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Sharing Consumer Information

U.S. Banking Deregulation and Its Impact On Consumers

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Technological advances in information storage, retrieval, and transmission have had an enormous impact in the banking industry. Because of deregulation in recent years, the banking industry has assumed a new role in the financial arena of the United States.

Banks have taken new liberties in the transmission and retrieval of personal consumer information, liberties that are not directly conveyed nor agreed upon by the consumer, which raise ethical question related to consumer privacy rights. Personal non-private consumer information should not be distributed without the full knowledge and consent of the affected party. Consumers need direct government intervention to assist in consumer information privacy. Yet, in today's deregulated environment, the banking industry considers consumers' private information to be rather public and continues to mishandle and carelessly distribute consumers' personal data.

Since the Great Depression of the 1930's, government has regulated the banking industry with extremely strict guidelines as to what they can and cannot do. The Great Depression in the United States was triggered by a failure of three banks that were not able to meet withdrawal demands, and hence created a massive domino affect that crippled our financial system for more than four years. Since, these three failed banks were all conducting business in highly volatile and risky ventures, they were not able to transfer their ventures into liquid cash fast enough to meet customer demands. The U.S. government learned a great lesson from the depression and in response, the Glass-Steagall Act of 1933 was established. The act prohibited all banks from engaging in high-risk ventures and provided detailed criteria for reserve requirements and depository insurance. The government rescued the banking industry and the country has since enjoyed a rather prosperous and lengthy period of secured growth.

However, the regulation of the banking industry had in essence tied the hands of the financial intermediaries from conducting business in a much broader industry. The persistent and resourceful banking industry lobbyists long pushed for the deregulation of banks and finally won in 1999. Congress passed the Graham- Leach-Bliley Act Of 1999 (GLB) and the banking industry gates were opened once again to run free into the insurance, mortgage and lending, and security markets once again. The expansion of the industry was in fact fueled by the evolution of information efficiency. With technological advances in the banking industry the global market was too grand to overlook for the

United States banking industry. Regulations were limiting the financial institutions ability to properly act as the forerunner in a new and emerging global market and the U.S. government had to release their restraints on the industry if they wanted U.S. banks to take control of the new found opportunities. The result:

“was to reduce federal and state barriers to affiliation among financial providers such as banks, insurance companies, and securities firms. GLB enables these providers to affiliate under one corporate umbrella, often resulting in financial “supermarkets.””

(Stokes et al. 4)

GLB is also known as the Financial Services Modernization Act, and this Act was intended to do just that; to modernize the U.S. banking industry so that it may compete in the changed market condition of the 21st century. However, one major issue was left out of the GLB act, the issue of consumer privacy. When the House Commerce Committee was reviewing the Act, committee members brought up the issue of consumer privacy to the Senate and offered a rather strict notification requirements regarding consumer information sharing. These requirements were fought by the banking industry lobbyists and were not passed by the Senate. The compromised notification was ambiguous and open-ended and in one way or another consumer information was no longer private.

The privacy policy of Non-Public Information (NPI) for consumers has been a major concern as financial service companies continue to expand and link horizontally amongst their affiliated companies. After the compromises made in order to pass the GLB in 1999, there were the following agreements:

“a requirement restricting information sharing with unaffiliated third parties via a notice and an *opt-out* provision necessitating action by consumers if they did not want their information shared” (Stokes et al. 4)

This is the most detailed the GLB Act becomes in regard to NPI sharing. The interpretation of such a law has become the foreground for loopholes and compliance for the industry and the consumers it affects. There is a great disparity from the strict *opt-in* provision that was initially introduced by the House of Commerce Committee to the now approved *opt-out* provision of the GLB act. In the scope of this essay we shall examine the varying differences between the *opt-in* and *opt-out* requirements and see the implications they has on the NPI of consumers. We will also examine the attempts that are being made in order to have more detailed and less ambiguous notification

requirements by the financial companies to the consumers on both the state and federal levels.

Let us first examine the industry side of the *opt-out* provision and the benefits that the financial companies have in maintaining less detailed NPI requirements. Under the GLB act, the following aspects of NPI sharing are exempted from consumer notification:

- Information sharing that is necessary for processing or administering a transaction requested by or authorized by a customer
- Disclosures for the purpose of preventing fraud or responding to judicial process, a subpoena, or complying with federal, state, or local laws
- Financial products or services offered through a "joint marketing agreement" with another financial institution with whom there is a written contract."

