

**Congressional Internet Caucus Advisory Committee Privacy Task Force
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SECTION: Approaches to Consumer Consent/Choice
SUBSECTION: The Benefits & Costs to Consumers of Consent/Choice Options

An Overview of Types of Costs for Opt-Out & Opt-In

This analysis surveys the costs that would result from imposing either opt-in or opt-out. Along with a description of different types of costs, we offer a rough assessment of whether the costs would be greater or lesser for an opt-out or an opt-in system. Generally (perhaps obviously) the costs would be lesser for opt-out, but should not be understated even in this case. The assumption is made in the case of opt-in that relatively few consumers will opt in, due to inertia or for other reasons.

Business Costs: Direct Costs of Compliance. Many of these costs would be roughly the same for both opt-out and opt-in. Such costs would include adding staff to carry out compliance tasks on an ongoing basis (including the costs of maintaining two or more different databases for opt-ins, opt-outs, and other variations), paying for many lawyer-hours to design litigation-proof privacy notices, the costs of web site redesign.

One significant compliance question that would drastically affect costs is whether databases of information collected *before* the privacy regulation was created must be retroactively brought into compliance with the new rules. One cost that would be greater with opt-in would be the cost of incenting consumers to opt-in by, where possible, offering discounts or coupons. But that would not always be possible.

Note that when the FTC has considered the costs of implementing privacy rules, it has recognized only this one type of costs; and even for this type of cost, its assessments have been cursory at best.¹ Note also that these compliance costs

¹See, e.g. George W. Gekas, Chairman, Subcommittee on Commercial and Administrative law Jere W. Glover, Chief Counsel, Office of Advocacy, US Small Business Administration et al., Letter to the Honorable Dennis Clark, Secretary, Federal Trade Commission;
<http://www.ftc.gov/privacy/comments/ussba.pdf>

to business would be passed on to consumers in the form of higher prices, as is happening now with Gramm-Leach-Bliley.

Business Costs: Indirect or Hard to Quantify. Some of the most important costs to businesses are indirect costs; these costs are likely to vary widely depending on whether there is no regulation, opt-out, or opt-in. The most important difficult-to-quantify costs include business ventures or new products that are never developed. Under opt-in in particular, lists of information that inform businesses about consumers' preferences would become scarcer, less information-rich, and more expensive or nonexistent (as has happened in Europe). This would make it much more risky for new ventures to get their foot in the door, making it harder or impossible for new ventures to start. The loss of the secondary market in such lists could also add to the failure rate of existing businesses forced to guess about what consumers want as opposed to having hard data about their behavior. Another difficult-to-quantify cost would be the loss of information used to fight fraud.

Although many of these costs would be highest for opt-in, it is a mistake to see them as absent for opt-out. For example, when Amazon.com gets a customer order, they check that order against a database developed by another company with everybody's name and address, to make sure they are sending to real person at a real address. The value and usefulness of the database lies in its completeness—whether the database were run on an opt-in or opt-out basis, any holes would destroy its value and add to the costs of fraud for companies and consumers.

Consumer Costs. Surprisingly, in its privacy proceedings thus far, the FTC has not considered the costs of opt-in or opt-out for consumers. While some of these costs would be difficult to quantify, there is no particular reason to assume that these costs would be low or nonexistent.

Some such costs would include compliance costs passed on to consumers in the form of higher prices. But the largest cost of opt-in would be the loss for many or all consumers of the benefits of information-sharing.

- The loss of cost-savings that come from using information to control inventory, target marketing, and other types of information-related cost savings. These would be highest for opt-in.
- The loss of discount pricing offers, savings plans.
- Losses of time and convenience from, for example, needing to fill out information about oneself repeatedly instead of entering it only once and having it shared between affiliates.

Studies are barely beginning to measure these benefits to consumers from information sharing. Cost savings from information sharing in financial services

alone have been estimated at 17 billion per year for the customers of the companies' surveyed (the savings would be larger still for the entire financial services industry).² A study of the apparel industry estimates that opt-in would impose a 1 billion dollar tax on catalog and Internet clothing sales, as businesses passed on an increase in costs from 3.5 to 11 percent.³

One very significant cost of opt-in not yet measured by any study would be higher prices that result from the loss of heightened competition due to less information sharing. That these costs would be considerable can be implied from existing research into advertising. An opt-in rule would operate as a ban on sending advertising materials to a majority of the population, when broadcast advertising or junk mail to everyone is not a viable economic option. (For most goods and services, especially those offered by small and mid-size firms, broadcast advertising is not an economic option; for those firms who can afford it, broadcast advertising is wasteful). Studies of advertising show that advertising bans result in higher prices and less choice and quality for consumers, because companies are not forced to continually respond to competitors' public statements about the merits and price of competing products.⁴

² Ernst & Young for the Financial Services Roundtable, Customer Benefits from Current Information-Sharing by Financial Services Companies, December, 2000, available at <http://www.bankersround.org/PDFs/custbenefits.PDF>.

³ Michael A. Turner, "The Impact of Data Restrictions on Consumer Distance Shopping," 2001, available at www.understandingprivacy.org in spring, 2001.

⁴ For an excellent overview of such studies, see generally John E. Calfee, *Fear of Persuasion: Advertising and Regulation* (Agora Association, 1997).