

## THE GRAMM-LEACH-BLILEY ACT

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On November 12, 1999, with overwhelming bipartisan support from both houses of Congress,<sup>1</sup> President Clinton signed the Gramm-Leach-Bliley Act ("GLBA") into law.<sup>2</sup> Enactment of the GLBA, also known as the Financial Services Modernization Act of 1999, was a revolutionary event in the world of financial services. For that industry, the GLBA marked the end of regulation that addressed the perceived defects in the banking system thought to have caused the Great Depression.<sup>3</sup> For consumers, it marked Congress' tentative attempt to ensure that private financial companies protect their customers' financial information.

Congress enacted the GLBA to address the need for increased competition in the financial services industry. The Act also acknowledges privacy concerns regarding consumer financial information. This Note focuses on the privacy provisions of the GLBA in light of this allowance for competition among financial institutions.<sup>4</sup> It examines whether the GLBA establishes sufficient legal protections for individual privacy rights in personal financial information. Part I provides an overview of the GLBA and describes the Act's regulation of the financial system, as well as its specific requirements regarding privacy protection. Part II explains why financial services institutions value access to personal financial information and why privacy regarding such information has become a contested issue. Part III analyzes the problems with the GLBA's privacy provisions and suggests that the financial services sector still has the upper hand in controlling information. This Note concedes that the GLBA is not a complete

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1. The vote in the House of Representatives was 362 to 57. 145 CONG. REC. H11,513, 11,531 (1999). The vote in the Senate was 90 to 8. 145 CONG. REC. S13,883, 13,917 (1999).

2. Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.).

3. 145 CONG. REC. S13,883, 13,915-16 (1999) (statement of Sen. Gramm).

4. Financial institution is defined as "any institution the business of which is engaging in financial activities" as described in the amended section of 4(k) of the Bank Holding Company Act of 1956. Pub. L. No. 106-102, § 509(3)(A), 13 Stat. 1338, 1443 (current version at 15 U.S.C. § 6809 (2001)). In a presentation on June 18, 2001, the Federal Trade Commission defined financial institution as one that "must be *significantly engaged* in financial activities." Examples include mortgage lenders, companies that sell travelers' checks, and check-cashing businesses. The Gramm-Leach-Bliley Act: Privacy of Consumer Financial Information, at <http://www.ftc.gov/privacy/glbact/glboutline.htm>.

defeat for privacy advocates because Congress has established some limits to the private sector's use of personal information. Nevertheless, as long as society remains information-driven and efficiency is valued at a premium, informational privacy concerns will remain secondary considerations.

## I. THE PASSAGE OF THE GLBA

### A. The GLBA Restructures the U.S. Financial System

The GLBA redesigned the regulatory structure that had been in place since the Great Depression. The regulations adopted in the early 1930s were not part of a "well-considered overall blueprint,"<sup>5</sup> but were made in "immediate response to developments and crises as they occurred."<sup>6</sup> Because the regulatory structure developed in such an ad hoc manner, the GLBA's reforms answer a long-felt need for coherence.<sup>7</sup>

The 1920s, marked by a succession of bank failures, culminated in the stock market crash of 1929.<sup>8</sup> The economic depression that followed led to more market failures, decreased public confidence, and engendered cries for government intervention.<sup>9</sup> In response to these calls for reform, Congress passed the Glass-Steagall Act.<sup>10</sup> Passed during the Roosevelt administration, the Glass-Steagall Act directly responded to the belief that the stock market crash resulted from the lack of separation between lending and underwriting activities that had allowed banks to engage in speculative investments.<sup>11</sup> Under the Glass-Steagall Act, Congress separated commercial banking<sup>12</sup> from investment banking,<sup>13</sup> thereby prohibiting

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5. GEORGE G. KAUFMAN, *THE U.S. FINANCIAL SYSTEM: MONEY, MARKETS, AND INSTITUTIONS* 340 (5th ed. 1992).

6. *Id.*

7. The GLBA represents twenty years of effort by industry lobbyists and lawmakers to reform the industry's regulatory structure. Adam Nguyen & Matt Watkins, *Financial Services Reform*, 37 *HARV. J. ON LEGIS.* 579, 579 (2000).

8. HELEN M. BURNS, *THE AMERICAN BANKING COMMUNITY AND NEW DEAL BANKING REFORMS 1933-1935*, 3-6 (1974).

9. *Id.*

10. 48 Stat. 162 (1933), *repealed by* Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 101, 113 Stat. 1338, 1341 (2001). The Glass-Steagall Act is also referred to as the Banking Act of 1933.

