the group's response)

The revisions accomplish the following:

- Eliminate the requirement for financial institutions to provide annual privacy notices if certain conditions are met.
- Sunset the safe harbor of compliance with the privacy notice content requirements for the existing sample privacy notice clauses 18 months from Jan. 1, 2018 (by July 1, 2019).
- Create a new safe harbor of compliance with the privacy notice content requirements by replacing the existing sample privacy notice clauses with the federal model privacy form.
- Allow additional variations of the federal model privacy form, but without an explicit safe harbor of compliance.

Items of some controversy were whether to sunset the use of the sample clauses in the model as a safe harbor; whether to require and sunset as a safe harbor the use of the federal model privacy form; and the amount of transition time for the revisions to the model to become effective. Also of some controversy was the lack of uniformity, specifically the different versions of the model in effect in states.

7. Any Other Important Information (e.g., amending an accreditation standard)

None.

PROJECT HISTORY - 2002

PRIVACY OF CONSUMER FINANCIAL AND HEALTH INFORMATION MODEL REGULATION (#672)

1. Project Description

The amendment to the Privacy of Consumer Financial and Health Information Model Regulation was drafted to ensure that the original intent of the model regulation with respect to the treatment of group policies was implemented by licensees. The amendment clarifies that licensees are required to provide privacy notices to group policyholders, including holders of group life, health and workers compensation plans, if they choose not to provide notices to individuals covered under such policies. Licensees are required to provide notices to individuals covered under such policies only if the licensee chooses to disclose nonpublic personal financial information outside the model regulation's legal, business and joint marketing exceptions.

2. Group Responsible for Drafting Model and States Participating

The Privacy Issues Working Group developed the model. The members of that working group are New York, Co-Chair, Florida, Co-Chair, Kansas, Vice Chair, California, Delaware, District of Columbia, Kentucky, Maine, Minnesota, Missouri, Montana, Ohio, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, Wisconsin, and Wyoming.

3. General Description of Drafting Process

The Privacy Issues Working Group decided to amend the Privacy of Consumer Financial and Health Information Model Regulation in March 2002 after several meetings of the Privacy Working Group at which certain interested parties disagreed with the treatment of group policies under the model regulation. Prior to that, working group members had drafted an analysis that explained the treatment of group policyholders. The intent was to include the analysis in the privacy Q&A on the NAIC website. Although the working group agreed with the content of the analysis, working group members decided to amend the model in order to avoid any further misinterpretation of the group policyholder requirement and ensure the original intent of the model regulation with respect to the treatment of group policyholders was implemented by licensees.

A draft amendment was distributed to interested parties for comment in June 2002. The working group received and reviewed numerous comments from interested parties. The amendment was revised and a second draft was distributed publicly in August 2002. The working group received additional comments in writing and orally at the Privacy Issues Working Group meeting in New Orleans on September 10, 2002. The amendment was adopted by the working group at their meeting on September 10, 2002.

4. Significant Issues Raised

As stated above, the amendment ensures that the original intent of the treatment of group policyholders under the model privacy regulation is implemented. This issue was the subject of much discussion during the initial drafting of the model regulation and the language in the model regulation was the result of a compromise between the drafters and interested parties. The major trade associations supported final adoption of the model regulation, and, according to NAIC records, no objections to this compromise were raised.

The amendment does not change the compromise or the intent of the regulation. It merely ensures that the model regulation is being interpreted correctly. Indeed, most of the states are interpreting the current regulation in this manner.

The only interested parties that raised substantive objections to the amendment were property and casualty trade groups, most notably the American Insurance Association (AIA). During the debate on the amendment, AIA made no assertions about the language as it applies to group health or life policies, but objected to the requirement that insurers providing workers compensation coverage deliver notices to employers. Their objections were based on two arguments:

- (i) they interpreted the model language to require licensees to treat individuals covered under workers compensation policies as consumers **ONLY** if the licensee discloses information outside the exceptions in sections 14, 15 and 16 of the model regulation; therefore, under their interpretation, if the licensee was not disclosing information outside of the exemptions in sections 14, 15 and 16, neither the group policyholder nor the individuals covered under the policy would receive any privacy notice; and
- (ii) workers compensation should not be covered under the model regulation because it is a commercial line.

The working group responded as follows:

- (i) AIA's interpretation of the treatment of group policyholders is incorrect. The original intent of the model regulation was to require that licensees send notices to group policyholders if licensees chose not to provide notices to individuals covered by such policies. Individuals would receive notices only if a licensee wished to disclose an individual's nonpublic personal financial information outside the legal, business, and joint marketing exceptions. Under AIA's interpretation, group policyholders would never receive notices and individuals would only receive notices if information was disclosed outside the exceptions. It should be noted that both the life and health trade associations agreed with the working group's interpretation of the treatment of group policyholders under the model regulation.
- (ii) When the model privacy regulation was drafted, the decision was made to include group policies – including workers compensation – because the benefits of such policies accrue to individuals for personal, family or household use. Although technically commercial policies, the working group believed that there was no reason to treat nonpublic personal information about individuals covered under such policies different from other insurance policyholders. In addition, GLBA explicitly permits the states to enact rules that are more protective of consumer privacy than the GLBA standards, thus enabling the states to protect information covered under commercial policies.

In addition to the substantive issue described above, interested parties also expressed concern that opening the model to any amendment could cause problems maintaining uniformity across the states because amending the model might encourage individual states to make other changes in their privacy rules that would differ from state to state. However, as noted above, most states are interpreting the regulation in this manner. To address this concern, it was decided that a drafting note or cover letter would be included advising that if a state currently interprets its regulation in accordance with the original intent, it need not amend its regulation.