

DEFINING CONSUMER PRIVACY: AN ESSENTIAL PRECURSOR TO NEW REGULATIONS

by
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With the exception of the war on terrorism, privacy may be this year's hottest public policy issue. There is a growing perception that a hunger for privacy is dominating the consciousness of the American public. This perception has captured the attention of many elected and appointed officials on both sides of the aisle. As a result, across the country, there are a remarkable number of legislative proposals intended to protect personal privacy. Consumer advocates argue that strict and inflexible laws are required to protect the public. Businesses, including insurers and financial services providers, are concerned that strict privacy regulations will be expensive, ineffective, and will deny consumers the choices they want and expect. As the debate about personal privacy rages, the one missing element is a clear definition of personal privacy. We do not really know what the public wants.

There is no way to adequately describe the explosion in technological advances that we have seen in the last ten years. These advances have made it possible to provide unparalleled levels of service to consumers. Yet, this same technology has increased the potential for harm. We must achieve a balance that reflects the needs and desires of our society, but we cannot do that effectively until we understand the meaning of privacy.

The insurance industry became fully engaged in the privacy debate with the passage of the Gramm Leach Bliley Act (GLBA) in 1999. GLBA's most prominent mandate requires that insurers give their customers the opportunity to opt out of certain information sharing practices. Insurers must send all policyholders a yearly notice explaining their rights, and renewing the opt-out opportunity. Some estimate that fewer than two percent of those receiving notices have opted out.

In light of the national attention on privacy, this number initially seems surprisingly low. However, the behavior of consumers shows that people make decisions about their privacy for many varying reasons. Consider the various reasons for purchasing caller ID. One person's motivation may be to avoid a stalker; someone else may just want to avoid telemarketers. These concerns are very different, and there is no way that a law could address them. Michael A. Turner, *Measuring the True Cost of Privacy: A Rebuttal to Privacy, Consumers, and Cost*, INFO. POLICY INST. (available at www.the-ipi.org).

The rapid growth of the Internet, despite widespread reservations about the security of personal information, provides extraordinary insight into consumer's privacy choices. A recent Gallop Poll indicates that 53% of those who use the Internet are "very concerned" about the security surrounding their personal information. Yet, they continue to use the internet and as your paper notes, it continues to grow at an extraordinary rate. These statistics prove that people engage in a privacy transaction of sorts. They recognize that there are certain inherent risks in giving out personal information, but are frequently willing to assume those risks in return for a desired benefit. In this case, people's desire to shop on the Internet frequently outweighs their privacy concerns.

Another insight into the nature of privacy is offered by survey data. Privacy ranks as a major concern when it is suggested in a list of possible concerns. However, when people are asked to list the things that concern them most, privacy does not make the list. See Jim Harper and Solveig Singleton, *With a Grain of Salt, What Consumer Privacy Surveys Don't Tell Us*, COMP. ENTERPRISE INST., June 2001. The practice of suggesting answers in surveys, commonly known as "push polling," is not a valid tool for determining public opinion. Push polls are used to form opinions rather than gauge them. Credible privacy surveys reveal that some people care deeply, others do not care at all, and some will have concerns in the middle. Turner, *supra*.

When viewing consumer behavior and credible surveys, it becomes clear that people do not have a one-dimensional view of privacy. Rather, individual privacy decisions reflect each person's concerns, values, and desires. Despite the fact that there is not a clear understanding of individual privacy decisions, there are a surprising number of increasingly restrictive privacy initiatives in the states. Consider the following:

- New Mexico and Vermont have implemented opt-in privacy regulations. In other words, a consumer must affirmatively agree to allow their information to be shared. This is more restrictive than GLBA's national consensus opt-out standard, which allows information sharing unless the consumer responds to the privacy notice instructing the sender not to share information. The opt-in regulations create a patchwork of varying rules that complicates compliance for multi-state insurers.
- Extensive legislative action increasing privacy restrictions is underway in California. Its passage will further complicate compliance efforts of national insurers.
- The wild popularity of state no-call lists may serve as a catalyst for increasingly restrictive privacy initiatives. An article in the October 17, 2002 *Indianapolis Star* reports that Indiana's no-call list contains roughly half of the residential phones in the state, is making money, and has a 98% approval rating. The popularity of these lists suggests that consumers don't want to receive marketing pitches on someone else's schedule. The absence of a groundswell against solicitations through the U.S. mail or commercials on television indicates that people don't mind marketing pitches but they do want control how and when to deal with them.

If public concerns about privacy are not clarified, insurers are likely to face an increasingly confusing patchwork of inconsistent and restrictive privacy laws that will impede legitimate business, increase administrative costs, and expose companies to new privacy litigation, without addressing the public's true concerns.

The outlook is even bleaker from the public policy perspective. It has been suggested that one critical downside to privacy legislation is that it gives people a false sense of security resulting in a diminished interest in new privacy technology. Further, the contention is made that this technology is best suited to answer individual privacy concerns. Sonia Arrison, *Consumer Privacy, A Free Choice Approach*, PACIFIC RESEARCH INST., Sept. 2001. Microsoft's P3P product, which allows individuals to establish their own privacy settings on their web browsers, is an exciting start. Dampening the market for this initiative with overly restrictive privacy legislation when it is not even clear what the public wants, would be a terrible loss.

Rather than rushing to judgment, policy makers should take their time to assess the real needs and wants of consumers, and work towards solutions, like GLBA's opt-out, that respect the wide variety of choices that people make when it comes to privacy.