11. *Bankers as Brokers*, *BUS. WK.*, Apr. 11, 1983, at 70. *See generally* KAUFMAN, *supra* note 5, at 366-67.

12. Commercial banks generally accept deposits and issue loans. KAUFMAN, *supra* note 5, at 364. For an extensive description of commercial banking activities, see *id.* at 162-74.

commercial banks from underwriting most securities.<sup>14</sup> With the goal of eliminating conflicts of interest, Congress sought to prevent these firms from engaging in similar activities.<sup>15</sup>

The Glass-Steagall Act, however, was unsuccessful in maintaining these legal barriers.<sup>16</sup> Had it been effective, the Act would have minimized direct competition between commercial banks and securities firms.<sup>17</sup> Instead, by 1990, the largest banks were able to participate in almost all of the securities activities that they had engaged in before the Glass-Steagall Act.<sup>18</sup>

Several factors explain the deficiencies of the Glass-Steagall Act. First, designed as remedial legislation, the Glass-Steagall Act could not anticipate the development of new financial services and instruments.<sup>19</sup> Investment banks began to offer new products that effectively served the same needs as traditional commercial banking products. For example, investment banks introduced checkable interest-earning money market funds, a product that rivals traditional non-interest-earning checking accounts.<sup>20</sup> Second, the slower growth in traditional lending activities prompted commercial banks to pursue securities activities that were not expressly prohibited to them under the Glass-Steagall Act.<sup>21</sup> In response to these and other developments in the industry, regulatory agencies and

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13. Investment banks generally underwrite new debt and securities issued by private or government entities that require funding. Underwriting involves purchasing these securities and then reselling them to individual or institutional investors. *Id.* at 145. For an extensive description of investment banking activities, see *id.* at 144-50.

14. BURNS, *supra* note 8, at 81. Commercial banks were still allowed to underwrite state and local government issued securities. *Id.*

15. Congress sought to prohibit banks from shifting default risk to unsuspecting investors. For example, a bank with an insolvent client could improve its client's financial position by underwriting securities. The bank could then sell these low-grade securities to unsuspecting investors. The bank would no longer have an insolvent client, but investors would bear the risk of default. *Bankers as Brokers*, *supra* note 11.

16. For a chronology of what U.S. bank regulatory agencies have allowed at the insistence of the banking industry, see Paul J. Polking & Scott A. Cammarn, *Overview of the Gramm-Leach-Bliley Act*, 4 N.C. BANKING INST. 1, 1-2 (2000). See also *Bankers as Brokers*, *supra* note 11 (reporting that banks have chipped away at the Glass-Steagall Act by expanding services and acquiring other financial institutions). For a discussion regarding whether banks should be permitted to engage in investment banking activities, see KAUFMAN, *supra* note 5, at 373-78.

17. This Note uses the term "securities firm" interchangeably with "investment bank."

18. KAUFMAN, *supra* note 5, at 368.

19. *Id.* at 367.

20. *Id.*

21. *Id.* at 368.

courts made discretionary changes to the original regulatory framework without a well-conceived plan.<sup>22</sup>

Against this backdrop, the GLBA comes as no surprise. The Act's primary objective is to increase the competition of the financial services industry through a statutory framework.<sup>23</sup> The latter seems to have been the stronger impetus. In his speech urging fellow senators to vote for the GLBA, Senator Paul Sarbanes (D-MD), the then-ranking Democrat on the Senate Banking, Housing and Urban Affairs Committee, explained:

Very frankly, the issue for Congress is not whether these affiliations should occur, because they have occurred in one way or another, but whether they should take place on an orderly basis in the context of a responsible statutory framework, or instead, on an ad hoc basis as permitted by the regulators.<sup>24</sup>

Thus, at first glance, the GLBA seems to merely change regulations to reflect market developments. However, closer examination of its provisions shows that the Act makes sweeping changes in the financial services sector that go well beyond what had been permitted by regulators on an ad hoc basis.

