

July 26, 2001

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PETITION FOR RULEMAKING

Dear Sirs/Madams:

Ralph Nader, Public Citizen, Inc., the Consumer Federation of America, Consumers Union, the Electronic Privacy Information Center, Remar Sutton, the Center for Media Education, Commercial Alert, Computer Professionals for Social Responsibility, Consumer Action, the Consumer Project on Technology, the Consumer Task Force on Auto Issues, Essential Information, JunkBusters Corp., the National Consumers League, Net Action, the Privacy Rights Clearinghouse, and the U.S. Public Interest Research Group submit this petition under § 553(e) of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, to the agencies charged with rulemaking authority

under Subtitle A of Title V of the Gramm-Leach-Bliley Act (the “GLBA” or “Act”), Pub. L. No. 106-102, 113 Stat. 1338 (codified at 15 U.S.C. §§ 6801-6810).¹ Petitioners request a rulemaking to amend the regulations implementing the GLBA to ensure that consumers are provided with better notice and more convenient means of exercising their right to opt out of information sharing.²

In passing §§ 501-510 of the GLBA, Congress gave consumers the right to prevent financial institutions from transferring their personal financial information to third parties. To that end, the Act requires the institutions to notify customers of the right to opt out and to provide convenient means of exercising it. However, in notices mailed out thus far, most financial institutions have employed dense, misleading statements and confusing, cumbersome procedures to prevent consumers from opting out. Such notices evince a clear failure of the Act's implementing regulations to effectuate congressional intent. Accordingly, we ask the Agencies to revise the regulations and require that financial institutions provide understandable notices and convenient opt-out mechanisms.

1. The GLBA cannot protect privacy unless the Agencies require readable notices and reasonable opt-out opportunities.

The GLBA manifests a congressional desire for readable notices and reasonable mechanisms for consumers to exercise their opt-out right. Although Congress declared that “each financial institution has an affirmative and continuing obligation to respect the

¹ The agencies charged with rulemaking authority under the GLBA (the “Agencies”) include the Federal banking agencies (the Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve System (“FRB”), the Federal Deposit Insurance Corporation (“FDIC”) and the Office of Thrift Supervision (“OTS”), the National Credit Union Administration (“NCUA”), the Securities and Exchange Commission (“SEC”), the Commodity Futures Trading Commission (“CFTC”), and the Federal Trade Commission (“FTC”). 15 U.S.C. § 6804(a)(1).

privacy of its customers,” 15 U.S.C. § 6801, it placed much of the burden of privacy protection on consumers. Crucially, rather than adopting an informed consent (opt-in) regime for privacy protection, see, e.g., Cable Communications Privacy Act, 47 U.S.C. § 551(b)(1); Video Privacy Protection Act, 18 U.S.C. § 2710(b)(2)(B); Children’s Online Privacy Protection Act, 15 U.S.C. § 6502(b)(1)(A)(ii), which every petitioner strongly prefers to the GLBA's privacy provisions, Congress enacted a scheme that utilizes notice and a limited opt-out right. The Act requires that financial institutions give consumers notice of their practices, the law, and consumer rights, then allows them broad discretion to sell or share private information absent explicit consumer objection. This framework of privacy protection can only function properly—indeed, can only be intelligible—if consumers can understand the privacy notices they receive and assert their preferences with ease. Without understandable notice and convenient opt-out mechanisms, the Act provides no privacy protection at all.

