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The Consumer Response to Privacy Provisions in Gramm-Leach-Bliley: Much Ado About Nothing?

I. INTRODUCTION

Recent surveys have indicated that financial privacy is a significant concern for the American consumer.¹ In response to this concern, federal legislators added a financial privacy provision (Title V) to the Gramm-Leach-Bliley Act of 1999 (GLBA).² One commentator referred to these privacy measures as "the most sweeping privacy regulations ever passed."³ However, tepid consumer reaction⁴ and fierce criticism of the ways in which the privacy notices were drafted and sent⁵ indicate that GLBA is not likely to be the last word on the regulation of consumer financial privacy.⁶

This Note examines the responses of financial institutions and consumers to the implementation of Title V (the privacy provision) of GLBA, as well as the explanations for these responses and the debates surrounding these explanations. Because it is essential to understanding the context in which this debate has formed, this Note first discusses the climate in which


⁴. See Woodruff, supra note 1.


GLBA was formed, including the debates regarding the shape Title V would take, as well as pending legislation to amend GLBA. Next, the Note details the actions financial institutions took to comply with Title V, as well as the difficulties in achieving that compliance. The next section discusses consumer reaction to the implementation of Title V and contrasts the reaction with some of the prevailing assumptions about consumers' privacy concerns. Finally, this Note will examine some of the suggested explanations for this reaction.

II. OVERVIEW OF GLBA PRIVACY PROVISION

Title V of GLBA was formed in the shadow of a public outcry over a high-profile case involving the dissemination of non-public information by banks to third parties. Hatch v. U.S. Bank (Nat'l Ass'n) involved U.S. Bank's sale of consumer data to telemarketers. When those telemarketers solicited and sold credit cards to consumers, the telemarketers automatically charged the customers' fees to their bank or credit card accounts without their permission, which the telemarketers were able to do because they already had access to the account numbers through U.S. Bank. Although this case eventually settled out of court, it prompted federal legislators into action.

7. See infra notes 11-59 and accompanying text.
8. See infra notes 60-84 and accompanying text.
9. See infra notes 85-95 and accompanying text.
10. See infra notes 96-164 and accompanying text.
14. Id. The bank was being sued because it had allegedly promised customers that their private information would be kept confidential. The complaint also alleged that U.S. Bank used information obtained from credit bureaus, a purpose not authorized by the Fair Credit Reporting Act (FCRA). Due to these complaints, Minnesota claimed that U.S. Bank had "violated state consumer fraud, deceptive trade, and false advertising statutes." Id. Another high-profile case that received public attention was Ades v. Chase Manhattan Bank USA, No. 6003432000 (N.Y. Sup. Ct., Manhattan filed Jan. 27, 2000). Settled out of court, this case involved Chase Manhattan's sale of consumer personal financial information to non-affiliated companies that would use the information to market non-financial products to the
This action was taken through a privacy provision attached to GLBA, an act designed to allow banks, investment banks, and insurance companies to organize under one umbrella organization. The privacy provision quickly became the most controversial aspect of the act. In particular, debate centered upon two issues: first, whether to mandate an opt-in or an opt-out regulatory scheme and second, whether to allow the dissemination of nonpublic information to the institutions’ affiliates.

The debate over the opt-in/opt-out provision involved whether to forbid companies from disbursing nonpublic information unless the consumer affirmatively gave permission for the company to do so (opt-in) or whether to allow companies to use the information unless the consumer expressly forbade the company from doing so (opt-out). The supporters of an opt-in provision did not want to force consumers to search through difficult fine print in order to protect their privacy. While the potentially high cost of an opt-in requirement concerned many lawmakers, Beth Givens of the Privacy Rights Clearinghouse contends today that it may not cost financial institutions any more

customers. See Lisa Fickenscher, Chase Pact in N.Y. Shows How States Could Set Privacy Rules, AM. BANKER, Jan. 27, 2000, at 1. The terms of the settlement required Chase to “sharply limit the sale of information on customers approving such use to names, addresses, and telephone numbers.” Id.

15. See Smith, supra note 13, at 8. U.S. Bank paid approximately three million dollars to the state as well as to certain charities. They also agreed to provide the customers with refunds for the amounts they had been charged for the telemarketer’s “products and services [the customers] did not want or use.” Id.


