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To: Clients and Friends

From: David F. Dulock

Subject: CFPB Amends Annual Privacy Notice Requirement in Regulation P

In the August 17, 2018, issue of the *Federal Register* (83 FR 40945, [click here](#)), the CFPB published a final rule (“Rule”) amending Regulation P (12 CFR Part 1016), which requires, among other things, that financial institutions provide an annual notice describing their privacy policies and practices to their customers. The amendment implements a December 4, 2015, statutory amendment to the Gramm-Leach-Bliley Act (“GLBA”) providing an exception to this annual notice requirement for financial institutions that meet certain conditions. This GLBA statutory amendment (new GLBA section 503(f)) became effective upon enactment on December 4, 2015.

The Rule’s amendments to Regulation P, which will become effective on September 17, 2018, add new paragraph (e)(1) to §1016.5 to reflect the annual notice exception made by GLBA section 503(f), and also (i) add new paragraph (e)(2) to §1016.5 to provide timing requirements for delivery of annual privacy notices in the event that a financial institution that qualified for this annual notice exception later changes its policies or practices in such a way that it no longer qualifies for the exception, (ii) remove existing paragraph (c)(2) to §1016.9 that allows for use of the alternative delivery method for annual privacy notices, and (iii) make a technical correction to the definition of “You” in paragraph (s)(1) of §1016.3. The text of these amended sections is reprinted in the Attachment to this memorandum for your information and use.

The Rule will not affect the collection or use of consumers’ nonpublic personal information by financial institutions. The Rule implements the GLBA section 503(f) exception to limit the circumstances under which financial institutions subject to Regulation P will be required to deliver annual privacy notices to their customers. Delivery of annual privacy notices is required under the Rule if financial institutions make certain types of changes to their privacy policies or if the GLBA and Regulation P afford customers the right to opt out of financial institutions’ sharing of customers’ nonpublic personal information with nonaffiliated third parties. The GLBA section 503(f) exception and the Rule do not affect the requirement to deliver an initial privacy notice, and all consumers will continue to receive such notices describing the privacy policies of any financial institutions with which they do business to the extent currently required.

Section 1016.3(s)(1) - Definition of “You”

Although the CFPB has rulemaking authority over entities other than financial institutions pursuant to GLBA section 504(a)(1)(A), GLBA’s privacy notice requirements specifically apply only to financial institutions. Therefore, the Rule limits the definition of “You” in §1016.3(s)(1) to financial institutions by removing the phrase “or other persons.”

Section 1016.5(e)(1) - When Exception Available

The Rule adds new §1016.5(e) to Regulation P that incorporates the annual privacy notice exception created by GLBA section 503(f), which requires two conditions that must be met for the exception to apply. The first condition is set out in subsection 503(f)(1) and the second condition is set out in subsection 503(f)(2).

(7 pages)

Paragraph 5(e)(1)(i) incorporates the first condition by requiring that, to qualify for the annual notice exception, any nonpublic personal information that a financial institution provides to nonaffiliated third parties must be provided only in accordance with §1016.13, §1016.14 or §1016.15 of Regulation P. Sharing nonpublic personal information with nonaffiliated third parties as described in these sections of Regulation P does not trigger the customer's right to opt out of the financial institution's sharing. In addition, in the preamble to the Rule the CFPB states that any voluntary opt-out a financial institution may include on the privacy notice that allows customers to opt out of sharing that is described in §1016.13, §1016.14 or §1016.15 would not affect compliance with the paragraph 5(e)(1)(i) requirement or the annual privacy notice exception (*see* column 1 on page 40949 of the above cited *Federal Register*). The CFPB further states in the preamble to the Rule that given the structure of GLBA subsection 503(f)(1), which does not mention information sharing that would trigger an opt-out notice under sections 603(d)(2)(A)(iii), which describes a consumer's ability to opt out of sharing of information among affiliates, or 624 of the Fair Credit Reporting Act ("FCRA"), the CFPB does not interpret GLBA subsection 503(f)(1) to preclude financial institutions that provide nonpublic personal information in accordance with FCRA sections 603(d)(2)(A)(iii) or 624 from qualifying for the annual notice exception (*Id.*). That is, the presence or absence of these FCRA disclosures on a financial institution's privacy notice will not affect whether the institution satisfies GLBA subsection 503(f)(1) and paragraph 5(e)(1)(i) of Regulation P (*Id.* columns 1 and 2).

