

**BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, DC**

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In the Matter of

Alternative Forms of Privacy Notices

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Project No. P034815

**Comments of the Center for Democracy and Technology and Consumer Action on
Advance Notice of Proposed Rulemaking**

The Center for Democracy and Technology (CDT) and Consumer Action submit the following comments in response to the Advanced Notice of Proposed Rulemaking (ANPRM) request for comment on the Interagency Proposal to Consider Alternative Forms of Privacy Notices Under the Gramm-Leach-Bliley Act.

The Center for Democracy and Technology is an independent, non-profit public interest organization advocating democratic values and constitutional liberties in the digital age. CDT has been actively involved in policy formation and consumer education efforts toward effective, meaningful privacy protections. CDT has addressed these issues of information and data privacy as they have arisen in areas of government delivery of information and services, wireless communications, online authentication, spyware, cookies, network advertising, medical information and financial information.

Founded in 1971, Consumer Action works on consumer and privacy issues through its national network of 7,000 community based organizations. It is active at the state and federal level advocating for enhanced privacy and distributes more than two million multilingual publications a year on a wide range of privacy, financial and telecommunication topics.

CDT and Consumer Action have long held the position that optimal adoption of the Internet as a vehicle for commerce, research, government access and education relies upon robust implementation of principles of fair information practices. Without assurances about responsible data practices and the ability to control, where possible, the secondary use of their personal information, consumers will be less willing to engage in online transactions and to take advantage of the tremendous potential of the Internet. We also recognize that providing notice offline presents similar challenges that the Agencies' ANPRM attempts to address.

Recognizing that privacy is key to the successful consumer participation in the online world, CDT and Consumer Action have been closely involved in promoting rigorous implementation of fair information practices as applied to collection, use and sharing of consumer information online. Since the mid-1990s we have worked with industry, advocates, experts and government to facilitate adoption and implementation of fair information practices by business and government and have monitored the breadth and relative success of their adoption.

The organizations submitting these comments recognize that the linchpin of fair information practices is robust notice to consumers. Clear, understandable notice of a company's information and privacy practices empowers consumers to make choices about the company with which they may wish to do business based on their privacy policies, and to choose when possible to limit the transfer of their personal information to third parties. Failure to provide consumers with robust notice severely limits their ability to exercise the rights and responsibilities provided by other principles of fair information practices, including --but not limited to -- choice, access, and recourse to dispute resolution and legal remedies.

In Spring, 2003 CDT embarked on an inquiry into the state of "best practices" for implementation of fair information practices. As part of this effort, CDT convened a one-day, in-depth consultation of experts, advocates, and businesses about the successes and persistent challenges to delivering robust notice to consumers. Much of the conversation at that gathering focused on what measures might improve the usefulness of notices for consumers. Particular attention was paid to the need for better notice, and to the current efforts to design shorter notices that would provide consumers with key aspects of a privacy policy in an abbreviated form. Such a notice would work in conjunction with a longer, more detailed notice.

Among the many findings that emerged from this discussion was the realization that ongoing projects to determine the appropriate content and design of short notices were not informed in an ongoing fashion by a public interest or consumer advocacy perspective. In response to this discussion, CDT gathered a small, informal working group (in which Consumer Action participates) to bring that viewpoint and insight to the question of how to create short notices. The advocates represented in these comments, among others participating in the working group, believe it important that a clear consumer voice be brought to this discussion. The attached *Draft First Principles for Short Notices* attempts to represent an expression of consumer interests.

CDT and Consumer Action applaud the Agencies' work on the critical issue of how to deliver notice to consumers that is meaningful, fair and provides information that consumers want and need to make sound choices about the collection, use and sharing of their information. To aid the agencies in this effort, we submit the following comments:

1. *We submit for the agencies' review and consideration the attached Draft Principles for Short Notices.*

The attached *Draft Principles for Short Notice* represent a consumer and public interest perspective on what should be considered essential to a short notice for consumers. These principles are a work-in-progress. Currently, they focus on three key areas – principles to guide the development of the format and presentation of the content of the short notice; the relationship between the short notice and the longer, more detailed notice; and the need for inclusion of key principles of fair information practices in the short, as well as longer notice. Rather than prescribe specific content or presentation, the principles seek to articulate goals for short notices that would best serve consumers, and to provide high-level guidance as to how those short notices would be designed.

We intend that these serve as a guidepost for companies seeking to post short notices, and for ongoing projects whose goal is to create templates and formats for short notices. Lacking specific research data, prescribing more detailed requirements would be premature. However, it cannot be overstated that short notices will not obviate the need for longer notices, nor the need for companies to implement a full complement of fair information practices. CDT and Consumer Action hope that the Agencies will pursue additional independent research and consumer testing. The results of such research will inform our further input on the content and presentation of short notices.

2. *We strongly endorse, and urge the agencies to continue, work toward simplified, comprehensible privacy notice for consumers.*

The effort to develop content and formats for short notices contemplated by the Agencies represents an important step toward addressing a long-standing need to clarify and simplify notices, and to enhance their usefulness for consumers. As noted above, robust notice is key to fair information practices. Notice of a company's privacy policy, when communicated well to consumers, allows them to "vote with their feet" about whether or not to do business with a company based on their information practices. It also makes it possible for individuals to understand and exercise choice about subsequent transfer of their information.