Congress therefore instructed financial institutions on the content of notices, 15 U.S.C. §§ 6802-6803, rather than granting them excessive control over what consumers learn about their rights. Indeed, the Act could hardly be clearer in its requirements: Section 6802(a) mandates that no financial institution may disclose private financial information to a third party until the institution complies fully with the notice and opt-out requirements of the Act. Section 6802(b) requires that financial institutions provide "clear[]" and "conspicuous" notice of consumers' opt-out rights. And § 6803(a) reaffirms that each institution must give "clear and conspicuous" notice to consumers of its policies

² See 12 C.F.R. §§ 40.1-18 (OCC); 12 C.F.R. §§ 216.1-18 (FRB); 12 C.F.R. §§ 332.1-18 (FDIC); 12 C.F.R. §§ 573.1-18 (OTS); 12 C.F.R. §§ 716.1-18 (NCUA); 17 C.F.R. §§ 248.1-18 (SEC); 17 C.F.R. §§ 160.1-18 (CFTC); 16 C.F.R. §§ 313.1-18 (FTC).

and practices regarding the disclosure of personal financial information. By employing the words "clear" and "conspicuous" repeatedly, the Act demonstrates an unambiguous congressional desire for consumers to be able to exercise their rights. Therefore, in order to effectuate congressional intent, the Agencies must ensure that consumers receive understandable notices and reasonable opt-out devices.

2. Recent privacy notices show that regulations under the GLBA are failing to protect consumer privacy.

When the Agencies undertook the task of promulgating regulations under the GLBA, it was difficult to predict what notice and opt-out mechanisms financial institutions would employ. However, the Agencies must have hoped for better results than what the institutions have produced. We commend the Agencies for amending the definition of "conspicuous" to require that notices should be "designed to call attention to the nature and significance of the information contained." 65 Fed. Reg. 33,649 (May 24, 2000). But the notices delivered thus far plainly have failed to fulfill that mandate or satisfy any other fair measure of readability and convenience.

In the weeks approaching the July 1, 2001 deadline for financial institutions to send out notices, consumers began receiving dense, complicated, misleading statements with burdensome and confusing opt-out procedures. It seems that these notices were written by lawyers trained in the art of obfuscation, not by communication experts trained to express ideas clearly. Notices entitled "Our Privacy Commitment," Wal-Mart Credit Card, and "Protecting Your Privacy: Our Pledge to You," Mellon Dreyfus, go to great lengths to bury their already opaque explanations of the law and company practices beneath self-serving and often misleading representations of a commitment to protecting

privacy. The Wells Fargo notice, for example, makes no affirmative mention of financial information sharing until the bottom of its second page, well after consumers have read a “Pledge” containing, among other platitudes, the statement that the company is “committed to protecting your privacy at all times.” As a result of such tactics, the first sections of many mailings read like promotional material rather than legal notices.

Explanations of how to opt out invariably appear at the end of the notices. Thus, before they learn how to opt out, consumers must trudge through up to ten pages of fine print with as many words and more legal jargon than this detailed petition for rulemaking. (At least one notice even contains a glossary of terms. Wells Fargo.) Furthermore, many of the passages explaining how to opt out are obviously designed to discourage consumers from exercising their rights under the statute. When institutions provide toll-free numbers, seemingly the easiest opt-out mechanism, some make them available only at unusual hours. Chevron Credit Bank (offering a telephone line open 7:30 a.m.-4:30 p.m. Pacific Time on business days). If a notice provides an opt-out form with boxes to check off—boxes ostensibly designed to enable consumers to instruct an institution not to sell or trade private information—financial institutions sometimes bury the boxes in a thicket of misleading statements. American Express places the check-off boxes beneath the bold-faced heading, “**Offers for . . . Products and Services.**” American Express. The line immediately adjacent to the check-off box states, “Please exclude me from mailings of offers . . . ,” *id.*, implying that, in order to exercise their right to opt out, consumers have to forego valuable opportunities. As if that might not be enough to dissuade consumers from exercising their opt-out rights, the line immediately following the check-off box, italicized for emphasis, states, “*If you opt out, you may not receive offers . . . that may be*

of value to you.” Id. Furthermore, examples of “valuable offers” that a consumer will miss sometimes include items that people most interested in privacy protection might want, such as “software designed to increase the security of your home computer.”

Mellon Dreyfus.