(Stokes et al. 4)

Note that the above-mentioned provisions do not require any notification to the consumer. The financial companies can freely share NPI of consumers freely among these channels or "affiliates" as often as they desire. The information about us that they are sharing includes:

"Name, Address, Telephone Number, Social Security Number, Driver's License Number, Account Numbers, Credit or Debit Card Number" (Anonymous 4)

In the above information we can see that the information shared by the banks poses a greater risk for consumers than the information normally held by a retailer. Banks inherently need personal information to protect and verify the customer's identity and offer products and services when applied for by the customer. However, the bank readily transfers this information among its partners horizontally well after you have been approved or denied for the services that you had initially requested.

"According to Gregory Schaffer personal information is traded and transferred about each and every U.S. citizen every five seconds, on the average"

(Stokes et al. 4)

Why have such loose provisions about consumer notification? What advantage is it to the banking industry? The banking industry, through the "effective" use of consumer information retrieval and sharing, has created an entirely new way of marketing and advertising.

“A consumer’s financial transactions give rise to a wealth of very personal data. Every credit card purchase, every ATM withdrawal, every loan payment every paycheck deposit leaves an electronic trace at a person’s bank. Advances in information technology now allow firms to collect information from disparate sources and compile comprehensive profiles of individual behavior. The resulting databases can allow businesses to target very specific consumer categories” (Lacker 1)

The legal right to distribute NPI information horizontally among banking “supermarkets” and other affiliates means a great deal of information and money for the banking industry. The Mergers & Acquisitions industry booms and continues to boom and the need for providing more products and more services under one roof becomes a marketing haven for banks to not only use NPI but also to sell NPI.

“Providing greater financial privacy can be costly for a financial service provider because it means foregoing the potential economic value of information sharing. These benefits provide genuine economic value by increasing the probability of a successful buyer-seller match and decreasing the probability of wasting marketing efforts on those who would not be interested” (Lacker 1)

Financial institutions also argue that:

“the success of financial conglomerates depends on their ability to market a range of services to customers, and detailed rules limiting how and when they use customer information would be an impediment.” (Schroeder 1)

This makes clear the intention of the banking lobbyists in their rigorous opposition for the House Commerce committee’s initial effort to protect the privacy of consumer information in the late 1990’s. Effective marketing for a number of affiliated companies and NPI dissemination to other interested parties means big bucks for the banking system. Banks profit from information sharing not only within their organization, but also in the marketplace as well. Consumer information sharing, according to the GLB act, must be *Opted-out* by the consumer and the consumer cannot opt-out of every type of sharing either. So where does this leave the consumer?

Consumers are frustrated about the new deregulation of banks because their NPI has become a publicly traded commodity among firms. As it stands:

“If customer’s don’t object, financial institutions can release customer account numbers to outside marketers or partners who run programs such as air-miles. The rules don’t

require institutions to make sure that third parties, handling everything from preparing account statements to marketing, keep consumer information under wraps.” (Schmitt 88)

Customers are left torummed through the industry’s jargon of: “affiliates”, “third parties”, “non-affiliated parties”, which are allowed without opt-out, and who are allowed with *opt-out*. This terminology has left a busy, hard working consumer with many days to contemplate legal statements and notifications, which of course many people don’t bother to do. Not only has the banking industry left the *opt-out* option in the hands of the consumer but has also made the terminology extremely difficult for comprehension. The definitions of the terminology are left vague and non-descript on purpose because as businesses continue to merge and morph into greater and broader entities they can share your information without notifying you.

“Consider a health insurance provider merging with a bank, brokerage house, financial planner, accounting firm, or tax preparer. As a result databases can be also merged and become huge repositories of personal information”

(Stokes et al. 4)

From the best that can be deciphered, the only actual full *opt-out* possibility for the consumer is the non-affiliated third-party sharing profiles. Non-affiliated third parties would mean: selling NPI information to anybody who is willing to buy it from the firm for any particular reason.

“In a recent interview, Capital One’s chairman and chief executive officer, Richard Fairbank, said his company did not sell nonpublic information to third parties. But in its privacy notice, Capital One states that it may “share” customers’ information with “business partners” -- a category that encompasses “financial service providers (including credit bureaus, mortgage bankers, securities broker-dealers, and insurance agents)” as well as “non-financial companies (including retailers, online and offline advertisers, membership list vendors, direct marketers, airlines, and publishers).”

