

April 27, 2000

MEMORANDUM

TO: NEC PRINCIPALS

CC: SALLY KATZEN
DAVID BEIER

FROM: FINANCIAL PRIVACY WORKING GROUP

RE: FINAL ISSUES ON FINANCIAL PRIVACY

We urgently solicit your views on two remaining issues: (1) whether we should describe the narrow opt-in proposal as involving “personal spending profiling” or use another term (see options below); and (2) whether to include an additional provision that would preclude sharing transactional information or characteristics derived therefrom involving especially sensitive issues (e.g., sexual orientation, religion, political views). We also attach the final legislative language that we have developed for the opt-in proposal. ***We ask that each of you share your reaction to this memo with your staff immediately (or contact Sarah Rosen Wartell directly at 456-5386). We will compare notes and determine whether or not a principals’ phone call should be scheduled for this evening.***

I. USE OF THE TERM “PROFILING”

Principals discussed on Monday whether to use the word “profile” in describing what is covered under the new opt-in provision for spending or earning information, including the list of purchases made via credit card, debit card, and similar payments mechanisms or characteristics derived therefrom. During the call, we agreed to try the word “profile” with limiting adjectives. Staff has agreed that “personal spending” is the best modifier to describe what is covered (although technically sources or income are also covered), as in “requiring an opt in for personal spending profiles or portraits.” (Staff have agreed on legislative language that does not include this term. (See III below.) The only question is how we describe what the language does.)

In the call, we also agreed to discuss the issue with the Commerce Department, which has the lead on Internet privacy, where “online profiling” has become a term of art for the activity of companies like DoubleClick. Commerce is seeking a “robust opt-out” rather than “opt-in” those firms. Commerce, through General Counsel Andy Pincus, strongly prefers *not* to use the word “profiling” for reasons described below. (The best alternatives we could come up with are “personal spending habits” or “personal spending portraits.”) David Beier and Sally Katzen agree with Commerce, and Peter Swire leans in the same direction. Treasury has expressed a preference for using “profile” but could live either way. Sarah Rosen Wartell, and Tom Kalil believe that we can manage the real problems raised by using the term “profiling” if we are

exceptionally careful and clear in the background paper that we give to the press, Hill, groups, and industry. We seek final guidance from Principals.

In short, the problem is that the term “profile” is used to describe the practice we seek to limit (sharing info or characteristics of a specific person) but also used to describe practices we do not want to affect (sharing lists of people that have specific characteristics). Thus, the use of another, less well-known term might lead to misunderstanding of what we are trying to do; but use of the broader term could also lead to the conclusion that our proposal does more than it does. The latter problem could lead to problems when we subsequently announce the self-regulation agreement with the on-line Doubleclick-like industry and people argue that we have already said that “opt-in” is appropriate for “profiling.” *Interestingly, both Karen Tramontano and Loretta Ucelli thought that most Americans do not know what “profiling” is and preferred the term “personal spending habits.”*

The case for “personal spending profiles”:

- The word “profile” has political resonance and has been widely used in privacy debates.
- Legislative passage is highly unlikely this year, so nuances are less important and the clarity of our public message is more so.
- None of the other available terms is particularly compelling. Treasury staff, for instance, think that financial firms’ opposition might be even greater if we require opt-in for a vague term like “personal spending patterns” which could be read to mean information used for risk management purposes (like unusual spending that prompts a call to ensure the card was not stolen) or other current industry practices.

The case for “personal spending habits” or “personal spending portraits”:

- Several of the staff who also work on Internet privacy, and especially on the DoubleClick industry issues, have had the same negative reaction to using “profile.” The vulnerability will come when the press says: “The Administration now favors opt-in for profiling.” We will be exposed in the near term, when the Doubleclick industry privacy code is announced in a couple of weeks. That code will include a robust opt-out rather than opt-in. We will also be exposed in the long term on Internet privacy, when people ask why we favor opt-in for some profiling but oppose any legislation for profiling done of web surfers.
- The best argument for using the term profiling is also the best reason not to use it. Its political resonance stems from the public’s broader expectations about the word’s meaning.