17. Id.


19. Ledig, supra note 11.


to be required to use opt-in provisions rather than opt-outs.\textsuperscript{24} She also draws attention to the high costs that are presently caused by fraud and consumer confusion.\textsuperscript{25}

Supporters of an opt-out provision felt the requirement that companies notify consumers of their privacy policies\textsuperscript{26} gave consumers plenty of freedom, as the consumers would be able choose whether they wanted their personal information shared.\textsuperscript{27} In addition, they claimed that the industry would be unable to offer consumers convenient and beneficial services.\textsuperscript{28} One bank executive said that "if customers have to opt in to information-sharing procedures that are necessary for certain business practices, customers' natural 'inertia' about responding to privacy notices would become a problem."\textsuperscript{29} The American Bankers Association (ABA) worried that opt-in requirements would raise the costs of goods and services provided by financial institutions.\textsuperscript{30} The ABA argued that this is because financial companies normally use integrated systems in order to operate more efficiently.\textsuperscript{31} "Requiring customers to opt-in to information sharing decreases the speed, lowers the efficiency, and raises the cost of information," according to one commentator.\textsuperscript{32}

\begin{itemize}
\item 25. Id.
\item 28. Givens, supra note 24.
\item 29. Lavonne Kuykendall, Privacy Officers Say Role Keeps on Growing, AM. BANKER, Aug. 28, 2001, at 1 (citing to Julie Johnson, chief privacy officer at Bank One Corp.).
\item 31. Id.
\item 32. Id. The author raises the example of mortgage companies. Id.
\end{itemize}

With opt-in, a financial institution would be forced to begin from scratch the process of collecting and verifying information about a customer who has applied for a mortgage. This process would take much longer than it does today, create delays in mortgage closings, and raise the interest rate on mortgage loans.
The affiliate-sharing controversy arose because allowing different types of financial institutions to affiliate with each other in a financial holding company was originally the primary focus of GLBA.\textsuperscript{33} There was a concern, however, that the companies would share nonpublic information they gathered with affiliated companies if GLBA did not give consumers an opportunity to opt out.\textsuperscript{34}

Supporters of information-sharing among affiliates pointed out that sharing customer information benefits the customer by providing synergies of sales and marketing.\textsuperscript{35} This broad choice of services creates the convenience of "one-stop shopping."\textsuperscript{36} However, critics of the idea balked at allowing holding companies to "share a wealth of nonpublic personal financial information with affiliated telemarketers selling nonfinancial products such as travel services, dental plans, and so forth."\textsuperscript{37} Senator Richard Shelby (R-AL) expressed concern that "large financial conglomerates will have more information on citizens than the IRS, but [Congress has] done virtually nothing to protect the sharing of such nonpublic personal financial information for the American people."\textsuperscript{38}

Ultimately, the final act provided for an opt-out provision, rather than an opt-in provision.\textsuperscript{39} The act carved out several exceptions to the opt-out notice requirement placed upon the}


\textsuperscript{34} Givens, supra note 24.

\textsuperscript{35} Jack Cooksey, Private Matters: Does the Law Go Far Enough to Protect Privacy?, at http://www.insidebiz.com/hamptonroads/special_report/special052800.htm (last visited Feb. 23, 2002). Vic Albrecht, director of compliance for First Union's capital management group says, "[w]hen you do business with First Union, you expect to be able to do business with all of First Union." Id.


\textsuperscript{37} 145 CONG. REC. S13894 (daily ed. Nov. 4, 1999) (statement of Sen. Shelby) (emphasis added); see infra notes 51-54 and accompanying text (a bill proposed by Senator Sarbanes would amend GLBA).

\textsuperscript{38} 145 CONG. REC. S13894 (daily ed. Nov. 4, 1999) (statement of Sen. Shelby). One fear that has been mentioned is that this mass of information being collected on individuals may enable the legal system to one day routinely subpoena the information in civil and criminal cases. Givens, supra note 24. This concern was raised in response to the subpoenaing of Monica Lewinski's book purchases from a bookstore. Id.

companies. An opt-out notice was not required when the nonpublic information was provided to "perform services for or functions on behalf of the financial institution, including marketing of the financial institution's own products or services, or financial products or services offered pursuant to joint agreements between two or more financial institutions that comply with [certain] requirements . . . ." The finalized act also allowed companies to share nonpublic information with affiliated companies, causing Senator Shelby to refer to GLBA privacy provisions as "a sham." Another important aspect of the bill required banks to develop a privacy policy and send it to their customers, annually detailing the types and amount of information the bank shares and how to opt out of such sharing.

One more crucial component to GLBA is an expressed acknowledgement that states are allowed to provide more stringent privacy requirements than the federal bill requires. Taking advantage of this provision, the California legislature almost became the first state to mandate a general opt-in requirement. The proposed California law would have required financial institutions to get customer permission before sharing the customer information with nonaffiliated parties, and it would have required them to give customers the opportunity to opt out of most sharing with affiliated parties. The bill was eventually defeated; however, some commentators feel certain that other

41. Id. To be covered by these exceptions, the financial institution must also disclose the fact that they are providing this information, as well as ensure contractually that the non-affiliate will maintain the confidentiality of the information. Id.
states would follow California's lead should it ever pass similar legislation.  