Many notices make a final attempt to dissuade consumers from opting out by implying that consumers may have already opted out or that opting out will have little effect. Some state in boldfaced type, “**If you have previously informed us of your preference, you do not need to do so again.**” Wal-Mart Credit Card; Exxon Credit Card. Of course, consumers are extremely unlikely to have expressed preferences previously because, as Congress and the Agencies recognized in requiring notices, most consumers are unfamiliar with the law and have never before been given notice of their rights under the GLBA. Other notices simply remind consumers that, even if they opt out, the financial institution will continue to share their information with marketing partners, service providers, and affiliated companies. To an uninformed consumer, this may seem to render opting out a waste of time.

Mark Hochhauser, a Ph.D. in psychology who studies readability and offers readability consulting services, conducted a revealing analysis of thirty-four privacy notices. Mark Hochhauser, Lost in the Fine Print II: Readability of Financial Privacy Notices, Privacy Rights Clearinghouse, May 2001, at <http://privacyrights.org/ar/GLB-Reading.htm> (July 9, 2001). Hochhauser found that, on average, the notices are written at a third- or fourth-year college reading level rather than the junior-high level that literacy experts recommend for the general public. Id. Some are written at the level of a first-year graduate school student; others are so highly complex that experts cannot even reliably

measure their reading level. Id. Although specialists recommend that sentences contain a maximum of fifteen to twenty words, id., key phases of the privacy notices are often as long as forty-five words and contain double, triple, quadruple, and even quintuple negatives. To explain the opt-out right, Chevron's notice states, in forty words,

If you prefer that we not disclose nonpublic personal information about you to nonaffiliated third parties, you may opt out of those disclosures; that is, you may direct us not to make those disclosures (other than disclosures permitted by law).

Wells Fargo's explanation is even more misleading. Rather than merely leaving consumers confused, Wells Fargo managed to craft a statement that may give consumers an impression of the law, their rights, and the institution's practices that is completely contrary to reality:

We do not share customer information with outside companies for the purpose of marketing the products or services of those companies, unless you have been given the opportunity in advance to decline this option.

After reading this sentence, many consumers will think they need not take any action because they will reasonably believe the institution will give them an opportunity to opt into any specific information sharing scheme. Through a combination of small font sizes, "sans serif" fonts,³ small margins, demanding grammatical structure, obtuse word choice, and misleading statements, the notices deprive consumers of their right to prevent financial institutions from sharing private information.⁴

The status quo notices and opt-out mechanisms have yielded startling results. As of June 21, 2001, according to the American Bankers Association, only 0.5% of consumers had exercised their opt-out right. Moreover, the same ABA poll found that 22% of banking customers said they received a privacy notice but did not read it, and 41%

³ Sans serif fonts such as this one lack picks at the edges of each character and are therefore somewhat harder to read than serif fonts.

could not even recall receiving a notice. John Martin, Opting Out – Or Not, ABCNews.com, June 21, 2001, at http://abcnews.go.com/sections/wnt/DailyNews/privacy_notices_010621.html (July 9, 2001). Since so few consumers have exercised the opt-out right, and so many do not even recall receiving privacy notices, the notices cannot have been “clear and conspicuous,” and the means to opt out cannot have been “reasonable.”

3. Recent privacy notices lack adequate definitions of important terms and phrases.

The most crucial tools financial institutions employ in obfuscating information are poorly defined words and concepts. For example, the notices almost invariably employ the term "family" to refer to affiliates. Words are often defined many pages before or after their most significant use in the notices, so that consumers will not yet know or will have forgotten the meanings of key phrases when they read them. To illustrate these problems, attempt to make sense of the following paragraph quickly:

Sharing With Citigroup Affiliates - (Box 2)

The law allows us to share with our affiliates any information about our transactions or experiences with you. Unless otherwise permitted by law, we will not share with our affiliates other information that you provide to us or that we obtain from third parties (for example, credit bureaus) if you check **Box 2** on the Privacy Choices Form.

