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A Survey Of Bank Privacy Policies

CALPIRG

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The author alone bears responsibility for any factual errors. The report's scores and grades represent the opinion of the author.

California Public Interest Research Group (CALPIRG) is an advocate for the public interest. The organization works to protect consumers, safeguard the environment, and foster responsive government.

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EXECUTIVE SUMMARY

Federal financial privacy law offers consumers limited rights.

The Gramm-Leach-Bliley Financial Services Modernization Act of 1999 (GLB) created new threats to privacy by enabling the development of one-stop financial "supermarkets." Recognizing this, Congress did include two provisions intended to protect privacy.

First, the law required banks and other covered institutions to annually notify – beginning no later than July 1, 2001—their customers of their information sharing policies. If not, they would lose the right to share information. Those notices had to inform consumers of their limited right to "opt out," or say no to, some third party sharing.

Second, the law affirmatively gave states an explicit right to enact stronger financial privacy laws. The so-called Sarbanes amendment was a recognition by Congress that the law's largely notice-based privacy protection was inadequate and that more needed to be done.

With the notices, the burden is placed on consumers to instruct their bank not to share their financial records—to opt out.

This opt-out strategy relies on banks to make their notices simple and readable, even when it is to their financial advantage to prevent consumers from opting out.

As CAL FED states in their privacy notice, financial institutions make money from sharing this information.

Not surprisingly then, this survey of some of the largest banks doing business in California found that none score well in terms of their privacy policies and privacy notices.

Bank of America scored the best—a C - grade. US Bancorp scored a D minus. Union Bank of California received a D -.

The rest—Bank One (First USA), Bank of the West, Citibank, Washington Mutual, and Wells Fargo Bank—received an F.

Based on strong consumer support for greater privacy protections, other problems resulting from the freewheeling exchange of financial records (e.g. identity theft), and the results of this survey, it is CALPIRG's recommendation that California adopt stronger privacy protections.

California should abandon the "notice is good enough with a limited opt-out" strategy, which is flawed at its core, and replace it with an "opt-in" policy.

An opt-in strategy would prevent financial institutions from sharing information about consumers, unless the consumer has agreed beforehand to allow the sharing of his or her financial records.

That's a fair use of consumer's information—asking first.

INTRODUCTION

Lack of privacy

Technology has changed the way business operates.

Today it is far easier for corporations and businesses to sell, buy, share, trade, lease, and otherwise obtain information about individuals.

Names, addresses, phone numbers, household incomes, social security numbers, purchasing habits, account balances, and more are readily attainable.

Such a freewheeling exchange of consumer information leads to more telemarketing calls and junk mail.

But the invasions of privacy caused by bank information sharing lead to worse problems than meal interruptions. Many consumers spend hours canceling credit card charges for products that they in fact never ordered. Their bank and its telemarketer, working in concert, tricked the consumer into taking a trial offer that had to be cancelled or their credit card would be billed.

Why didn't the consumer know? The bank gave the telemarketer permission to bill the consumer's account, even though the consumer never told the telemarketer their account number, let alone their expiration date.[i]

Experts believe bank information sharing also increases the likelihood of identity theft. In fact, the Federal Trade Commission recently published results showing identity theft as the most common type of U.S. consumer fraud during 2001.

Furthermore, banks, insurance companies or others might use the information to make unwarranted negative decisions about the prices individuals pay for financial products or services. Some consumers may not receive certain services at all.

Consumers denied on the basis of shared information have fewer rights than consumers denied on the basis of credit reports.

Consumer opinions

Setting aside the negative ramifications, most consumers still harbor serious concerns when it comes to others controlling their financial records.

Consumers believe that it is their information to control.

According to a February 2002 poll conducted by the Evans McDonough Company, Inc.:

- 79% of Californians polled were "not at all comfortable with financial institutions selling … financial information to other financial companies."
- 82% rated the protection of financial privacy as very important.
- Privacy polled higher in importance than balancing the state budget.
- 62% agreed that privacy laws are not strict enough.

Federal laws governing privacy

Federal law places the burden on consumers to notify their financial institution in order to "opt out" of having their information shared.

To opt out, consumers can respond to privacy notices sent out by banks once per year.

