**Before the**
**Federal Trade Commission**
**Washington, D.C. 20580**

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| In the Matter of | ) | |
| | ) | |
| Interagency Proposal to Consider | ) | FTC File No. 034815 |
| Alternative Forms of Privacy | ) | |
| Notices Under the Gramm-Leach-Bliley | ) | |
| Act | ) | |
| | ) | |

To: The Commission

**COMMENTS OF THE**
**ELECTRONIC PRIVACY INFORMATION CENTER**
March 29, 2004

We applaud the Gramm-Leach-Bliley Act (GLBA) Agencies for holding this rulemaking designed to simplify privacy notices issued under the Act.[1] In July 2001, EPIC and seventeen other consumer organizations filed a petition with the GLBA Agencies, urging them to adopt requirements of clear, concise language for privacy notices, and to require more effective measures to allow consumers to opt-out from financial information sharing.[2] Improving notice is an important first step to meeting the goals of the 2001 petition. The second step—to improve the measures by which individuals can opt-out, also is important. Thus, we renew our call to require more effective measures to opt-out from financial information sharing.

*In Addition to Clear Notice, Individuals Need Simple, Effective Ways to Opt-Out*

The Gramm-Leach-Bliley Act (GLBA) has placed the burden of opting-out squarely on the consumer in order to safeguard personal information. Information is shared with non-affiliates and other third parties unless, after receiving notice, the consumer takes action and tenders an objection.

An opt-in standard would place the responsibility on the financial institutions that ultimately benefit from the disclosure of private consumer information. An opt-in practice would prevent private information from being shared with third parties unless consumers first agreed to the information sharing. Such an opt-in process would eliminate unknowing or unwanted disclosures of private individual consumer information.

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[1] Interagency Proposal to Consider Alternative Forms of Privacy Notices Under the Gramm-Leach-Bliley Act, 68 Fed. Reg. 75164 (Dec. 30, 2003) [hereinafter Joint Proposal].
[2] GLBA Petition for Rulemaking, Jul. 26, 2001, available at http://www.epic.org/privacy/consumer/glbpetition.pdf

The combined results of surveys by Star Systems, Inc. (an ATM company) and E-Loan (an on-line lender) reveal that most consumers:

> *would want an opt-in before information is shared with non-affiliates
> *would want the ability to block data sharing even among affiliates
> *desire a private right of action against financial entities for violation of their privacy interests.[3]

Star Systems, Inc. found that 57% of the survey participants were concerned about financial services corporations sharing data with their partners or third parties and 62% of the respondents were concerned that financial institutions were sharing private financial data with affiliated companies.[4] The survey by E-Loan found that 66% of survey participants favored an opt-in strategy, and 80% indicated that they were "not at all comfortable" with their financial institutions selling their private information to other entities.[5]

In the absence of legislation mandating an opt-in procedure, we can look to successful opt-out implementations for guidance in improving privacy. We believe that the recently-created FTC Telemarketing Do-Not-Call Registry is an example of a user-friendly opt-out implementation. According to FCC Chairman Michael K. Powell, over 730,000 people added their telephone numbers to the Registry on the first day it was available to the public.[6] Nearly 50 million Americans have added their home and cellular telephone numbers to the Registry as of September 2003.[7] This number comprises about 17% of all Americans (based on U.S. population statistics as reported by the Census Bureau) as opposed to the 5% opt-out rate for the financial services industry concerning limiting the sharing of private consumer data.[8]

Individuals have opted out because the process is simple. It only requires a two-step process, and the opt-out extends to virtually all telemarketers.

Financial services institutions have not implemented opt-out mechanisms that compare favorably to the Do-Not-Call Registry. Rather, individuals are confronted by opt-out procedures that differ at every institution. Furthermore, there is no central place where one can opt-out of all financial information sharing. Instead, individuals must opt-out at every institution. Because financial services institutions have not implemented user-friendly, effective opt-out mechanisms, we again urge the GLBA agencies to require more simple procedures for opting out.