## **B. The GLBA Increases Efficiency in the U.S. Financial System**

The GLBA repeals the sections of the Glass-Steagall Act that had restricted commercial banks from affiliating with securities firms.<sup>25</sup> The GLBA also amends the Bank Holding Company Act of 1956 ("BHCA"),<sup>26</sup> which had required banks to divest their nonbanking interests. Prior to the GLBA's enactment, banks could only engage in those activities that were closely related to banking.<sup>27</sup> Under the new statute, Congress allows affiliations between banking and securities firms<sup>28</sup> and the creation of financial holding companies that can engage in a wide variety of financial activities.<sup>29</sup> Thus, commercial banks, securities firms, and insurance compa-

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22. *Id.* at 373.

23. Pub. L. No. 106-102, 113 Stat. 1338, 1338 (1999).

24. 145 CONG. REC. S13,783, 13,787 (1999) (statement of Sen. Sarbanes).

25. The GLBA repeals sections 20 and 32 of the Glass-Steagall Act. Pub. L. No. 106-102, § 101, 113 Stat. 1338, 1341 (1999).

26. 70 Stat. 133 (1956), *amended by* Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 102, 113 Stat. 1338, 1341-42 (1999) (current version at 12 U.S.C. § 1843(c)(8) (2001)).

27. Nguyen & Watkins, *supra* note 7, at 580.

28. Pub. L. No. 106-102, § 101, 13 Stat. 1338 (1999).

29. *Id.* § 102. Section 102 amends the BHCA by allowing "financial holding companies" that can engage in banking, securities underwriting, and insurance activities.

nies are no longer formally restricted to a limited scope of financial activities. Furthermore, because the GLBA facilitates mergers among these financial institutions,<sup>30</sup> companies can now choose between entering into new product lines and services on their own or joining forces with an entrenched firm. The end result is that the GLBA restructures the marketplace by enabling one-stop shopping for financial services.<sup>31</sup>

One advantage of such one-stop shopping is increased efficiency.<sup>32</sup> The ability to provide a full array of financial services should result in lower average costs to consumers through economies of scale.<sup>33</sup> Companies already have the capital resources necessary to engage in these activi-

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Gramm-Leach-Bliley Summary of Provisions, at <http://www.senate.gov/~banking/conf/grmleach.htm>.

30. Nguyen & Watkins, *supra* note 7, at 583. The GLBA makes merging easier because regulators no longer play a discretionary role. However, mergers in the financial services sector date back to the 1980s. Bank of America acquired Charles Schwab in 1981. *Bankers as Brokers*, *supra* note 11. NationsBank, the fourth-largest bank at the time, acquired Montgomery Securities, a securities firm, in 1997. David Greising et al., *Love Among the Heavyweights*, *BUS. WK.*, July 14, 1997, at 55. Citibank, a bank holding company, merged with Travelers, an insurance company to form the world's largest financial services company in 1998. Matt Murray, *Fed Approves Citicorp-Travelers Merger*, *WALL ST. J.*, Sept. 24, 1998, at A3. When Citibank and Travelers announced their not-then-legal merger, they hoped that their lobbying power would persuade Congress to modernize the financial services sector. Robert W. Dixon, *The Gramm-Leach-Bliley Financial Modernization Act: Why Reform in the Financial Services Industry was Necessary and the Act's Projected Effects on Community Banking*, 49 *DRAKE L. REV.* 671, 676 (2001).

31. James Hamilton, *Gramm-Leach-Bliley Act Creates Financial Dynamic for the Next Century*, at <http://www.bankinfo.com/compliance/reform.html>. However, with depressed economic conditions since the GLBA's enactment, mergers in the short term are unlikely. Dixon, *supra* note 30, at 688. Furthermore, many of the mergers might have already occurred because congressional legislation tends to follow the market developments by roughly ten years. Raphael Soifer, *Banking Services: Banks Fail to Get in on the Act—The Take-up Rate Among International Banks to Become Financial Holding Companies in the US Has Been Relatively Low*, *THE BANKER*, Oct. 1, 2000, at Vol. 150, No. 896. *But see* Emily Thornton, *Here's Where the Easy Money Ends*, *BUS. WK.*, Dec. 18, 2000, at 96 (reporting that the GLBA has triggered a "shakeout" in the financial services sector referring to mergers, acquisitions, and firms exiting the industry).

32. James Hamilton, *Gramm-Leach-Bliley Act Creates Financial Dynamic for the Next Century*, at <http://www.bankinfo.com/compliance/reform.html>. Proponents believe that with firms free to compete in a wide range of financial activities, there will be enhanced competition, resulting in more efficient companies that can better serve their clients. *Id.* *But see* Nguyen & Watkins, *supra* note 7, at 584-89 (proposing possible anti-competitive consequences and the creation of firms that are "too big to fail" such that the government would have to bail them out in times of financial crisis because failure would damage the economy).

