

Interagency Proposal to Consider Alternative Forms of Privacy Notices Under the Gramm-
Leach-Bliley Act

Comments on Advance Notice of Proposed Rulemaking

By

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March 29, 2004

Introduction.

I am writing in support of developing a required GLBA short notice for all financial institutions¹. There is ample evidence that the current notices do not serve consumers effectively. However as I hope my comments will demonstrate, substantial research needs to be conducted prior to writing a new rule.

Privacy notices provide information to promote informed consumer choice. The importance of information to consumer decision-making as a means for minimizing risk has a long history in marketing. In particular, researchers have noted that information disclosure can improve consumer decision processing and choice.² Researchers have analyzed the effectiveness of information disclosures in improving consumers' situations across a wide array of contexts including advertising, product and nutrition labels, and warnings for products and services³.

For this discussion, it is useful to place privacy notices in the more general context of consumer information processing. Previously, consumer marketing transactions were typically operationalized in terms of a single utilitarian exchange where goods or services are given in return for money or other goods. However, increasingly consumer transactions also involve a "second exchange" where consumers also make a non-monetary exchange of their personal information for value. This is particularly true for consumer interactions using the Internet.

When consumer transactions are viewed in terms of these two exchanges, privacy notices serve a function that is roughly analogous to a product label or warning notice for the second exchange. Just as consumers use information about products to make sound purchase decisions, they also need information to decide whether to disclose their personal information. For example, a recent study found that consumers use online privacy notices to manage risk and that these notices are used as one part of an overall strategy to manage the risks of disclosing personal information. In addition to privacy notices, consumers also relied on their own experience with a company, the company's reputation or brand, and privacy seals to manage risk⁴. It is my opinion that what we have learned about product labels and warnings in general and nutrition (or food) labels in particular provide a useful backdrop for thinking about how to improve current GLBA privacy notices.

¹ All views presented here are my own.

² See for example Beales, Howard, Richard Craswell and Steven C. Salop, "The Efficient Regulation of Consumer Information," *Journal of Law & Economics*, 24 (December 1981), 491-539.

³ For a review of this literature, see Stewart, David W. and Ingrid M. Martin, "Intended and Unintended Consequences of Warning Messages: A Review and Synthesis of Empirical Research," *Journal of Public Policy and Marketing*, 13:1 (Spring 2004) 1-19.

⁴ George R. Milne and Mary J. Culnan, Strategies for Reducing Online Privacy Risks: Why Consumers Read [Or Don't Read] Online Privacy Notices, *Journal of Interactive Marketing*, Vol 18, No. 3, 2004 forthcoming.

Nutrition Labels vs. Privacy Notices

There are both similarities and differences for notices for the first exchange (physical products) and the second exchange (personal information disclosure) and these are summarized in Table 1. I focus here on nutrition labels because of similarities in the risk characteristics both nutrition labels and privacy notices are intended to address versus other types of product labels or warnings. For both food and privacy decisions, risks and benefits are borne largely by the same individual, risks are low (compared with other contexts) and comparable across offerings, information to address the risk is potentially available and comprehensible, and the provision of information can facilitate safe use.⁵ Further, both nutrition labels and privacy notices serve the same purposes and share the same basis for regulation.

Yet, privacy notices also differ from nutrition labels in a number of important ways and these differences are shown in bold in Table 1. First, nutrition labels represent the end result of a manufacturing process and the disclosure governs the product at the time of purchase. The consumer controls subsequent use of the product. Privacy notices, by contrast, are intended to inform consumers about how their personal information will be used as input to a set of ongoing, dynamic business models that are likely to vary from firm to firm and from industry to industry, and even to change over time. The organization, not the consumer, controls these subsequent uses. This represents an important challenge to developing a privacy notice that communicates succinctly and effectively at the time it was written and subsequently remains truthful.