The privacy notices provide a combination of limited opt-out rights under two federal laws, the Gramm-Leach-Bliley Act and the Fair Credit Reporting Act (FCRA).

1) Under the FCRA, a consumer has the right to say no to affiliate sharing of so-called "other" information. Other information is obtained from the consumer and from other third parties. These "other" third parties include the consumer, her application, her references, and her credit report.

2) Under GLB, all information derived from a consumer's "experiences and transactions" with any covered financial institution—size of account balances, types of credit card transactions, number of accounts, co-owners of accounts—are subject to notice and limited opt-out protections.

However, even after a consumer has opted out, financial institutions can still share information with unrelated financial institutions (third parties) under "joint marketing agreements."

Furthermore, institutions can share "experience and transaction" data with affiliated organizations—those institutions connected through ownership.

"Experience and transactions" data includes volumes of information derived from credit card use details, purchasing habits, the number of accounts a consumer has with the bank or its affiliates, the size of the consumer's accounts, whether there are co-account holders, how often deposits are made, and the size of deposits.

Privacy notices

Sharing consumer information is a moneymaker. Or, as CAL FED states in their privacy notice, financial institutions "receive compensation in such arrangements."

Thus, it's in an institution's best financial interest to make opting out a challenge.

Even a high-ranking bank employee, in a 2002 article by Wall Street Journal reporter Russell Gold, found that her bank's policy was "a challenge to understand."

Assuming consumers can wade through the complicated language, opting out still isn't simple. Some banks provide a form and self-addressed envelope while others do not. Not all provide a website. To opt out one must strictly follow the procedures in the privacy notice.

Reform

Consumer advocates have long supported stronger privacy protections, and indeed the federal law does grant states the ability to set more protective standards.

Wanting to place consumers in control of their financial records, legislators in California have proposed Senate Bill 773 (Speier).

The bill would, if passed, strengthen existing privacy policies by requiring financial institutions to adopt an "opt in" policy for sharing with third parties.

An opt-in requires banks to obtain permission before sharing a consumer's information.

The Speier bill also expands a consumer's ability to opt out of affiliate sharing. Although it does not create an across-the-board opt-in policy, it does significantly strengthen consumers' ability to safeguard their financial information.

Politics

Overwhelming support exists for Senate Bill 773.

Businesses such as American Express, Pacific Life Insurance, the California State Automobile Association, and others support the bill.

AARP, CALPIRG, Consumers Union, Privacy Rights Clearinghouse, ACLU, Consumer Federation of California, Consumer Action, and labor unions support the bill.

Positive newspaper editorials have appeared in the LA Times, San Francisco Chronicle, San Jose Mercury News, and San Diego Union-Tribune.

But the banking and insurance industries vehemently defend their right to share consumers' financial records.[ii] As the CAL FED notice makes abundantly clear, there is money to be made. The industry has fiercely contested SB 773.

Business opposition played a large role in blocking the bill in the California Assembly after it had passed the Senate. But the Assembly can still protect consumers by passing the bill at the close of the 2002 legislative session.

FINDINGS

This report analyzes the privacy notices of ten financial institutions doing business in California.

These institutions are Bank of America, Bank of the West, California Federal Bank (CAL FED), Citigroup, First USA/Bank One, Union Bank of California, US Bancorp, Washington Mutual, and Wells Fargo Bank.

Some of these are the largest banks in the U.S. As of the end of the first quarter of 2002, Citigroup was by far the largest bank holding company in the U.S., with assets of over $1 trillion. Bank of America was third largest with $620 billion; Wells Fargo was fifth with $312 billion; Bank One was sixth $263 billion; and US Bancorp was 10th with $165 billion in assets.[iii]

While not making the Top 50 for bank holding companies, Washington Mutual had $242 billion; California Federal had $54 billion; Union Bank of California had $36 billion; and Bank of the West had $13 billion.[iv]

How good are the bank's privacy policies?

This report analyzes the different ways banks allow consumers to opt out.

Under federal law, consumers have a limited right to opt out of affiliate sharing (under FCRA) and third party sharing (under GLB).