There may be more change to GLBA itself on the horizon. Senator Paul Sarbanes (D-MD) has proposed new legislation that would further restrict the activity of financial institutions. The name for this relatively new bill is the Financial Information Privacy Protection Act of 2001. This act would be similar to the proposed California legislation, providing for an "opt-out" when sharing with affiliates, but requiring the "opt-in" only for "some types of sensitive financial or medical information." This act would also give customers the right to see information being released and give them an opportunity to correct any mistakes. Other bills currently pending in Congress that would amend GLBA are the Freedom from Behavioral Profiling Act of 2000, the Privacy Act of 2001, and the

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50. See infra notes 51 - 59 and accompanying text.


52. Id. The bill is sponsored by seven other senators and has the support of several interest groups. Press Release, Maryland Senator Paul Sarbanes, Sarbanes Spearheads Financial Privacy Legislation as Priority in New Congress (Jan. 23, 2001) [hereinafter Press Release, Sarbanes], http://sarbanes.senate.gov/pages/press/sarbanes_spearheads_financial_1.html (last visited Feb. 23, 2002).


54. Financial Information Privacy Protection Act of 2001, S. 30, 107th Cong. § 511 (2001). The companies would be allowed to charge for access to the information. Id. at § 511(d).


56. Privacy Act of 2001, S. 1055, 107th Cong. §101 (2001). This bill would extend the GLBA requirement of opt-out disclosures to commercial entities, as well as prohibit companies from selling, purchasing, or displaying to the general public someone's personal identifiable information. Id.
Consumer’s Right to Financial Privacy Act. After the terrorist attacks of September 11, 2001, these non-terrorism related issues were briefly put on hold, although they were quickly put back on the table by October 16.

III. IMPLEMENTATION OF GLBA’S PRIVACY PROVISIONS

When the bill was finally passed in 1999, financial institutions took several actions, which included expanding the role of their privacy officers, finding ways to manage the high cost GLBA implementation brought with it, dealing with complicated management issues, and developing privacy policies. One of the earliest actions companies took in response to GLBA was to expand the role of the privacy officer. The role of chief privacy officer has become more of a strategic business position than in years past. One chief privacy officer mentioned that she meets with senior executives “at least quarterly to talk

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57. Consumer’s Right to Financial Privacy Act, H.R. 2720, 107th Cong. § 502 (2001). The bill would mandate an opt-in requirement for banks to share information with affiliates or non-affiliates. Id.

58. Michele Heller, GOP Privacy Hawk Shifts Focus to War On Terrorists, AM. BANKER, Sept. 28, 2001, at 1. In public comments he made, Senator Shelby, one of the toughest privacy advocates, said, “[w]e’ve got to be a hell of a lot more aggressive,” in response to the September 11, 2001, attacks. Id. Fellow privacy advocates were wondering how he could protect consumers from misappropriation of their nonpublic information while at the same time push for the government to have more access to such information in the aid of national security. See id. Sen. Shelby moved his proposals to the “back burner” because, he said, “[c]ircumstances change.” Id.

59. Michele Heller, Capitol Hill Gets Back to Pre-Terror Issues, AM. BANKER, Oct. 16, 2001, at 1. Rep. Tauzin (R-LA.) said, “today we’re more interested in security than privacy. But we thought it was appropriate today to stand before you and say: This issue is still here, and it’s a critical one.” Id.

60. See infra notes 65-68 and accompanying text.

61. See infra notes 69-75 and accompanying text.

62. See infra notes 76-77 and accompanying text.

63. See infra notes 78-84 and accompanying text.

64. See Kuykendall, supra note 29, at 1.

65. Id. The expanded role of privacy officers has also been an effect of internet banking and the increased ease of sharing information electronically. Lisa Fickenscher, Big Banks Put Senior-Level Execs on Privacy Watch, AM. BANKER, Jul. 12, 1999, at 1. A proposed amendment to the law would require financial institutions to appoint someone to be responsible for ensuring compliance with Title V of GLBA. S. 451, 107th Cong. § 4 (2001).
about strategies.” In addition to privacy officers, companies are also forming privacy committees composed of individuals from various departments. This allows the privacy officers to keep abreast of their companies’ privacy practices.