The reality of privacy notices has fallen far short of this ideal. Notices have become long, cumbersome, and difficult to understand. Because companies that post notices open themselves to liability for unfair and deceptive practices under Section 5 of the FTC Act, corporate attorneys have drafted legalistic notices that often serve better as disclaimers that protect companies from liability than as vehicles to inform consumers about how their information is collected, shared, and managed, and about their choices about the sharing of information with third parties. Consumers, frustrated by these complex notices, often disregard them.

Difficulties encountered in implementing the notice requirements of Gramm-Leach-Bliley underscored these fundamental problems.

Short notices, if implemented properly, could ameliorate these problems by providing users with necessary first-tier information that would assist them in making deliberate choices about whether or not to engage with a company based on their privacy and information practices and in some cases, to exercise choice the transfer of their information to third parties. Short notices would not be intended to stand alone, rather to serve to provide the consumer with a "first level" view of their information practices and then direct the interested reader to the longer notice -- a more discursive version of the privacy notice that includes additional information. Based on the short notice, the consumers could choose to engage in transactions or activities, to take their business to another company or organization, or to seek more information in the longer notice. Thus, the short and long notice would work in tandem to inform the consumer.

It is critical to the successful adoption of fair information practices that this work toward short notices go forward and we urge the Agencies to embark on this important work.

3. *Decisions about short notice must be based on impartial research that is made available to the public.*

The organizations submitting these comments urge the agencies to allocate resources necessary to conduct the necessary research and survey work that assures that the interests of industry *and* consumers are reflected in the resulting short notice requirements. If short notices are to be useful to consumers *and* fairly communicate key information about privacy, it is critical that the Agencies engage in an impartial process of research and design development.

To date, it appears that all work in this area has been conducted and funded by the business community. While the best of intentions may be at work, the credibility of the process and of the resulting product requires that the needs and concerns of consumers be fairly, directly, and independently represented and not solely reflected through the lens of business interests or informed by preconceived industry beliefs. We strongly urge the agencies to undertake their own efforts in this area, providing for intensive and ongoing representation and participation by consumer group, academics and privacy advocates. To whatever extent industry-sponsored research forms the basis of government requirements for short notice, that research must be opened for public review.

4. *The FTC must act carefully in this inquiry about short notices for financial services information, as they will serve as a model for short notices in other sectors.*

We wish to highlight that the attached *Draft Principles* reflect requirements beyond those set forth in Gramm-Leach-Bliley. While this Advanced Notice of Proposed Rulemaking focuses on short notices for financial services industries seeking to comply with GLB, we believed it important to these principles reflect the elements and format for short notices that would assure that consumers receive all pertinent information about a company's information practices, regardless of the industry sector or legal requirements. Thus, the principles encourage inclusion of information in the short notice that goes beyond GLB requirements.

We take this opportunity to remind the Agencies that subsequent decisions about short privacy notices in other sectors will rely heavily on decisions that are made here. We urge the Agencies to consider the importance of *all* principles of fair information practices as and reflect them in its rules for short notice.

We are prepared to assist the Agencies in any way possible as it develops policies for implementation of short notices. We are encouraged by this process and thank the Agencies for the opportunity to submit these comments.

Respectfully submitted,

Paula J. Bruening
Ari Schwartz
Center for Democracy and Technology

Ken McEldowney
Consumer Action

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Draft First Principles for Short Notices

The following draft principles are the result of discussions of a working group of people with experience in privacy and notice issues and are offered for the consideration of regulators. The contents of this document reflect the drafters' belief that decisions about short notices for financial services organizations will influence the design of short notices for other industry sectors.

The drafters of these principles emphasize that it is important that public policy about the content or format of short notices should only be based on proprietary research if the research is fully available for independent inspection or peer review.

These principles represent a work in progress and are not to be considered a final statement of principles.

Format of the Short Notice

- The elements of a short notice should be expressed in neutral, plain language.
- The elements of a short notice should as much as possible be defined by binary (yes/no) description.
- The elements of short notice should be presented in a check-box or similar format.
- Short notices should be sufficiently consistent in content, language and presentation that they can be readily compared across policies. It is particularly important that the format for short notices be consistent within a particular sector, e.g., financial services or health care.

Relationship of Short Notice to Longer Notices

- Each short notice should be associated with a mandatory, publicly accessible long notice that describes a complete privacy policy. The long notice should be readily available to the public via a website and other appropriate means. When provided on paper, a short notice must include information about where the affiliated long notice may be obtained online.

- A long notice should use plain language and should be wholly compatible with its affiliated short notice. Preferably, a long notice will express each short notice element in the same language used in the short notice with additional language providing a fuller explanation of each element, along with additional required or optional elements that appear solely in the long notice. A short notice should link directly to the relevant information in the affiliated long notice.

Elements of Short Notice

The short notice must include the following:

- A short notice must prominently and expressly state at the beginning whether the organization shares or does not share personal information with other websites, institutions, or companies.
- A short notice must state clearly whether the consumer can exercise choice about this sharing.
- A short notice should indicate clearly how a consumer can opt out of the sharing of information to third parties.
- To serve consumer needs for information about the company's information practices, using a check box or similar format, short notices should also describe as many elements of fair information practices as practical.