Second, while nutrition labels are backed by regulations that establish consistent baseline health and safety expectations on the part of consumers, privacy notices typically do not.⁶ Third, nutrition labels also contain reference information for ingredients in the form of percent of RDA which also facilitates consumer decision-making. No such standards exist for privacy notices and as a result, consumers are left to decide whether the organization's information practices are "safe" or respect the interests of consumers in controlling the collection, use and sharing of their personal information. Here, harm could include the inability to restrict unwanted solicitations, having their information shared with third parties for marketing purposes, or the risk of identity theft if the organization has not implemented appropriate security procedures.

Third, nutrition labels describe product contents and these can easily be expressed using a standard vocabulary and numbers (e.g. grams or % of RDA). Consumers can readily compare competing offerings for the same type of product. In contrast, privacy notices are based on natural language and no standard vocabulary exists to describe complex business practices that vary across firms. These differences highlight some of the challenges that need to be addressed in developing a rule for a short privacy notice.

⁵ Susan G. Hadden, *Read the Label: Reducing Risk by Providing Information*, Westview Press, 1986.

⁶ See for example Food and Drug Administration, *FDA Backgrounder: The Food Label*, 1999. Available at: <http://www.cfsan.fda.gov/~dms/fdnewlab.html>.

Goals of a Privacy Notice

Both long and short privacy notices have one goal: to promote two types of informed choice by consumers. First, notices should help a consumer decide whether or not to do business with a firm based on the firm's information practices. Second, notices should help consumers to compare information practices across firms.

Nutrition labels perform the same two roles and have been very effective in this regard, largely because the format promotes easy comparisons across products, and because they were accompanied by an extensive independent program to educate consumers about nutrition. As a result, consumers use nutrition labels to make product choices, not as a source of information about dietary science or dietary guidance⁷.

If privacy notices are to help consumers make choices about the second exchange in the same ways that nutrition labels support the first exchange, then clearly consumers need to be educated about the purpose for a privacy notice, corporate information practices and privacy risks. For example, one recent survey found that a majority of respondents did not understand how websites used and shared their personal information, and many knew almost nothing about how to stop sites from collecting personal information about them⁸. This same survey also found that the act of posting a privacy notice also provided unwarranted assurances to consumers about the website's actual practices.

I believe it is infeasible to incorporate educational materials in a privacy notice without exacerbating the readability issues. Privacy concerns are likely to vary across consumers in the same way different people have different nutritional concerns. A good privacy notice should provide a way for a consumer to quickly determine whether or not the organization engages in a practice they find objectionable or to compare across organizations in the same way a nutrition label enables a consumer concerned about sodium or carbohydrates to make a quick decision about which products to purchase.

Elements, Format and Language of a Privacy Notice

What a privacy notice should contain and how it should look are empirical questions that should not be answered without careful research. If a privacy notice is to promote informed choice by consumers, in addition to complying with the law, the notice must address the issues that are important to consumers and consumers must be able to comprehend the notice. To the best of my knowledge, these issues have so far not been adequately investigated.

⁷ Derby, Brenda M. and Alan S. Levy, "Do Food Labels work? Gauging the Effectiveness of Food Labels Pre- and Post-NLEA, In. Paul Bloom and Gregory T. Gundlach eds., *Handbook of Marketing and Society*, p. 372-398, Thousand Oaks: Sage Publications, Inc., 2001.

⁸ Turow, Joseph, *Americans and Online Privacy: The System is Broken*, Annenberg Public Policy Center, University of Pennsylvania, June 2003.

Two national public opinion surveys conducted prior to the “Get Noticed” Interagency Workshop in 2001 provide some preliminary insights.⁹ Based on consumer concerns, short notices should address marketing uses of personal information (used by the same company, shared within the same organization, shared with or sold to other companies, opt out) and security issues. A strong majority of respondents in the PLI Survey further reported a strong preference for short privacy policies, and for companies to adopt a consistent summary or checklist for their privacy policies. This suggests that if privacy notices are to take on the importance and usefulness of a nutrition label, a simplified unified format that presents information in a condensed and accessible format is needed. None of this research, however, has addressed comprehension issues. A rule should not be written prescribing the content and format for a short notice without comprehension testing¹⁰.