That is quite a laundry list, say consumer groups” (Kingson 1)

Yet the consumer has another obstacle to ponder and that is the privacy statement sent by the bank itself:

“Indeed, many recipients, unable or unwilling to plough through the jargon and marketing talk, have simply tossed them in the trash. That only plays into the

hands of the companies; a no-response to the mailer gives them the green light to sell that person's data." (Gold D1)

Increasing public outcries have forced banks to create an easier to understand and more precise privacy statement that have minimized this issue recently. Banks were noted to have made the changes in fear of losing customers because of their aggravation. Consider the following example:

"Marcia Kepnes, a nature photographer, read to the bitter end of the two-page privacy notice she received last year from Northfield Savings Bank in Northfield, Vt. It was "exceedingly complicated" and "ridiculously intimidating," she said including definitions of "you" and "your." And she's a lawyer." (Gold D1)

Banks were also mailing the privacy notices to customers along with other promotional items in order for the notice to be "unnoticed". As it stands the banks already have had more than their desires satisfied by the GLB Act and still they further tried to eliminate a customers ability to *opt-out*, from the little that consumers actually can. Banks create wordy legal documents and unfair mailing practices; to try to get all of the rights over NPI of consumers.

"Despite their meticulous work crafting privacy notices that conform to new federal law, financial institutions may have failed in one crucial respect: To persuade consumers that they could benefit from not *opting-out* of information-sharing programs." (Kingson 1)

The urgency in the matter of NPI sharing regulation is not just because consumers are receiving mailboxes full of promotional items, or being phoned to accept a free vacation to Disney Land. The sharing of NPI has become an urgent concern to the citizens of the country because the information is being mishandled at alarming rates.

Information storage and retrieval has become much more efficient because of our new-found technology. Yet, this double-edged sword has allowed those who have no right to your NPI to have access as well. Consumers are not only facing the difficulty in trying to keep their NPI private but also now are contending those who are simply just losing it. Headlines have followed:

"In February Choicepoint Inc. went public with the news that it sold records of 145,000 customers to a ring of crooks in the Los Angeles area" (Simpson 42)

“Bank Of America Corp. announced in February it had lost tapes with personal data on 1.2 million federal employees that participated in the Smart Pay charge card program” (Simpson 42)

“Citigroup Inc. said a cardboard box containing computer tapes with personal information on 3.9 million customers of its storefront consumer-finance unit was lost by United States Parcel Service, Inc.” (Pacelle A3)

For the scope of this article we will stay in the area of company negligence but there are also security issues involving hackers and database compromising. These other factors only add further concern and need for corrective measures to be taken by both industry and government. With NPI being used, lost, and mishandled what is being done to protect consumers?

Currently legislation has been everything but uniform. The media has coined a term called “patchwork” compliance.

“The problem when states start enacting legislation in sectors already covered by federal legislation is that companies have to comply with a patchwork of laws rather than a single, comprehensive set of obligations” (Vijayan 7)

In the consumers’ eyes, any kind of legislation, whether federal or state or district, is better than none. If these “patchwork” areas create problems for the firms to adhere to, will show the firms they need a federal mandate. Federal rulings have been not at all what consumers are looking for though, let us consider the largest ruling as of yet, the FACT act of 2003. The Fair and Accurate Transactions Act of 2003 (FACT) was enacted on December 4, 2003. The act was considered a step in the right direction because of the following aspirations:

“to enhance the ability of consumers to combat identity theft, increase the accuracy of consumer reports, and allow consumers to exercise greater control regarding the type and amount of marketing solicitations they receive” (Moss 66)

This sounds great but in depth and detail it lacks the actual urgency to match the ongoing problems that consumers are facing today with NPI sharing. The FACT act does begin however to set the guidelines for a federal standard. The most positive aspect of the FACT Act is it requires the Federal Trade Commission (FTC) to get more involved in the disclosure of opt-out rules and clarity. FACT Act also states in Section 216:

“direct the SEC as well as other federal agencies to adopt regulations requiring any person who maintains or possesses consumer report information to “properly dispose” of the information” (Kelvin 32)

As one can see this by no means is a milestone rule or regulation but it can be considered as a stepping- stone for further legislation. Creating further stepping-stones are some pioneering states that require noteworthy mention for their diligent efforts, namely California, Vermont, and Illinois. California would have to be the champion state in regard to protecting consumer information mostly because they, as a state, fell victim to a database breach in 2002. During this breach many state employees personal information were endangered and the employees were not told until weeks after the breach had occurred. Following the incident, California enacted legislation named “S.B. 1”, which mandates notification of both information breach and information sharing.