This change was relatively easy, however, when compared to the overall gigantic cost of implementing Title V. The American Bankers Association (ABA) initially estimated that the costs would run as high as $1.25 billion. A July 9, 2001, Computerworld article suggested that companies had already “spent more than $400 million compiling privacy policies and identifying partners and third parties with whom they share data.” A November 2001 survey found that the high costs most seriously affected smaller financial institutions. Consolidating several databases containing the same consumer information into one database that can only be accessed by the proper companies has carried with it one of the larger price tags. If opt-in requirements are ever mandated, the costs will likely run even higher. One industry analyst says that such requirements would run the cost “to Y2k spending proportions.”

Management difficulties have arisen, as well, in trying to devise a way to configure company databases so that affiliates do not have access to other affiliates’ information. Concerns also


67. Id.

68. Id.

69. See Michele Heller, Banks Want More Time on Reform’s Privacy Rules, AM. BANKER, Apr. 12, 2000, at 3.

70. Id.

71. Mearian, supra note 23, at 1.

72. AMERICA’S COMMUNITY BANKERS, ACB PRIVACY COMPLIANCE SURVEY (November 2001), at http://www.acbankers.org/letters/compliance_survey.htm. The America’s Community Bankers survey found that “[a]s a percentage of non-interest expenses, the smallest group . . . of institutions paid almost four times as much as the largest group in the survey . . . .” Id.

73. See Mearian, supra note 23, at 1.

74. Id. (citing Christine Pratt, TowerGroup analyst).

75. Id. (citing Christine Pratt, TowerGroup analyst).

76. See Kuykendall, supra note 29, at 1 (quoting Robin Warren, top privacy executive at Bank of America Corp. in Charlotte, N.C.). This would only apply to companies that, in light of the fact that they must now disclose their privacy policy, opt not to share information with affiliates. See 15 U.S.C. § 6802(a) (2000) (stating that financial institutions are allowed to share information with affiliates).
exist regarding variations between different state laws, which make the operation of national financial institutions difficult to coordinate between states.\textsuperscript{77}

Drafting privacy policies and communicating these policies to consumers have presented challenges for financial institutions.\textsuperscript{78} A November 2001 "survey found that the great majority of institutions with less than $1 billion in assets do not share customer information with non-affiliated third parties beyond the basic exceptions provided under GLBA."\textsuperscript{79} The same survey also found that "[a]pproximately one of every two institutions with assets greater than $1 billion shares information with non-affiliated third parties . . . to offer products and services they believe their customers would find of value."\textsuperscript{80} Of the top ten North Carolina banks, only Fidelity Bank and First Union share information with non-affiliates beyond the exceptions stated in GLBA.\textsuperscript{81} Bank of America, Branch Banking and Trust Company, Central Carolina Bank and Trust Company, RBC Centura, First Bancorp, First Charter Bank, First Citizens Bank & Trust Company, and Wachovia do not share information with non-affiliates beyond these exceptions.\textsuperscript{82} An \textit{American Banker} article suggests that only

\textsuperscript{77} Kuykendall, supra note 29, at 1; see also supra notes 45-49 and accompanying text (discussing California's proposed legislation).

\textsuperscript{78} Eileen Colkin, \textit{The 1999 Privacy Act Means Banks Must Make an Ongoing Effort to Communicate with Customers}, \textit{INFORMATIONWEEK}, Aug. 20, 2001, at 52.

\textsuperscript{79} AMERICA'S COMMUNITY BANKERS, supra note 72.

\textsuperscript{80} Id.


a few financial institutions give customers the opportunity to opt out of allowing the institution to share personal information within their own family of affiliates, as they are entitled to do by law. However, another look at the top ten North Carolina banks reveals that only Central Carolina Bank & Trust Company, the Fidelity Bank, First Bancorp, and First Citizens Bank do not provide their customers a mechanism in their privacy policies for opting out of having their information shared with affiliates.

IV. CONSUMER REACTION

While financial institutions had numerous concerns, consumers seemed to react by ignoring the law. This reaction is somewhat surprising, considering the number of polls and surveys that have indicated growing consumer concern over the confidentiality of personal information. A 1998 American Association of Retired Persons (AARP) survey showed that eighty-one percent of the participants were opposed to affiliated companies sharing personal information. A Louis Harris survey of the same year found that ninety percent of people worry about threats to their privacy. Young Boozer, executive vice president of Colonial Bank in Montgomery, Alabama, says, "[p]eople want to be sure their information is protected and not used inappropriately." Consumers seemed to affirm this theory by fiercely protesting the merger of Doubleclick and Abacus when it


84. See CCB Privacy Policy, supra note 82; The Fidelity Bank Privacy Principles, supra note 81; First Bancorp Privacy Policy, supra note 82; First Citizens Bank Privacy Policy, supra note 82. For the companies that do allow their customers to opt out, usually all that is required is a telephone call. See Bank of America Privacy Policy for Consumers, supra note 82; BB&T Consumer Privacy Notice, supra note 82; Centura Bank Privacy Policy, supra note 82; First Charter Privacy Policy Notice, supra note 82; Wachovia Privacy Policy, supra note 82.