In scoring the banks, a bank receives the lowest mark ("1") under "affiliate sharing" if its policy is no stronger than federal law. In theory, a bank receives the highest mark ("3") if there is no affiliate sharing or an opt-in for affiliates, and receives a "2" if it allows consumers to opt out of all affiliate sharing. <u>However, no bank has a stronger policy than federal law, and thus all banks received the lowest score.</u>

For the second score, labeled "joint," a bank receives the lowest mark ("1") if its policy is no stronger than federal law and it therefore participates in joint marketing agreements. A score of "2" indicates that a bank allows consumers to opt out of all third party sharing, including joint marketing agreements. A score of "3" indicates the bank does not share with third parties, including joint marketing.

Bank of America, according to their notice, does not sell or share with "marketers" outside the company. Thus, they don't need to offer customers the chance to opt out. This was the only bank to score a "3" under "joint."

Citigroup, US Bancorp, and Wells Fargo allow customers to opt out of all third-party marketing, including joint marketing agreements. This too is stronger than federal law. These institutions scored a "2."

Bank of the West's notice was unclear, but in a follow up phone call to their listed toll free number, a representative stated that customers can opt out of all third-party

marketing, including joint marketing agreements. Bank of the West also scored a "2."

Union Bank of California does not allow consumers to opt out of joint marketing agreements, but it also does not share with other third parties, except for joint marketing agreements. This bank was scored a "2."

Analyzing the notices: Is it simple to opt out?

The report examines the notices for formatting and layout and offers examples of how the notices are misleading or confusing.

A petition for rulemaking to the FTC and other agencies—signed by CALPIRG's national office, Privacy Rights Clearinghouse, Consumers Union, and 15 other organizations—suggests that every privacy notice, at the beginning of the form, print the statement:

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.[v]

Instead, all the notices discuss consumers' right to opt out at the end of the text. By the time readers get to the opt-out piece, they have read all sorts of marketing by the bank.

Notices contain language telling consumers how much the bank values customer privacy. For example:

> "At Wells Fargo, we value the trust you have placed in us … and we intend to continue to earn your trust each day. That's why we welcome this opportunity to describe our privacy policies and the steps we take to protect your customer information." The next section of their notice starts with the heading, "This Is Our Pledge To You."
>
> Or
>
> "At Bank of the West, trust is the basis for each customer relationship. We recognize your right to privacy."

Some banks, like Westamerica, are more direct and avoid most marketing and propaganda. Its notice immediately starts by discussing privacy.

Notices are also difficult to understand. Through a combination of small font sizes, small margins, demanding grammatical structure, and obtuse word choice, the notices

deprive consumers of their right to prevent financial institutions from sharing information.

A Privacy Rights Clearinghouse report that analyzed last year's notices (2001), Lost in the Fine Print II: Readability of Financial Privacy Notices, found that, on average, the notices were written at a third- or fourth-year college reading level rather than the junior-high level that literacy experts recommend for the general public.[vi]

Consider, for example, the following 54-word sentence from the 2001 Westamerica notice:

> "In order to offer you a wide variety of financial related products and services, we may disclose information we collect, as described above, to nonaffiliated companies that perform marketing services on our behalf or on behalf of us and another financial institution, or to other financial institutions with whom we have joint marketing agreements."

As for scoring the notices, the column labeled "prominent" scores the banks on whether they prominently feature the opt-out at the beginning of the notice in bold print. All banks received the lowest score of "1."

The column labeled "$$" scores the banks on whether they tell the consumer that they are making money by sharing information and if so, the amount of money made. A score of "1" means that the banks say nothing. A "2" results from telling consumers that they make money. Unlike other columns, this was scaled on a 1 through 2 rating. Only one bank, CAL FED, scores a "2."

The next column scores the banks on the "layout" of the notice. For instance, is it so text-heavy with such small print that only the most diligent consumer could wade through it? Does it use large bold print and color? This was the most difficult, and arguably the most subjective, of all the ratings.

The sixth column, labeled "options," scores banks on how many mechanisms exist for opting out. For instance, can a consumer opt out with a toll free number, a website, and mailing address? Or are consumers limited to one or two options. One option scores a "1." Two options scores a "2." Three options scores a "3."