Notices should also be required to use a common vocabulary based on neutral language. As Table 1 shows, vocabulary is one of the key differences between nutrition labels and privacy notices. A standard set of definitions and a vocabulary will need to be developed in order to have a unified format for a short privacy notice. Developing these definitions and the vocabulary represent a major challenge for the regulatory process. For example, the nutrition label describes product contents that are fixed at the time of purchase. Privacy notices not only describe how the personal information will be used in at the time of disclosure, but also in the future. Obviously, organizations may change their information practices as their circumstances change. The use of the terms “may collect” or “may share” (see Appendix A and Appendix B) communicates that while certain practices are legal or possible, they do not accurately communicate the firm’s current information practices or how current information practices vary across organizations. On the other hand, if the practices change after the consumer receives the notice, then that notice is no longer truthful.

The three sample notices in the appendix to the ANPR provide a useful starting point for designing a short notice. I prefer the first two notices (Appendix A and Appendix B) as they both use standard language and “yes” or “no” which should facilitate their use by consumers to both make a decision about an individual firm as well as to choose across firms. Appendix A is more readable due to the larger font size. I also understand that Appendix B is a complete GLBA notice while Appendix A is not complete. From the consumer’s perspective, there are no obvious differences in the content of the two forms.

The third notice (Appendix C) is clearly preferable to existing long notices and can facilitate choice about doing business with a single organization. However, the absence of standard language and format provides for too much potential variation across organizations

⁹ See: Mary J. Culnan and George R. Milne, *The Culnan-Milne Survey on Consumers and Online Privacy Notices*, 2001 and Privacy Leadership Initiative, *Privacy Notices Research*, 2001. Summary of results for both surveys available at www.ftc.gov.

¹⁰ See for example Alan S. Levy, Sara B. Fein, and R.E. Schucker, “Performance Characteristics of Seven Nutrition Label Formats,” *Journal of Public Policy & Marketing*, Vol 15, No. 1, Spring 1996, p. 1-15 and Louis A. Morris, Karen Lechter, Michael Weintraub and Debra Bowen, “Comprehension Testing for OTC Drug Labels: Goals, Methods, Target Population and Testing Environment,” *Journal of Public Policy & Marketing*, Vol 17, No. 1, Spring 1998, p. 86-96. .

and therefore may make it difficult for consumers to compare across organizations. Leaving the choice of language up to the organization also means the notice may not always be based on neutral language.

Finally a word about opt out. Public opinion surveys repeatedly show that consumers are concerned about having the personal information they provided for a specific purpose shared with other parties for marketing purposes. An obvious goal of any privacy notice should be to inform consumers about second generation uses of their personal information and to provide instructions about how to opt out of these uses if the consumer objects (toll-free number, online or by postal mail). However, I do not believe that providing opt out should be the primary goal of the privacy notice, nor should opt out rates be the primary metric to measure the success of a notice. This is especially true since the original GLBA provisions do not require financial institutions to provide an opt out for affiliate sharing. This policy is at odds with the self-regulatory guidelines that apply to the rest of the private sector. If a financial institution does not share information with unaffiliated third parties, there may be no opt out. However, if there are real choices, and the opt out notice is easy to find, easy to read, easy to understand, and easy to execute, and people still choose not to opt out, there is no reason to attribute their behavior to a problem with the notice. On the other hand, the choices offered and the effectiveness of current opt out notices and opt out procedures are empirical questions that potentially merits research.

Clearly if a financial institution chooses to offer consumer choices to opt out of information sharing arrangements that are not mandated either by the FCRA or GLBA, the Agencies should definitely allow these institutions to include in the short notice information about these additional choices to opt out (Question E7). Providing choice when it is not mandated is one clear way for a financial institution to differentiate itself from its competitors.