Paragraph 5(e)(1)(ii) incorporates the second condition by requiring that, to qualify for the annual notice exception, a financial institution must not have changed its policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed to the customer under §1016.6(a)(2) through (5) and (9) in the most recent privacy notice the financial institution provided. These sections of Regulation P require a financial institution to include information related to its policies and practices with regard to disclosing nonpublic personal information. Section 1016.6(a)(7) of Regulation P requires that any disclosure an institution makes under FCRA section 603(d)(2)(A)(iii) be included on the privacy notice. Here again, the CFPB states in the preamble to the Rule that given the structure of GLBA subsection 503(f)(2), which the CFPB believes is ambiguous as to whether a financial institution that changes the disclosure required under §1016.6(a)(7) from the most recent notice sent to consumers would satisfy GLBA subsection 503(f)(2), the CFPB does not interpret GLBA subsection 503(f)(2) to preclude financial institutions that make changes to disclosures required by §1016.6(a)(7) from qualifying for the annual notice exception (*Id.* column 1, page 40950). Also, in the preamble the CFPB states that disclosures, and changes to those disclosures, that are not required to be in the annual privacy notices by the GLBA or § 1016.6 of Regulation P (*e.g.*, disclosures describing sharing with affiliates under FCRA section 624 or voluntary disclosures and opt-outs) would satisfy paragraph 5(e)(1)(ii) and not affect a financial institution's eligibility for the annual privacy notice exception under GLBA section 503(f) (*Id.* columns 1 and 2).

Section 1016.5(e)(2) - Delivery of Annual Privacy Notice after Financial Institution No Longer Meets Requirements for Exception

GLBA section 503(f) states that a financial institution that meets the requirements for the annual notice exception will not be required to provide annual notices "until such time" as the financial institution fails to comply with the criteria described in subsections 503(f)(1) and 503(f)(2), which are now implemented in §1016.5(e)(1)(i) and (ii) of Regulation P. A financial institution will no longer meet the requirements for the exception either by beginning to share nonpublic

personal information in ways that trigger rights to opt-out notices under the GLBA and §1016.8 of Regulation P, or by otherwise changing its policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed to the customer under §1016.6(a)(2) through (5) and (9) in the most recent privacy notice the financial institution provided.

Paragraph 5(e)(2) provides two methods for a financial institution to regain the annual notice exception after failing to comply with paragraph 5(e)(1). Subparagraph 5(e)(2)(i) provides the procedure when a financial institution no longer meets the requirements for the exception by beginning to share nonpublic personal information in ways that trigger a revised policy notice and rights to opt-out under §1016.8 of Regulation P. Subparagraph 5(e)(2)(ii) provides the procedure when a financial institution changes its policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed to the customer under §1016.6(a)(2) through (5) and (9) in the most recent privacy notice the financial institution provided.

Under subparagraph 5(e)(2)(i), if a financial institution no longer meets the requirements of paragraph 5(e)(1) because it changes its policies or practices in such a way that §1016.8 requires the financial institution to provide a revised privacy notice prior to the change, the financial institution must thereafter provide an annual privacy notice in accordance with the timing requirements in paragraph 5(a) (*i.e.*, not less than annually), treating the revised privacy notice as an initial privacy notice. Note that §1016.8 requires the financial institution to provide a revised privacy notice *before* the financial institution shares nonpublic personal information with a nonaffiliated third party if the sharing would be different from what the financial institution described in the initial notice it delivered. After delivering the revised notice, the financial institution must also give the consumer a reasonable opportunity to opt out of any new information sharing, excluding the Regulation P exceptions, and the consumer does not opt out, before the new sharing occurs.

Under subparagraph 5(e)(2)(ii), if a financial institution no longer meets the requirements of paragraph 5(e)(1) because it changed its policies or practices in such a way that §1016.8 does not require the financial institution to provide a revised privacy notice, the financial institution must provide an annual privacy notice within 100 days of the change in its policies or practices that caused it to no longer meet the requirements of paragraph 5(e)(1).