- Because our financial proposal covers only a subset of financial profiling (allowing, for instance, the American Express staffers), privacy advocates will criticize us for over-promising.
- Because industry engages in some form of profiling in a wide variety of settings, from credit card staffers to telemarketing activities to e-merchants studying browsing patterns, many parts of industry may react negatively to the broad-sounding announcement of requiring opt-in for personal spending profiling.

DECISION: _____ “Personal Spending Profiles”
 _____ “Personal Spending Habits”
 _____ “Personal Spending Portraits”
 _____ Other

II. PROTECTION FOR ESPECIALLY SENSITIVE INFORMATION

In the Principals’ discussion on Monday night, Staff was asked to draft an option for requiring opt-in (or a ban on) sharing or profiling based on especially sensitive information. We provide below pros and cons for inclusion of such language; however; ***staff are unanimous in recommending not to include the provision in the package for the reasons set forth below.***

Staff’s initial draft of this provision would require opt in for “any list or profile that identifies the consumer by -

- (1) race;
- (2) religious affiliation;
- (3) sexual orientation;
- (4) political affiliation; or
- (5) medical condition.”

Other candidates for inclusion might include: color, national origin, sex or marital status, or handicapped status. As for the other personal financial profiling, nothing would “prevent a financial institution from transmitting individualized information in order to identify the customer on an aggregate marketing list.”

The analogous language in the Equal Credit Opportunity Act states that “it shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction- (1) on the basis of race, color, religion, national origin, sex or marital status, or age.” If we decided to go further with this provision, we would need to consult with DOJ.

In favor of including the provision:

- (1) The law contains other anti-discrimination statutes that serve as analogies for this sort of limit on profiling. Categorizing individuals by group status such as race is noxious and legal rules can deter the bad actors.

(2) The anti-discrimination categories are traditional categories for defining “sensitive” information. Because we have generally sought to have stricter privacy rules for “sensitive” data, these categories are natural ones to consider including.

(3) This Administration strongly opposes discrimination, and this provision would send that message in a context where it would be hard for companies to defend their practices if they in fact were marketing based on the prohibited categories.

Against including the provision:

Although it is theoretically attractive to limit these sorts of noxious uses of information, arguments against doing so include:

(1) Some of the categories in traditional antidiscrimination statutes are widely used and accepted in the marketing context. For instance, marketing lists may target either men or women. Age is used for many marketing uses (would you want to receive the promotions received by a teenager?). Marital status and similar household information can be relevant for many marketing campaigns. The list used for ECOA may thus be over-inclusive.

(2) The list of categories used for ECOA may also be under-inclusive. Some especially sensitive information from a checking account may include political affiliation and sexual orientation. These categories have not usually been included in antidiscrimination legislation, and their inclusion here may draw a good deal of attention to this provision.

(3) For much of the most noxious behavior, some other law will probably often cover the activity, such as ECOA or the prohibitions on discrimination in forming contracts.

(4) The effect of this prohibition may most heavily fall on the most benign uses of such data, such as marketing of products that would be of particular interest to members of a group. Opting in to such uses may be unlikely because it would seem to be volunteering to be the victim of discrimination, even if the uses are economically beneficial.

(5) Several people have expressed concerns that including the antidiscrimination language could distract attention away from the privacy aspects of the proposal and into the different arena of civil rights legislation.

Decision: _____ *Do not include any provision*
_____ *Include a provision limiting any list or profile that identifies the consumer by the following characteristic [LIST THOSE YOU WANT COVERED].*

III. FINAL LANGUAGE FOR OPT-IN PROPOSAL

The working group has agreed that the following language best reflects the concept for which we are requiring opt-in; however, lawyers still need to integrate this language into the section that describes the mechanism of opt-in.

RESTRICTION ON THE TRANSFER OF PERSONAL SPENDING PROFILES.

(a) If a financial institution provides a consumer with payment services through a check, debit card, credit card, or other similar instrument, that institution shall not, unless the consumer affirmatively consents (opts-in), transfer to any affiliate or nonaffiliated third party--

(1) an individualized list of that consumer's transactions or an individualized description of that consumer's interests, preferences, or other characteristics; or

(2) any such list or description constructed in response to an inquiry about a specific, named individual;

if the list or description is derived from information collected in the course of providing that service.

(b) Paragraph (a) shall not apply to the transfer of aggregate lists of consumers, consistent with [cross-reference the opt-in requirement].