Citi Financial.⁵ After reading the above paragraph, some may wonder what the effect of stating a preference would be—or if there would be any effect at all. In fact, such skepticism is warranted because checking "Box 2" on Citigroup's "Privacy Choices Form" will actually do nothing. When examined closely, the paragraph states that consumers can

⁴ No doubt, the Agencies would not appreciate receiving this petition not to allow the aforementioned notices to continue failing to inform consumers of their rights to privacy protection through opt-outs in an 8-point sans serif font and in sentences other than those that are not too long or redundant and use ideal grammatical structure and sentence length.

⁵ We must admit some uncertainty in interpreting this paragraph. The analysis that follows is our best attempt to decipher it.

only tell Citigroup not to share with its affiliates information that the law already prohibits it from sharing. That is an utterly vacuous option.

Citigroup was able to craft such a bizarre and misleading passage only because the Agencies have failed to give sufficient direction for defining and utilizing key terms and phrases. The paragraph employs ambiguous phrases such as "other information" (what other information?), "unless otherwise permitted by law" (in actuality, the law almost always permits disclosure), and "information about our transactions or experiences with you" (read: "your nonpublic personal information" or, simply, "your private information") to mislead consumers with an impenetrable explanation of a nonexistent right. Financial institutions would be far less capable of constructing such passages if the Agencies would provide more guidance regarding the definition and use of important words and phrases.⁶

ACTION REQUESTED

We ask the Agencies to initiate a rulemaking as soon as possible to amend existing regulations implementing the GLBA to ensure that consumers have meaningful opportunities to exercise their rights. The regulations should require that financial institutions provide notice that consumers can understand and opt-out mechanisms that consumers can use conveniently. To that end, each notice should be truly "clear and conspicuous," following a standardized or tightly modeled format with the most important components—those explaining the law and consumer rights—coming at the beginning of

⁶ Petitioners understand that some of the confusing language in the above paragraph derives from Citigroup's simultaneous compliance with disclosure provisions in both the Fair Credit Reporting Act and the GLBA. But the mere fact of simultaneous compliance with two statutes does not excuse the company's effort to mislead consumers. Indeed, the potential for such confusion only bolsters the argument for better agency prescriptions regarding the definition and use of key phrases.

the notice. Finally, consumers should be provided multiple convenient means of opting out.

We recognize that the Agencies have decided to grant each financial institution the flexibility to describe its own information sharing practices. But there is no reason to allow each institution to craft its own explanation of the relevant law and consumer rights. That information is standard across the board. Since the same law applies to all financial institutions, no institution needs flexibility to tailor legal explanations to its particular practices.⁷ Handing financial institutions virtually unfettered discretion to determine how to inform consumers of their rights only gives them an opportunity to try to subvert or obscure those rights. Furthermore, the receipt of numerous notices, each with a different explanation of consumer rights and a different opt-out mechanism, only adds to consumer confusion. Both the regulated industries and the Agencies lauded standardization in agreeing that the Agencies should issue identical regulations so that financial institutions would not have to navigate a patchwork of rules. See, e.g., 65 Fed. Reg. 33,646 (May 24, 2000); Comments of the Securities Industry Association, 2 (March 31, 2000) ("Differing approaches and regulations by the various agencies will be burdensome and costly for the industry [and] confusing for consumers.").⁸ Under a provision for consumer privacy protection, consumers deserve the benefits of standardization at least as much as financial

⁷ Unless, of course, a particular institution engages in none of the relevant information sharing. In those limited cases, it is perfectly reasonable that the institutions not be required to explain the law at all.

⁸ See also Comments of Chase Manhattan Bank, 2-3 (March 30, 2000). Chase, making comments typical of many industry commenters, argued that consistent regulations were "critical" to both industry and consumers and that "[t]he privacy rights of consumers and privacy obligations of financial institutions should not depend upon which primary regulator happens to regulate the particular financial institution." Likewise, petitioners believe that the rights of consumers should not depend upon which financial institution a particular consumer happens to engage for services.

institutions do.⁹ Likewise, consumers deserve the same benefits from flexibility that the Agencies appreciated in granting financial institutions freedom to explain their own privacy practices and craft their own opt-out mechanisms. The Agencies should give consumers more options for asserting their opt-out rights so that they may do so in the manner most practicable for them.