Finally, we urge the agencies to consider creating a unified opt-out system that could combine telemarketing, financial services, FCRA prescreening, and other opt-out mechanisms that are created in the future. Opt-out has been deemed by some to be more efficient for the economy,

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[3] Paul Schwartz & Ted Janger, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules*, 86 Minn. L. Rev. 1219, 1237-8 (2002), at http://www.paulschwartz.net/minn-final.pdf.
[4] *Id.* at n83 (citing "Not-So-Private Banking," Privacy Times, January 7, 2002, at 3-4).
[5] *Id.* at n83 (citing "Poll: Californians Want Speier Bill," 22 Privacy Times, February 27, 2002, at 6-7).
[6] "Do Not Call Registry Faces Tougher Challenge: Second Judge Blocks List, Citing Free Speech Concerns," available at http://www.cnn.com/2003/ALLPOLITICS/09/25/congress.no.call/.
[7] Id.
[8] Lee, W.A., "Opt-Out Notices Give No One a Thrill," American Banker, July 10, 2001.

but the diverse array and procedures for different opt-out mechanisms is not efficient for the individual. Individuals would benefit from a single portal from which they could control enrollment in the telemarketing Do-Not-Call Registry, all Gramm-Leach-Bliley opt-outs, the FCRA prescreening and new affiliate sharing opt-out, and even private-sector opt-out mechanisms that currently are difficult to locate and employ, such as the various IRSG "choice" mechanisms used by ChoicePoint, Acxiom, and other data brokers.

*Privacy Notices Should Start With A Call to Action*

We think it is critical to inform consumers first that they must take action in order to protect their privacy.

In the Joint Petition, we offered examples of such initial statements:

"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 STILL 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]

Research has demonstrated that a majority of consumers who receive notices in the mail from their financial institutions discard the notices or do not read the notices in their entirety.[10] The case of *Ting v. AT&T* is illustrative of this phenomenon. As a response to detariffing, AT&T developed a new standard customer contract.[11] AT&T mailed customer service agreements (CSAs) to approximately 18 million of its residential customers by including the agreements in the same envelopes with their billing statements.[12] There was no indication on the envelopes that they contained what amounted to new contracts.[13] There was a high probability that customers would open the billing envelope.[14] A reasonable person who was a member of this cohort, however, would not likely expect that a new contract would be found in the billing envelope, and therefore would have discarded it.[15] Had AT&T printed a statement on the billing envelope alerting the customers that a new contract was included, customers would have been more likely to read the CSA.[16]

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[9] *Joint Petition* at 11.
[10] *See generally Ting v. AT&T*, 182 F. Supp. 2d 902 (2002).
[11] *Ting* at 910.
[12] *Id.* at 912.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

AT&T's remaining forty-two million residential long-distance customers received the customer service agreement by mail in a separate envelope labeled "ATTENTION: Important Information concerning your AT&T service enclosed."[17] AT&T conducted its own quantitative study and concluded that approximately 25% of its customers were not even likely to open the separate mailing, and an additional 10% would not even skim the CSA contained in the separate mailing.[18] AT&T concluded that only about 30% of its customers would actually read the entire customer service agreement.[19]

AT&T's research showed that reliance on opt-out was sure to result in consumer inaction. "Assent by non-action" was introduced by AT&T.[20] Customers were advised that they did not need to take any further action.[21] The cover letter stated: "Please be assured that your AT&T service or billing will not change under the AT&T Consumer Services Agreement; there is nothing that you need to do."[22] Because the new CSA and detariffing were treated as "non-events," it is likely that, of the customers who opened either mailing, a large number did not read the CSA at all or did not read it completely and with understanding.[23]

The company's market research produced the following recommendation:

> "In the letter it should be made clear that this agreement is being sent for informational purposes only. The fact that no action is required on the part of the customer needs to be made. A strong link establishing that this information is not a "call to action" on the part of the customer should be clearly stated in the letter...Customers should understand that the mailing is being sent to comply with a federal mandate and does not imply any change in their relationship with AT&T."[24]

Instead of the purposeful approach taken by AT&T to de-emphasize the fact the detariffing and the new customer service agreements were "events," AT&T should have directly informed their customers that they were entering into a new contract with the company.[25] "From the perspective of affecting a person's legal rights, the most effective communication is generally one that is direct and specific. In this case, that would have been to boldly place on the separate mailing envelope at least the message that a new contract was enclosed rather than the generic 'Important Information' notification."[26]

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[17] *Id.* at 912.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 913.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 911.
[25] *Id.*
[26] *Id.*

The District Court held that this case involved more than merely a shift from resolving customer disputes in the court system to an arbitration process.[27] Moreover, the court found that AT&T was literally "re-writing the legal landscape on which its customers must contend."[28] This writing was indirect, unspecific, and evasive, by treating a new contract as a "non-event" and minimizing the need to take action on the part of the consumer. In ordering a permanent injunction, the court characterized AT&T's actions as follows:

> "Aware that the vast majority of service related disputes would be resolved informally, AT&T sought to shield itself from liability in the remaining disputes by imposing Legal Remedies Provisions that eliminate class actions, sharply curtail damages in cases of misrepresentation, fraud, and other intentional torts, cloak the arbitration process with secrecy and place significant financial hurdles in the path of a potential litigant. It is not just that AT&T wants to litigate in the forum of its choice – arbitration; it is that AT&T wants to make it very difficult for anyone to effectively vindicate her rights, even in that forum. That is illegal, unconscionable and must be enjoined."[29]

The experience in *Ting v. AT&T* strongly suggests that consumer notices would be more effective if they started with a call to action. Without calling the consumer's attention to the need to take action, many consumers will simply throw away short notices.