33. KAUFMAN, *supra* note 5, at 373.

ties.<sup>34</sup> Furthermore, the GLBA allows companies to take advantage of information by allowing financial supermarkets to share information among affiliates.<sup>35</sup> As one banking executive put it, “[t]he Act eliminates [legal] barriers without imposing significant obstacles to customer information sharing . . . thereby enabling a financial holding company efficiently to provide a broader range of services to its overall customer base.”<sup>36</sup> This means that a firm engaged in both banking and insurance operations can correlate information gathered from both activities to make even better decisions about customers. Thus, under the GLBA, resources, including information, will be used more efficiently.

### C. Limits to the GLBA’s Push For Efficiency

Since the GLBA fosters the use of information, it was inevitable that privacy advocates would lobby to include reasonable limits on the use and dissemination of such information. After much debate regarding the use of financial information,<sup>37</sup> drafters of the GLBA added in a plethora of privacy provisions. These provisions represent the first piece of federal legislation to establish a minimum federal standard of privacy for financial information.<sup>38</sup>

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34. *Id.* at 375-76.

35. The GLBA could have required databases that hold information gathered from different financial activities remain separate, thereby applying the concept of a “Chinese Wall,” which is already familiar to investment banks. In addition to underwriting activities, investment banks provide retail investors with recommendations regarding which securities to buy, sell, or hold. Thus, there is an inherent conflict in underwriting securities (performed by dealers) and providing investment advice (provided by research analysts). Accordingly, investment banks have tried to create a barrier between underwriting and research activities. For example, the two departments are often located on different floors and research analysts do not report to the dealers. Emily Thornton, *Commentary: Wall Street’s Chinese Walls Aren’t Strong Enough*, Aug. 27, 2001, at [http://www.businessweek.com/magazine/content/01\\_35/b3746057.htm](http://www.businessweek.com/magazine/content/01_35/b3746057.htm). See also Rick Wayman, *What is the “Chinese Wall” and Why is it in the News?*, available at <http://www.investopedia.com/articles/analyst/090501.asp>.

36. Polking & Cammarn, *supra* note 16, at 37-38.

37. Much of the discussion surrounding the GLBA was not about whether regulatory reform was necessary. Instead, the debate focused on companies’ use of personally identifiable financial information. See generally 145 CONG. REC. S13,783 (1999); 145 CONG. REC. H11,513 (1999).

38. While Congress has passed several laws protecting informational privacy, no federal law has applied to private companies’ use of financial information. See Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 (2001) (providing limits to when banks are obligated to release customer information to government agencies); Privacy Act of 1974, 5 U.S.C. § 552(a) (2001) (providing limits on federal agencies’ collection, use, and disclosure of personally identifiable information).

The GLBA establishes certain limits on companies' reliance on information. Subtitle A, which addresses the disclosure of customers' nonpublic personal information,<sup>39</sup> contains numerous provisions that require financial institutions to establish limitations governing the disclosure of nonpublic information to nonaffiliated third parties<sup>40</sup> and to provide their customers with a notice of the company's privacy policy.<sup>41</sup> Protection for this information lies in three sections: (1) section 501 requires institutions to establish a privacy policy, many of them for the first time;<sup>42</sup> (2) section 503 requires that the privacy policies be disclosed at the time of establishing a customer relationship;<sup>43</sup> and (3) section 502 prohibits firms from disclosing information to nonaffiliated third parties, subject to certain exceptions.<sup>44</sup>

In addressing the dissemination of nonpublic personal information, section 502 is at the heart of the GLBA's privacy provisions. Section 502(b)(1) provides in pertinent part:

A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless—

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39. "Nonpublic information" has three components as defined by Section 509(4) of Subtitle A: i) personally identifiable financial information provided by a consumer financial institution; ii) resulting from any transaction with the consumer or any services performed for the consumer; or otherwise obtained by the financial institution; and iii) that the term does not include publicly available information. Pub. L. No. 106-102, §§ 501-10, 113 Stat. 1338, 1436-46 (1999). The GLBA contains another set of privacy provisions. Subtitle B, which protects consumers from fraudulent access to their information, imposes criminal penalties on persons who fraudulently obtain customer information through false pretenses. *Id.* §§ 521-27.