“The provisions are part of California's Financial Information Privacy Act, known as SB 1, which went into effect July 1. The law, which is hugely unpopular among financial service providers, requires banks to give customers the opportunity to *opt- out* of cross-marketing programs in which their information is shared with affiliates such as mortgage and credit card companies.” (Vijayan 8)

S.B. 1 has more restrictions that relate to having specific *opt-in* only options as well when the NPI sharing is among non-affiliated parties. California's state legislation pioneered the consumer's ability to create further restrictions on information sharing than the GLB Act required. Illinois has chimed in also with rather strict policies to protect their residents from banks NPI sharing:

“Applicable to Vermont financial institutions was effective November 17, 2001 and requires, among other things, that each financial institution obtain the consent (or *opt-in*) of the consumer before non-public personal information may be shared with non-affiliated third parties....” (Benoit et al. 713)

Illinois also passed state legislation with strict rules regarding sharing NPI:

“The privacy provisions require institutions subject to the Illinois Acts to obtain the affirmative consent (or *opt-in*) of the customer before the disclosing to any other person the financial records or financial information contained in these records regarding the customer.” (Benoit et al. 713)

The light at the end of the tunnel for NPI protection is shown through a clause in the GLB that states that so long as the Act's requirements are not being reduced by the state laws enacted, the states may pass laws that will create further restrictions. GLB then offers states an initial grounding that they may carry further so long as they do not impede on the GLB legislation about NPI sharing. The courts have upheld this fact; when lobbyist from the banking industry have tried to use both the FACT Act and the GLB Act as preempted law to nullify the state legislation. Thankfully, the district courts have read the stipulations clearly and have allowed no such judgments to overrule the state legislation on tougher NPI sharing requirements. The policy solution however still seems to be far from resolved, largely due to the banking lobbyist's adamancy in trying to find legal loopholes to reduce their restrictions.

NPI sharing has gained recognition and fuel from government officials, the media, and the public and so it seems inevitable that a national mandate is on its way.

"While some federal legislation becomes popular for a while and then languishes at subcommittee, committee, or other levels before forgotten, legal experts don't expect that to happen with the privacy/consumer protection legislation." (Britt 25)

NPI has also had further attention amongst the Republican and Democratic parties, two groups that are seldom in agreement of any one aspect.

"Perhaps symbolic of the gathering bipartisan approach to the consumer privacy issue, U.S. Rep. Joe Barton (R-Texas) was joined by U.S. Rep. Edward J. Markey, a Massachusetts Democrat, to press for a closer look at the sale of consumer data." (Simpson 42)

Democrats and Republicans from all over the United States have become more and more concerned with NPI sales and transmission because of its "hitting home" impact regardless of political viewpoints. Along with both political parties, investigators for insurance groups and the banking industry feel that restrictions should be made nationally, so that regulations can be followed as a nation rather than state by state. There are immense cost factors and compliance issues that are raised with "patchwork" regulations and both industry and government would prefer uniform mandates. So then how does the nation implement a law that will satisfy lobbyists and the public?

California Democrat Sen. Dianne Feinstein has come up with what appears to be the latest and best solution so far:

"Feinstein's Privacy Act of 2005 would set national standards on the use and sale of such information as Social Security numbers, driver's license records, and medical and financial data. Companies would have to let consumers *opt-in* before their personal information is shared with a third party. And consumers would have the right to *opt-out* if a firm wanted to share such basic contact information as their name and address" (Simpson 42)

Feinstein's Act still takes into consideration the need for banks to market and use NPI, but just not as carefree or negligently as they have been. This Act, unlike the FACT Act, is a much more significant stepping-stone that may be used as a possible milestone in the protection of NPI. With the Republicans intense interest in passing legislation, their control of both the Senate and the House, the passageway for such legislation seems to be more or less inevitable. (Simpson 42)

In conclusion, let us hear the voice of the unaware public, a public that is in the dark about NPI, its sharing policies, industry practices or media coverage. A survey done in May 2005 that involved 1424 participants yielded the following results:

- 83% said banks should obtain customer permission before sharing any personal information with a third party.
- 93% of consumers were very or somewhat confident in the ability of their bank to protect personal information.
- 76% said that banks should stop offering third-party products or services
- 93% objected to having personal information shared with third parties"

(Anonymous 116)

Americans have re-cultivated a new trust with the banking system that goes as far back as the early 1930's. Ethically, banks should not use this trust and our information to further profit as an industry; if American consumers completely understood what was being done with their private data, there would likely be immense public outrage. Non-Public Information of consumers should not be distributed to third parties without the clear consent, or *opt-in*, of the consumer. It is clear that the exposure of mishandled or questionable information sharing creates a stir amongst the public and government. As technology and convenience redefines the banking industry, strict regulations need to be imposed nationally so that compliance is clear and accountable for all banking entities. The government needs to ensure residents in all states that their NPI is safe and secure. A consumer should have the right to decide whether their privacy can be sold as a

commodity or whether it remains only available to those for whom it was originally intended. Banks have a duty to their consumers to clearly state the consumer's rights about information sharing. Any further use of NPI should be available as an *opt-in* choice left up to the consumer not as an *opt-out* option decided by the banks.