85. See Woodruff, supra note 1.

86. See id.

87. Id.

88. Id.

89. Wirtz, supra note 3.
was revealed that the two companies would merge their databases.\textsuperscript{90}

Given this information, one could easily conclude that consumers would gladly send in their bank's forms expressing a desire to opt out of the dissemination of their personal information to third parties.\textsuperscript{91} However, early surveys estimated that only about five percent of consumers have actually opted out of their company's sharing policy.\textsuperscript{92} A more recent survey had a much higher count, finding that thirty-one percent of those surveyed had opted out.\textsuperscript{93} This survey, however, admitted that there could be over reporting due to the possibility of consumers misunderstanding what it means to "opt out."\textsuperscript{94} Another survey found that only about a third of consumers had even read the privacy notices they had received.\textsuperscript{95}

V. EXPLANATIONS FOR LACK OF CONSUMER REACTION

No shortage of explanations exists for why the response from consumers has been so minimal.\textsuperscript{96} Explanations include the unreadability of the notices,\textsuperscript{97} the length of the notices,\textsuperscript{98} the intent on the part of the drafters for a low response,\textsuperscript{99} the use of the notices as a marketing ploy,\textsuperscript{100} the lack of an informed public,\textsuperscript{101} a general consumer apathy,\textsuperscript{102} and, in spite of conventional wisdom to the contrary,\textsuperscript{103} a possible disinterest on the part of the

\textsuperscript{90} Givens, \textit{supra} note 24. Doubleclick is a website that gathers anonymous information on "the web-surfing patterns of millions of Internet users," and Abacus is "a company that compiles personally identifiable information about the mail order catalog purchases of 90 million households." \textit{Id.}

\textsuperscript{91} See Woodruff, \textit{supra} note 1.

\textsuperscript{92} Id.

\textsuperscript{93} STAR SYSTEMS, \textit{supra} note 48, at 43.

\textsuperscript{94} Id. at 40.

\textsuperscript{95} Woodruff, \textit{supra} note 1.

\textsuperscript{96} \textit{See infra} notes 97-164 and accompanying text.

\textsuperscript{97} \textit{See infra} notes 106-18 and accompanying text.

\textsuperscript{98} \textit{See infra} notes 119-24 and accompanying text.

\textsuperscript{99} \textit{See infra} notes 125-29 and accompanying text.

\textsuperscript{100} \textit{See infra} notes 130-33 and accompanying text.

\textsuperscript{101} \textit{See infra} notes 137-40 and accompanying text.

\textsuperscript{102} \textit{See infra} notes 141-44 and accompanying text.

\textsuperscript{103} \textit{See supra} notes 86-90 and accompanying text.
consumer in financial privacy, and even a possible desire for the sharing of their information.

The unreadability of the notices is one of the simplest and most often cited explanations. Although the law requires the notices to be "clear and conspicuous," one analyst noted that American Express' privacy notice was written on a graduate school reading level. Literacy experts usually recommend that materials sent out to the general public be written on a junior high school level. This level is recommended because only about twenty-five percent of Americans have a college degree, and most people typically read three to five grades lower than their highest educational level. One study of sixty privacy notices concluded that the notices averaged a third- to fourth-year college grade level, which marks them as "difficult" to read on the Flesch Reading Ease Score. Most scores also fall below the standard several states require for insurance policies that are sold within their states. An October 2001 report by USAction caused quite a stir in the financial community when it reported that, of the fifteen privacy notices it surveyed, most received either a "D" or

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104. See infra notes 145-56 and accompanying text.
105. See infra notes 157-64 and accompanying text.
106. Woodruff, supra note 1.
108. Woodruff, supra note 1.
110. Id.
111. Id. The Flesch Reading Ease Score takes into account the average number of syllables per word and the average number of words per sentence to compute a score from one to one hundred. A high number indicates a readable text. MEDICAL SCHOOL INSTITUTIONAL REVIEW BOARD, COMPUTER SOFTWARE TO ESTIMATE READABILITY OF TEXT, at http://www.med.umich.edu/irbmed/informational/Documents/consent/software.html (last visited Feb. 23, 2002).
112. See Hochhauser, supra note 109. Only ten of the notices would have met the minimum score in Arkansas, Indiana, Kentucky, and Ohio. Id. Only three would have met the standard in Connecticut and Florida, and none of the notices would have met the standard in Maine. Id.
an "F."\textsuperscript{114} Citigroup and Bank One Corp./First USA received the highest grades for having a clear and understandable privacy notice, and MBNA America received the lowest grade.\textsuperscript{115} The banks surveyed questioned the methodology USAAction used, as well as noting that their notices were developed using considerable consumer input.\textsuperscript{116} The banks also point to low customer complaints.\textsuperscript{117} Indeed, an August 2001 survey found that of those consumers who read their privacy policies, eighty-four percent said they had understood them.\textsuperscript{118}