A seventh column labeled "in-house" scores banks on whether they allow consumers to opt out of internal marketing. While this doesn't directly relate to sharing of information, it was scored because this opt-out protects consumers from one of the negative aspects of sharing—relentless marketing. Further, the consensus was that banks should be rewarded for giving consumers this opt-out. Banks score a "1" if they do not allow this opt-out and a "2" if they do.

CALPIRG Scorecard for Banks

Institution	Affiliate	Joint.	Prominent	$$	Layout	Options	In-House	Total	Grade
Bank of America	1/3	3/3	1/3	1/2	2/3	3/3	2/2	13/19	***C -***
Bank One (First USA)	1/3	1/3	1/3	1/2	2/3	2/3	1/2	09/19	***F***
Bank of the West	1/3	2/3	1/3	1/2	1/3	1/3	2/2	09/19	***F***
CAL FED	1/3	1/3	1/3	2/2	1/3	3/3	1/2	10/19	***F***
Citibank	1/3	2/3	1/3	1/2	2/3	1/3	2/2	10/19	***F***
Union Bank of California	1/3	2/3	1/3	1/2	2/3	3/3	1/2	11/19	***D -***
US Bancorp	1/3	2/3	1/3	1/2	2/3	3/3	2/2	12/19	***D***
Washington Mutual	1/3	1/3	1/3	1/2	2/3	3/3	1/2	10/19	***F***
Wells Fargo Bank	1/3	2/3	1/3	1/2	2/3	2/3	1/2	10/19	***F***

Grading Scale:

A +	=	19
A	=	18
A -	=	17
B	=	16
B -	=	15
C	=	14
C-	=	13
D	=	12
D -	=	11
F	=	0 - 10

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Conclusion and Recommendations

As of June 21, 2001, only 0.5% of consumers had exercised their opt-out right according to the American Bankers Association. Moreover, the same ABA survey found that 22% of banking customers said they received a privacy notice but did not read it, and 41% could not even recall receiving a notice.[vii]

One could conclude that consumers fail to opt out because they are comfortable with their bank's privacy notices.

However, polling data and the fact that 41% of consumers do not recall receiving an opt-out notice point to a different conclusion.

Consumers are not opting out because an opt-out strategy does not work for two key reasons.

First, the burden is placed on consumers to take action. Second, financial institutions are presumed to make their notices simple, readable, and noticeable, even when it's to their financial advantage to prevent consumers from opting out.

Banks make the opt-out difficult. This is seen in this survey, as not one bank scored higher than a C -.

It is CALPIRG's recommendation that California—as federal law permits—adopt a more protective privacy policy, requiring banks and other financial institutions to obtain their customers' permission before sharing personal financial data—an opt-in.

The Speier bill is a step in the right direction. California legislators should pass Senate Bill 773.

Methodology

With one exception, Citigroup, the privacy notices were gathered in August 2002 by walking into banks and asking for their most recent privacy notice. The Citigroup notice was mailed to a customer and then provided to the authors.

It is worth noting that some institutions handed over notices that were printed in previous years, despite the fact that they were asked for the most recent. For the purposes of this report, the assumption is that the policies did not change from year to year.

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[i] The banks argue that GLB solved this problem. It did not. See the state of Minnesota's post-GLB complaint against the Fleet Mortgage Company for "pre-acquired account telemarketing": www.ag.state.mn.us/consumer/news/pr/Comp_Fleet_122800.html.

[ii] Office of California Senate Floor Analyses. Bill No. SB 773. www.legweb.com/bills/2001-2002/sen/sb_0751-0800/sb_773_cfa_20010914_075236_sen_floor.html.

[iii] National Information Center: Federal Reserve System. 03/31/2002. www.ffiec.gov/nic.

[iv] Ibid.

[v] Nader, Ralph. Petition for Rulemaking. 7/26/2001. www.privacyrightsnow.com.

[vi] Hochhauser Ph.D., Mark. Lost in the Fine Print: Readability of Financial Privacy Notices. 7/2001. www.privacyrights.org.

[vii] Martin, John. Opting Out – Or Not. 6/21/2001. http://abcnews.go.com/sections/wnt/DailyNews/privacy_notices_010621.html.