Example (A) of subparagraph 5(e)(2)(iii) explains paragraph 5(a)'s annual period for providing the annual privacy notice after providing the revised notice under subparagraph 5(e)(2)(i) and the 100 day period for the annual privacy notice under subparagraph 5(e)(2)(ii), respectively. Example (B) of subparagraph 5(e)(2)(iii) explains that after a financial institution provides the annual privacy notice under subparagraph 5(e)(2)(i) or (ii), the financial institution once again meets the requirements of paragraph 5(e)(1) for an exception to the annual notice requirement and does not need to provide additional annual notices until such time as it no longer meets the requirements of paragraph 5(e)(1).

Please note that under paragraph 5(e)(2) a financial institution meets the requirements of paragraph 5(e)(1) for an exception to the annual notice requirement only after the annual privacy notice is provided under subparagraph 5(e)(2)(i) or (ii), as applicable. This means that, depending

on which subparagraph of paragraph 5(e)(2) a financial institution that lost the exception is required to use, the financial institution will lose the exception for the period of time from the change that caused it to lose the exception until the annual privacy notice is provided - *see* Examples (A) and (B) in subparagraph 5(e)(2)(iii) in the Attachment to this memorandum.

Section 1016.9(c)(2) - Alternative Delivery Method for Providing Certain Annual Notices

Because financial institutions that met the conditions in Regulation P to use the alternative delivery method will also meet the GLBA section 503(f) conditions to be excepted from delivering an annual privacy notice, the Rule removes the alternative delivery method from Regulation P by removing §1016.9(c)(2) and renumbering existing §1016.9(c)(1) as § 1016.9(c). However, in the preamble to the Rule (*see* column 2 on page 40954 of the above cited *Federal Register*), the CFPB states “that financial institutions that qualify for the new annual notice exception may still choose to post privacy notices on their websites, deliver privacy notices to consumers who request them, and notify consumers of the notices’ availability [and that s]uch activities will not affect a financial institution’s eligibility for the new 503(f) exception.”

ATCH. Amended §§1016.3(s)(1), 1016.5 and 1016.9(c)(2)

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ATTACHMENT

§1016.3 Definitions.

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(s)(1) *You* means a financial institution ~~or other person~~ for which the Bureau has rulemaking authority under section 504(a)(1)(A) of the GLB Act (15 U.S.C. 6804(a)(1)(A)).

§1016.5 Annual privacy notice to customers required.

(a)(1) *General rule.* Except as provided by paragraph (e) of this section, you must provide a clear and conspicuous notice to customers that accurately reflects your privacy policies and practices not less than annually during the continuation of the customer relationship. *Annually* means at least once in any period of 12 consecutive months during which that relationship exists. You may define the 12-consecutive-month period, but you must apply it to the customer on a consistent basis.

(e) *Exception to annual privacy notice requirement.*

(1) *When exception available.* You are not required to deliver an annual privacy notice if you:

(i) Provide nonpublic personal information to nonaffiliated third parties only in accordance with the provisions of §1016.13, §1016.14, or §1016.15; and

(ii) Have not changed your policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed to the customer under §1016.6(a)(2) through (5) and (9) in the most recent privacy notice provided pursuant to this part.

(2) *Delivery of annual privacy notice after financial institution no longer meets requirements for exception.* If you have been excepted from delivering an annual privacy notice pursuant to paragraph (e)(1) of this section and change your policies or practices in such a way that you no longer meet the requirements for that exception, you must comply with paragraph (e)(2)(i) or (e)(2)(ii) of this section, as applicable.

(i) *Changes preceded by a revised privacy notice.* If you no longer meet the requirements of paragraph (e)(1) of this section because you change your policies or practices in such a way that §1016.8 requires you to provide a revised privacy notice, you must provide an annual privacy notice in accordance with the timing requirements in paragraph (a) of this section, treating the revised privacy notice as an initial privacy notice.

(ii) *Changes not preceded by a revised privacy notice.* If you no longer meet the requirements of paragraph (e)(1) of this section because you change your policies or practices in such a way that §1016.8 does not require you to provide a revised privacy notice, you must provide an annual privacy notice within 100 days of the change in your policies or practices that causes you to no longer meet the requirements of paragraph (e)(1) of this section.