In addition to the unreadability, the notices may have been so long and involved that consumers just did not want to bother reading them.\textsuperscript{119} Indeed, Wells Fargo sent consumers a ten-page privacy notice.\textsuperscript{120} The study mentioned above noted that although many surveys used bullet points, those points were often followed by two paragraphs of text.\textsuperscript{121} In addition, only about seventeen percent of the sentences in each notice were identified as "short" by Grammatik 6.0 software.\textsuperscript{122}

Joe Belew, Consumers Bankers Association (CBA) President, blames the poorly worded notices on the "complicated and tortured regulations . . . that even confuse

\begin{footnotes}
\item[114] See Rob Blackwell, \textit{Ahead of Privacy Talks, Last-Minute Posturing}, \textit{Am. Banker}, Dec. 4, 2001, at 1. The fifteen banks surveyed were First Union Corp.; Columbus Bank & Trust; HSBC; First Premiere Bank; FleetBoston Financial Corp.; First Consumers National Bank; People's Bank; Metris Companies, Inc.; Citigroup; U.S. Bancorp; Bank of America, Chase Manhattan Corp., Bank One Corp./First USA Bank; Provident Bancorp Inc.; and MBNA America. Citizen Action of New York, \textit{supra} note 113, at v. Of these fifteen, only First Consumers National, People's, Citigroup, Bank of America, Bank One/First USA, and Provident Bancorp received a C. \textit{Id.} All others received a "D" or an "F." \textit{Id.}
\item[115] \textit{Citizen Action, supra} note 113, at ii. Citigroup and Bank One/First USA received 2.3 out of a possible 4.0 points, and MBNA received 0.3 out of a possible 4.0 points. \textit{Id.} at ii.
\item[116] See Blackwell, \textit{supra} note 114, at 1.
\item[117] \textit{Id.}
\item[118] \textit{In Brief: SIA Survey Finds Privacy Notices Work, Am. Banker}, Aug. 14, 2001, at 5 [hereinafter \textit{In Brief}]. This survey was funded by the Securities Industry Association. \textit{Id.} The survey also found that only sixty percent of the respondents had recalled receiving a notice, and, of those, only sixty-seven percent had bothered to read it. \textit{Id.}
\item[119] See Woodruff, \textit{supra} note 1.
\item[120] \textit{Id.}
\item[121] \textit{Id.}
\item[122] \textit{Id.}
\end{footnotes}
In late 2001, the Federal Trade Commission and seven other regulatory agencies sponsored a workshop to help financial institutions write better privacy notices. Critics charge that one reason the companies made their notices so long and confusing was because they want a low response rate, which the companies hope will lead legislators to believe consumers are simply not interested in their financial privacy. The fear of these critics may be justified, because the CBA President, Joe Belew, has expressed his view that the low response rate is an indication that consumer reaction "has been pretty positive," thus indicating his belief that consumers are satisfied with their banks sharing consumer information with other companies. Wes Vernon of Newsmax.com points out that this view "assumes that making the customer go to the trouble of informing the bank to remove his or her name from the list constitutes a real 'choice' in the strictest sense of the term."

Another reason the language may have been confusing to some customers is because many financial institutions decided to

123. Wes Vernon, Banks Use Sneaky Methods to Sell Your Financial Data, Social Security Number, at http://www.deweesonline.com/article_sneakymethod.html (on file with the North Carolina Banking Institute). This view was echoed by a number of banking executives at a December 2001 workshop. Nicole Duran, Bankers Stand By Work on Privacy Notices, AM. BANKER, Dec. 5, 2001, at 1. "We had to figure out how to fit our Cinderella foot into the unforgiving Gramm-Leach-Bliley glass slipper." Id. (quoting Robin K. Warren, Privacy Executive for Bank of America Corp.).

124. Get Noticed: Effective Financial Privacy Notices, at http://www.ftc.gov/bcp/workshops/glb/index.html (last visited Feb. 23, 2002). The seven other agencies are the Board of Governors of the Federal Reserve System; the Commodity Futures Trading Commission; the Department of Treasury, Office of the Comptroller of Currency; the Department of Treasury, Office of Thrift Supervision; the Federal Deposit Insurance Corporation; the National Credit Union Administration; and the Securities and Exchange Commission. Id.