References

Ambrose, Jr., Stephen F., and Joseph W. Gelb. "Consumer Privacy Litigation and Enforcement Actions." *Business Lawyer* Feb 2005: 60. :723. Business Source Premier. Newman Library. 04 Dec 2005 <newman.baruch.cuny.edu>.

Anonymous, . "Regulators Issue Information Breach Response Guidance." *ABA Bank Compliance* 2006: 26. :4-5. ABI/GLOBAL INFORM. Newman Library. 08 Dec 2005 <newman.baruch.cuny.edu>.

Anonymous, . "Study: Privacy Breaches Can Jeopardize Customer Retention." *Community Banker* Oct 2005: 14. :116 . ABI/GLOBAL INFORM. Newman Library. 06 Dec 2005 <newman.baruch.cuny.edu>.

Benoit, Michael A., and Elena A. Lovoy. "Consumer Privacy Legislation and Regulation- 2004 Developments." *Business Lawyer* Feb 2005: 60. :713. Business Source Premier. Newman Library. 04 Dec 2005 <newman.baruch.cuny.edu>.

Britt, Phillip . "In The Wake of Security Breaches." *Information Today* October 2005: 22. :25 . ABI/GLOBAL INFORM. Newman Library. 12 Dec 2005 <newman.baruch.cuny.edu>

Gold, Russell. "Privacy Notice Offers Little Help- Mailing From Banks, Retailers, Lets You Protect Financial Data, But It's Harder to Decipher." *The Wall Street Journal* 30 2002: eastern edition. :D1 . Proquest Company. Newman Library. 06 Dec 2005 <newman.baruch.cuny.edu>.

Kelvin, Jeffrey B. . "SEC Releases Final Rule On Protection Of Personal Client Information ." *Journal Of Financial Service Professionals* 2005: 59. :32. ABI/GLOBAL INFORM. Newman Library. 06 Dec 2005 <newman.baruch.cuny.edu>.

Kingson, Jennifer A. "A Missed Opportunity?." *American Banker* 17 2001: 166. :1. Business Source Premier. Newman Library. 12 Dec 2005 <newman.baruch.cuny.edu>.

Lacker, Jeffrey M. . "The economics of financial privacy: To opt out or opt in?." Economic Quarterly- Federal Reserve Bank of Richmond summer 2002: 88. :1. ABI/GLOBAL INFORM. Newman Library. 06 Dec 2005 <newman.baruch.cuny.edu>.

Moss, Valerie. "FACT Act Rulemaking Continues." Credit Union Management 2005: 71. :66. ABI/GLOBAL INFORM. Newman Library. 12 Dec 2005 <newman.baruch.cuny.edu>.

Pacelle, Mitchell . "UPS Loses Citigroup Data; Missing Box Held Facts On 3.9 Million Customers; Blunder Likely To Fuel Furor." The Wall Street Journal 07 2005: eastern edition. :A3. ABI/GLOBAL INFORM. Newman Library. 04 Dec 2005 <newman.baruch.cuny.edu>.

Schmitt, Christopher H. "Think YOur Secrets Are Safe?." Business Week 09 2001:88 . Ebsco Host. Newman Library. 04 Dec 2005 <newman.baruch.cuny.edu>.

Schroeder, Michael. "Consumer-Privacy Proposals Get Mixed Reaction." The Wall Street Journal 04 2000:1 . ABI/GLOBAL INFORM. Newman Library. 04 Dec 2005 <newman.baruch.cuny.edu>.

Simpson, Burney . "Keeping Data Secure." Credit Card Management 2005: 18. :42(3pages) . ABI/GLOBAL INFORM. Newman Library. 08 Dec 2005 <newman.baruch.cuny.edu>.

Stokes, Pamela, Leon Dube, and . "Current Issues In Consumer Privacy." S.A.M. Advanced Management Journal Spring 2005: 70. :4 . ABI/GLOBAL INFORM. Newman Library. 04 Dec 2005 <newman.baruch.cuny.edu>.

Vijayan, Jaikumar. "New privacy Rules Could Mean Headaches For Financial Services IT." Computer World 11 2003: 37. :7. ABI/GLOBAL INFORM. Newman Library. 12 Dec 2005 <newman.baruch.cuny.edu>.

Vijayan, Jaikumar. "Banks Balk at Info-Sharing Provision in Privacy Law." Computer World 02 2004: 38. :8 . ABI/GLOBAL INFORM. Newman Library. 13 Dec 2005 <newman.baruch.cuny.edu>.