Next Steps

The Agencies should move forward to develop a required short notice, but to proceed slowly. The goal should be to develop a one-page notice with standard format, content and language with a check-off or yes/no for each item in the notice (similar to Appendix A and Appendix B).

The process should start with research on the content, format and language for the notice. Research is also needed to develop measures for consumer comprehension and to identify what types of consumer education are needed to accompany a short notice. One way to begin such a large effort would be to develop a number of prototypes for comment to see if a single notice can serve multiple segments of the industry. It may also be easier to develop the language for a short notice by using prototypes rather than by trying to develop a vocabulary independent of its use. Experimental research with consumers should be conducted to test the effectiveness of different formats and wording.

There are many academics who are well-qualified to conduct such research. The Agencies could stimulate this work by issuing a RFP and funding the actual costs of the studies

(e.g. compensating subjects for participating in experiments, or funding the costs of conducting a survey to test alternative formats with a national sample). In addition, companies should be encouraged to conduct their own research on short notices. However, any research that is used as input for a new rule should be accessible for public inspection and scrutiny, independent of the source of the research.

If the Agencies have ongoing concerns about opt out, I suggest two types of research to determine if current opt out rates are a function of policy (limited choice), problems with the ways organizations have implemented opt out, or something else (e.g. consumer preferences). First, conduct a “sweep” of current privacy notices to measure how many organizations are required to offer opt out based on their practices, and how many offer choice voluntarily (e.g. Question E7). This research could be based on a content analysis of current notices. Second, for those organizations that offer opt out, assess the “easy to find, easy to read, easy to understand and easy to execute” components of the opt out.

I look forward to continuing to work with the Agencies as you move forward with this important endeavor.

Table 1
Nutrition Labels vs. Privacy Notices
Characteristics of Notice for the First Exchange vs. Second Exchange

Characteristic	First Exchange	Second Exchange
Value proposition of exchange	Money for value (goods or services)	Personal information for value (enhanced service, personalization, etc)
Example	Nutrition label	Privacy notice
Coverage	Food products	Collection of personal information
Purpose	<ol style="list-style-type: none"> 1) Risk minimization 2) Promote informed consumer choice about whether to purchase a product versus alternatives 3) Reduce likelihood of deception by sellers 4) Promote fair competition among sellers 	<ol style="list-style-type: none"> 1) Risk minimization 2) Promote informed consumer choice about whether to disclose personal information versus alternatives 3) Reduce likelihood of deception by sellers 4) Promote fair competition among sellers
Existing laws	NLEA	GLBA, HIPAA, COPPA, FACTA
Basis for regulation	Unfair or deceptive practices	Unfair or deceptive practices
Label Definition	Format and content specified by regulations; standard vocabulary and language; numeric information.	Content specified by regulation or self-regulation; no standard vocabulary or language; text.
Reference Information to facilitate decision-making	% of RDA	None
Label Format	On product: Flat 2-dimensional. Online: may be hyperlinked to facilitate navigation	Offline: Flat 2-dimensional. Online: may be hyperlinked to facilitate navigation
Risks of participation in exchange	Allergic reaction, consume undesirable ingredients (e.g. fat)	Identity theft, unwanted marketing communications, general loss of control over future uses of personal information
Ability of consumer to control risks related to exchange	High. Product is fixed at purchase and consumer controls subsequent use.	Low. Future uses of information are controlled by firm and may not be known at disclosure
Method of risk control	Do not purchase or consume product; restrict consumption	Do not disclose information; disclose false information
Externalities	Risks and benefits borne largely by same individual	Risks and benefits borne largely by same individual
Are risks comparable across offerings?	Yes	Yes
Is information to address risk potentially available and comprehensible?	Yes	Yes but people may not be aware of or understand the risks
Can providing information facilitate safe use?	Yes	Yes
How serious is the risk	Low	Low
Given appropriate information, can consumer control risk?	Yes	Yes for current uses, Maybe for future uses

Adapted from Susan G. Hadden, *Read the Label: Reducing Risk by Providing Information*, Westview Press, 1986