125. See, e.g., Friery & Givens, supra note 5; Vernon, supra note 123.

126. See Vernon, supra note 123.

127. Id.

128. Id. (quoting an anonymous banker).

129. Id.
use the privacy notices as a marketing ploy.\textsuperscript{130} These financial institutions phrased their privacy notices in such a way as to lead the customer to believe the companies had structured their policies to benefit the consumer.\textsuperscript{131} The notices would begin with phrases such as: "Because you are a valued customer . . ." or "[i]n order to provide you with better products and services . . . ."\textsuperscript{132} Tena Friery and Beth Givens of the Privacy Rights Clearinghouse note that "[l]ead-ins of this sort do nothing to help consumers understand the minimal privacy rights they have. Such declarations of goodwill may even discourage consumers from reading further into the notice where the gist of the company's policy is hidden."\textsuperscript{133}

The Office of the Comptroller of the Currency (OCC) has recently voiced its displeasure with the manner in which companies are complying with the privacy provisions of GLBA.\textsuperscript{134} The OCC was particularly upset with the unreadability of the notices and the fact that many banks have actually discouraged customers from exercising their right to opt out.\textsuperscript{135} Due to these problems, Julie L. Williams, OCC Chief Counsel, has indicated that the OCC may soon order some financial institutions to send out corrective disclosures.\textsuperscript{136}

Lack of consumer knowledge may also have contributed to such a small response rate.\textsuperscript{137} In research for its "Managing Privacy" series, \textit{American Banker} found that many people had not "looked twice" at their privacy notices and were not even sure what they were.\textsuperscript{138} According to one Phoenix attorney, the consumers are "sick of them . . . . They think it's junk mail and it goes straight to the circular file."\textsuperscript{139} This is despite (or perhaps

\begin{itemize}
\item \textsuperscript{130} \textit{See} Friery & Givens, \textit{supra} note 5; Woodruff, \textit{supra} note 1.
\item \textsuperscript{131} \textit{See} Woodruff, \textit{supra} note 1.
\item \textsuperscript{132} Friery & Givens, \textit{supra} note 5.
\item \textsuperscript{133} Id.
\item \textsuperscript{135} Id. Some banks tell their customers not to opt out unless they are unhappy with their bank's service, and other banks discourage the customers from reading the entire notice. Id.
\item \textsuperscript{136} Id.
\item \textsuperscript{138} Id.
\end{itemize}
because of?) the fact that the average household has received at least fifteen privacy notices.\textsuperscript{140}

Many of those who did bother to read their privacy notices may have been surprised to learn that their financial institution is even allowed to sell their personal information.\textsuperscript{141} One commentator has observed that consumers seem to feel that there is not much they can do to protect their privacy.\textsuperscript{142} This thinking may lead to a general apathy in which, according to one study, even consumers who have never been victimized by fraud expect to be victimized eventually.\textsuperscript{143} While consumers may be skeptical of the financial industry as a whole, a survey conducted by the Securities Industry Association found that seventy-four percent of the respondents who had read their financial institution's privacy notice were satisfied with their company's policy.\textsuperscript{144}

Finally, poor consumer response may simply be due to the fact that consumers are not as concerned about financial privacy as surveys suggest.\textsuperscript{145} A June 2001 study found that many survey questions "distort or manipulate" the answers.\textsuperscript{146} The study went on to note that surveys "cannot effectively replicate the choices that consumers make in the real world, where they must choose among competing desires and where nothing comes for free."\textsuperscript{147} The authors of the survey also point out that consumers are continuing to shop online in record numbers despite early forecasts that privacy concerns would keep them away.\textsuperscript{148} The study notes that other surveys show that when people are asked to name their top concerns without being given a list of possible responses, privacy is not listed as one of their top concerns.\textsuperscript{149} The authors of the study also indicate that consumers may not always

\begin{itemize}
\item \textsuperscript{140} See generally Mark K. Anderson, Ignore This Letter Please, at http://www.wired.com/news/business/0,1367,44893,00.html (June 29, 2001).
\item \textsuperscript{141} Kuykendall, supra note 29, at 1.
\item \textsuperscript{142} Lee, supra note 137, at 1.
\item \textsuperscript{143} See id.
\item \textsuperscript{144} In Brief, supra note 118, at 5.
\item \textsuperscript{145} See HARPER, supra note 1, at introductory page.
\item \textsuperscript{146} Id. at 1. The study noted that the questions would group together several widely-ranging concepts (such as "security, identity fraud, spam, and other crimes and inconveniences") all under the blanket term "privacy." Id.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id at introductory page.
\item \textsuperscript{149} Id. at 5. Issues such as medical care, education, crime, and Social Security are the frequently-cited concerns. Id. at 5.
\end{itemize}
report their actual behavior accurately. For example, a BusinessWeek/Harris survey found that thirty-five percent of those surveyed "always" read privacy policies. However, website operators state that visitors pay very little attention to their online privacy policies. Additionally, a survey conducted by the Securities Industry Association found that seventy-four percent of those people who read their privacy notices were actually satisfied with their bank’s policy.