*The Opt-Out Instructions Should be free of Multiple Negatives, and Should Clearly Explain How to Take Action*

The manner in which privacy options are presented to the consumer is crucial to the rate of response. Bellman, Johnson, and Lohse conducted a systematic study exploring the influence of question framing and default answers on consumer action.[30] Participants were members of the Wharton Virtual Test Market, which is an online cohort of 30,000 Internet users representative of the Internet-user population in the United States.[31]

Bellman, Johnson, and Lohse found that the way a question was asked had a strong influence on results. "[Their] experiments show the format of privacy questions can influence a consumer's apparent agreement with privacy policies. Opting-in does not equal opting-out, and answers are influenced by the default option."[32]

Their research demonstrated that an online organization can use a combination of question framing and default answers to nearly ensure that visitors to the site will consent to whatever it is that the organization is asking of consumers such as to share private information.[33] Marketers

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[27] *Id.* at 938.
[28] *Id.*
[29] *Id.* at 938-939.
[30] Bellman, S.J., Johnson, E.J., and Lohse, G.L., "To Opt-In or Opt-Out? It Depends on the Question," *Communications of the ACM*, February 2001, Vol. 44, No. 2 at 25.
[31] *Id.*
[32] *Id.* at 26.
[33] *Id.*

can take advantage of consumers who are inattentive by setting a default radio button with the "yes" answer that they desire from consumers already activated.[34] Consumers may also view the default answer as the more popular or correct answer.[35]

If an organization's goals are to truly separate interested from uninterested consumers, Bellman, Johnson, and Lohse recommend using radio buttons with no defaults on web pages.[36] Otherwise, a large number of default answers will merely be misleading and not of much value to corporations.

We can extend this research to the offline world to recommend that privacy notices clearly and simply present opt-out choices. Sample language might read:

CHECK HERE TO OPT-OUT OF INFORMATION SHARING ☐

*Puffing Should be Prohibited; Characterizations of Trust or Quality in the Privacy Notice Should be Legally-Binding*

Privacy notices are inappropriate for puffing or saccharine depictions of corporate "families," "trusted" third parties, etc. Privacy notices define the legal relationships between individuals and corporations. Therefore, representations in the notice should be legally-binding. A characterization of a information-sharing partner as "trusted" should carry with it legal burdens. It should be a representation that the financial service company has evaluated the information sharing partner, and takes responsibility for its use of personal information.

Similarly, financial services institutions should not be able to claim that they are "committed to privacy" and engage in highly privacy-invasive practices, such as pre-acquired account number telemarketing. Representations in the privacy notice are taken seriously, and therefore should be drafted seriously. Claims that a company is "committed" to privacy, or claims that privacy is a "priority" are material representations to consumers. Actual practices should match these representations.

*Clear Examples of Information Sharing Would Improve Notices*

Financial services corporations should provide clear explanations to the consumer of how their private information will be utilized by the corporation. For instance, the representation "we share personal information with trusted third-parties to provide better services to you" is meaningless and perhaps untrue.[37] Individuals would benefit more from representations such as: "We sell your personal information to marketers for telemarketing, direct mail, and e-mail solicitations."

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[34] *Id.*
[35] *Id.*
[36] *Id.* at 27.
[37] *See* Comments of the Electronic Privacy Information Center to the Federal Trade Commission Workshop on Information Flows, FTC File No. P034102, Jun. 18, 2003, available at http://www.epic.org/privacy/profiling/infoflows.html.

*The Short Notice Should Be Fully Consistent With the Long Notice*

The GLBA requires financial institutions to "provide a clear and conspicuous disclosure" of their privacy policies to the consumer.[38] To that end, short privacy notices should be written in plain language and be consistent with the long notice.

*The Agencies Should Consider a Checkbox Format that Allows Comparison and Scoring Across Financial Institutions*

A standardized checkbox format for explanation of the privacy practices would allow individuals to easily compare privacy policies at different institutions. Furthermore, values could be assigned to the checkboxes, thereby allowing a score to be derived from the institution's practices.

[38] *15 USC § 6803(a) (2003).*