To implement the above policies, we make the following specific recommendations regarding notices and opt-out mechanisms:

1. Each notice should state prominently at the top of its first page, in a large, bold-faced font—and in a simple, easily comprehensible phrase—that consumer information may be shared and that consumers have a “right” to opt out of certain information sharing.

We suggest using a statement and format such as the following:

WE ARE ALLOWED TO DISCLOSE YOUR PRIVATE INFORMATION TO OTHER COMPANIES UNLESS YOU TELL US NOT TO.

YOU HAVE A RIGHT TO PREVENT US FROM DISCLOSING YOUR PRIVATE INFORMATION TO OTHER COMPANIES.

BUT IF YOU DO NOT RESPOND WITHIN 30 DAYS, WE MAY BEGIN SHARING YOUR INFORMATION. YOU WILL STILL HAVE THE RIGHT TO TELL US TO STOP AT ANY TIME. BUT ONCE WE HAVE SHARED INFORMATION WITH OTHER COMPANIES, WE CANNOT GET IT BACK FROM THEM OR STOP THEM FROM USING IT.

⁹ Petitioners do not wish to suggest that only consumers would benefit from standardization. While standardized notices would better enable consumers to understand and compare policies and to exercise their rights, they would also benefit financial institutions. Foremost, standardization would make it easier and less costly for the institutions to comply with regulations by sparing them much of the burden crafting notices. Many institutions expressed concern over complying with ambiguous requirements such as “ample line spacing” and “wide margins” and the directive to avoid “explanations subject to different interpretations.” *See, e.g.*, Chase Manhattan, 7-8; Comments of USA Group, 4 (March 30, 2000). Standardization would help allay other industry concerns as well by preventing litigation over whether a particular notice qualifies, *see e.g.*, Comments of MasterCard International, 9 (March 31, 2000), and forestalling the possibility that financial institutions will interpret the regulations as requiring longer, more confusing, or more technical notices than necessary. *See e.g.*, USA Group, 3-5.

This notice includes a detachable postcard, an email address, and a toll-free telephone number that you may use to tell not to share your private information with other companies. You may use any of those methods—the postcard, an email, or the telephone—to notify us of your preference. Please read the rest of this notice to learn more about our policies, the law, and your rights.

2. With respect to opt-out mechanisms, the Agencies should require all financial institutions to provide a toll-free telephone number available twenty-four hours a day, an option to send an e-mail or use a web page, and a detachable, pre-addressed postcard with boxes in which to check off preferences. Providing these opportunities at a minimum will give consumers more realistic opt-out rights by allowing each consumer to exercise her rights in the manner most practicable for her.

3. The Agencies should prescribe definitions for key words such as "affiliate," "nonaffiliated third party," and "nonpublic personal information" (or simply "private information"). Definitions should use bullet points with clear, short sentences and, where relevant, they should include not just examples, but the number of institutions that they embrace. Furthermore, financial institutions should be required to use the defined terms. We suggest the following examples:

AFFILIATE:

- "Affiliate" means any company that SJBank owns or that owns SJBank.
- Our affiliates include banks, credit card companies, and life insurance companies such as SJ Online, SJCard and SJ Mutual Life.
- We have 5 affiliates.

NON-AFFILIATE:

- "Non-affiliate" means any other company.
- We currently share consumer information with 12 non-affiliates.

PRIVATE INFORMATION:

- "Private information" means personal information about you that is not available to the public.
- Examples of private information are: your social security number, your credit limit, your account balance, and, if they are not listed in public directories, your address and phone number.

CONCLUSION

Because the GLBA is ineffective when consumers cannot exercise their rights, we ask the Agencies to promulgate new regulations requiring financial institutions to provide notices that consumers can understand and opt-out mechanisms they can use.

Respectfully submitted,

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