Lack of consumer concern appears to be even more prevalent in the United States than in other countries. An October 1999 IBM survey states that sixty-four percent of their United States respondents at least somewhat agree that “[m]ost businesses handle the personal information they collect about customers in a proper and confidential way.” This percentage compares to only fifty-eight percent in the United Kingdom and fifty-four percent in Germany.

This lack of concern leads into the final explanation for lack of consumer response: consumers may view the use of their personal information as beneficial. Two different surveys indicate this to be the case. The November 2001 STAR survey found three broad ways in which a majority of those polled thought the ability to share information would be helpful to them: security, convenience, and marketing-related benefits. Sixty-six percent thought the ability to share information would help “prevent fraud,” and sixty percent thought it would “prevent or minimize identity theft.” Convenience was also seen as very important, with sixty percent citing “improved customer service” as a benefit and fifty-eight percent stating that the “ability to use

150. Id. at 7.
151. HARPER, supra note 1, at 7.
152. Id. The authors refer to this lack of congruence between words and action as the “talk is cheap” problem with surveys. Id. at 6.
153. In Brief, supra note 118, at 5.
155. Id. at 22.
156. Id.
157. See STAR SYSTEMS, supra note 48, at 15.
158. See IBM, supra note 154, at 11-12; STAR SYSTEMS, supra note 48, at 15.
159. See STAR SYSTEMS, supra note 48, at 15.
160. Id. at 54.
another financial institution's ATM" was a benefit.\textsuperscript{161} Fifty-four percent thought "discounts on future purchases" would also be beneficial, and fifty-three percent thought that the ability to "receive information about new product offerings that interest [them]" would be a benefit.\textsuperscript{162} This interest in marketing was also cited in the IBM Multi-National Privacy Survey.\textsuperscript{163} Sixty percent of the Americans polled in that survey viewed "personalized marketing" as a "good thing."\textsuperscript{164}

VI. CONCLUSION

The scope of financial privacy has dramatically changed in the last few years, and GLBA has contributed substantially to that change.\textsuperscript{165} However, much data is still being collected on how the consumer feels about financial privacy,\textsuperscript{166} and little response by consumers to the opt-out notices is unlikely to help clear up the matter of how to regulate privacy.\textsuperscript{167} Therefore, federally mandated "opt-out" requirements are unlikely to be the final word on the subject.\textsuperscript{168} While unreadable notices,\textsuperscript{169} long notices,\textsuperscript{170} deliberately poor drafting,\textsuperscript{171} use of the notices as marketing ploys,\textsuperscript{172} lack of consumer knowledge regarding GLBA,\textsuperscript{173} consumer apathy,\textsuperscript{174} lack of concern,\textsuperscript{175} and a possible belief in the benefits of information-sharing\textsuperscript{176} have all been offered as possible explanations for the lack of a strong consumer response to their

\begin{footnotes}
\footnotetext{161.}{Id. at 54.}
\footnotetext{162.}{Id.}
\footnotetext{163.}{See IBM, supra note 154, at 20.}
\footnotetext{164.}{Id.}
\footnotetext{166.}{Compare Givens, supra note 24, with IBM, supra note 154, at 11-12.}
\footnotetext{167.}{See supra notes 85-95 and accompanying text.}
\footnotetext{169.}{See supra notes 105-18 and accompanying text.}
\footnotetext{170.}{See supra notes 119-24 and accompanying text.}
\footnotetext{171.}{See supra notes 125-29 and accompanying text.}
\footnotetext{172.}{See supra notes 130-33 and accompanying text.}
\footnotetext{173.}{See supra notes 137-40 and accompanying text.}
\footnotetext{174.}{See supra notes 141-44 and accompanying text.}
\footnotetext{175.}{See supra notes 145-56 and accompanying text.}
\footnotetext{176.}{See supra notes 157-64 and accompanying text.}
\end{footnotes}
opt-out rights, both federal and state legislators are likely to continue drafting new legislation until they reach a conclusion that the legislators feel gives individuals the say they deserve in determining what happens to their private information.\textsuperscript{177}

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\textsuperscript{177} See, e.g., Press Release, Sarbanes, \textit{supra} note 52.