(iii) *Examples.* (A) You change your policies and practices in such a way that you no longer meet the requirements of paragraph (e)(1) of this section effective April 1 of year 1. Assuming you define the 12-consecutive-month period pursuant to paragraph (a) of this section as a calendar year, if you were required to provide a revised privacy notice under §1016.8 and you provided that notice on March 1 of year 1, you must provide an annual privacy notice by December 31 of year 2. If you were not required to provide a revised privacy notice under § 1016.8, you must provide an annual privacy notice by July 9 of year 1.

(B) You change your policies and practices in such a way that you no longer meet the requirements of paragraph (e)(1) of this section, and so provide an annual notice to your customers. After providing the annual notice to your customers, you once again meet the requirements of paragraph (e)(1) of this section for an exception to the annual notice requirement. You do not need to provide additional annual notices to your customers until such time as you no longer meet the requirements of paragraph (e)(1) of this section.

§1016.9 Delivering privacy and opt out notices.

* * * * *

(c) *Annual notices only.* ~~(4) Reasonable expectation.~~ You may reasonably expect that a customer will receive actual notice of your annual privacy notice if:

(1) (4) The customer uses your website to access financial products and services electronically and agrees to receive notices at the website, and you post your current privacy notice continuously in a clear and conspicuous manner on the website; or

(2) (4i) The customer has requested that you refrain from sending any information regarding the customer relationship, and your current privacy notice remains available to the customer upon request.

* * * * *

~~(2) Alternative method for providing certain annual notices. (i) Notwithstanding paragraph (a) of this section, you may use the alternative method described in paragraph (c)(2)(ii) of this section to satisfy the requirement in §1016.5(a)(1) to provide a notice if:~~

~~(A) You do not disclose the customer's nonpublic personal information to nonaffiliated third parties other than for purposes under §§1016.13, 1016.14, and 1016.15;~~

~~(B) You do not include on your annual privacy notice pursuant to §1016.6(a)(7) an opt out under section 603(d)(2)(A)(iii) of the Fair Credit Reporting Act (15 U.S.C. 1681a(d)(2)(A)(iii));~~

~~(C) The requirements of section 624 of the Fair Credit Reporting Act (15 U.S.C. 1681s-3) and subpart C of part 1022 of this chapter, if applicable, have been satisfied previously or the annual privacy notice is not the only notice provided to satisfy such requirements;~~

~~(D) The information you are required to convey on your annual privacy notice pursuant to §1016.6(a)(1) through (5), (8), and (9) has not changed since you provided the immediately previous privacy notice (whether initial, annual, or revised) to the customer, other than to eliminate categories of information you disclose or categories of third parties to whom you disclose information; and~~

~~(E) You use the model privacy form in the appendix to this part for your annual privacy notice.~~

~~(ii) For an annual privacy notice that meets the requirements in paragraph (c)(2)(i) of this section, you satisfy the requirement in §1016.5(a)(1) to provide a notice if you:~~

~~(A) Convey in a clear and conspicuous manner not less than annually on an account statement, coupon book, or a notice or disclosure you are required or expressly and specifically permitted to issue to the customer under any other provision of law that your privacy notice is available on your Web site and will be mailed to the customer upon request by telephone. The statement must state that your privacy notice has not changed and must include a specific Web address that takes the customer directly to the page where the privacy notice is posted and a telephone number for the customer to request that it be mailed;~~

~~(B) Post your current privacy notice continuously and in clear and conspicuous manner on a page of your Web site on which the only content is the privacy notice, without requiring the customer to provide any information such as a login name or password or agree to any conditions to access the page; and~~

~~(C) Mail your current privacy notice to those customers who request it by telephone within ten days of the request.~~

~~(iii) An example of a statement that satisfies paragraph (c)(2)(ii)(A) of this section is as follows with the words “Privacy Notice” in boldface or otherwise emphasized: Privacy Notice—Federal law requires us to tell you how we collect, share, and protect your personal information. Our privacy policy has not changed and you may review our policy and practices with respect to your personal information at [Web address] or we will mail you a free copy upon request if you call us at [telephone number].~~