40. Section 509(5) defines "nonaffiliated third party" as "any entity that is not an affiliate of, or related by common ownership or affiliated by corporate control with, the financial institution, but does not include a joint employee of such an institution." *Id.* § 509.

41. Federal agencies, including the Federal Trade Commission, have the task of issuing and implementing rules to carry out the purposes of this subtitle. *Id.* § 504.

42. *Id.* § 501. Section 501(b)(1) requires that companies meet agency-specific standards that are intended to ensure confidentiality of customer information. *Id.*

43. *Id.* § 503. Privacy policy notices must be sent to consumers annually thereafter. Privacy notices must include the following: the categories of nonpublic personal information that the firm collects and discloses, categories of affiliates and nonaffiliates with whom the firm shares information, and an explanation of the consumer's right to opt-out. *Id.*

44. *Id.* § 502.

(A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form . . . that such information may be disclosed to such third party;

(B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and

(C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option.<sup>45</sup>

Accordingly, consumers must affirmatively prevent companies from sharing their nonpublic personal information with nonaffiliated firms. If consumers fail to opt-out, their inaction provides firms with an implied consent to share information with any nonaffiliated company.

However, there are many exceptions even to this minor requirement of implied consent. Firms are only required to disclose that information is in fact shared and to enter into confidentiality agreements with third parties in limited circumstances: when companies hire nonaffiliated third parties to perform services, when firms contract with third parties (e.g. a company hires an outside agency to market its own products or services), and when companies enter into joint agreements<sup>46</sup> to co-offer products.<sup>47</sup> Additionally, under the section entitled "General Exceptions,"<sup>48</sup> firms can share information with nonaffiliates without consent for "a proposed or actual sale, merger, transfer, or exchange of all or a portion of a business or operating unit"<sup>49</sup> and for "institutional risk control."<sup>50</sup>

## II. THE BALANCE BETWEEN INFORMATIONAL PRIVACY RIGHTS AND ECONOMIC EFFICIENCY

While the Glass-Steagall Act has been criticized as a knee-jerk reaction to the crises of its time, it is clear that the GLBA is also a response to current trends. This section will describe the current understanding of the

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45. *Id.* § 502(b)(1).

46. Section 509(10) defines "joint agreement" as "a formal written contract pursuant to which two or more financial institutions jointly offer, endorse, or sponsor a financial product or service." *Id.* § 509(10).

47. *Id.* § 502(b)(2). When nonaffiliated third parties receive nonpublic personal information, they are prohibited from disclosing that information to other nonaffiliated third parties. *Id.* § 502(c).

48. *Id.* § 502(e).

49. *Id.* § 502(e)(7).

50. *Id.* § 502(e)(3)(C).

trade-off between the need for efficiency in information systems and the right to privacy. Part III will argue that, like the Glass-Steagall Act, the GLBA is very much a product of its contemporary conception of that balance.

### A. The Use Of Information Results in Increased Efficiency

We live in the “information age.”<sup>51</sup> While information has always had some value,<sup>52</sup> information started accruing real market value with the advent of computer technology.<sup>53</sup> In the 1960s, the federal government and large private corporations used mainframe computers to store records in computerized form.<sup>54</sup> Even then, these entities realized that this development would improve “operational efficiency.”<sup>55</sup> Using computer technology to better sift through personal financial information has allowed companies to increase efficiency (and profits) by increasing revenues while cutting excess costs. Consequently, reliance on databases in digital form has only increased.

Companies gather personal information in order to make strategic decisions about people.<sup>56</sup> Firms use computerized information to generate

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51. ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION? FROM PRIVACY TO PUBLIC ACCESS 1 (1994). *See also* FRED H. CATE, PRIVACY IN THE INFORMATION AGE 2 (1997) (describing society as “increasingly information-based”); Paul Schwartz, *Data Processing and Government Administration: The Failure of the American Legal Response to the Computer*, 43 HASTINGS L.J. 1321, 1326 (1992) (“Information has become the basis of the American economy.”).

52. BRANSCOMB, *supra* note 51, at 1-2.

53. *Id.* at 1-3.

54. PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 69 (1995).

55. *Id.* at 70. Before computers, if a business wanted to record information about its customers, it had to collect data and record by hand, and then store in physical files that were labor-intensive to maintain. CATE, *supra* note 51, at 14.

56. JAMES RULE ET AL., THE POLITICS OF PRIVACY 154 (1980). *See also* REGAN, *supra* note 54, at 70 (explaining that data collection serves the needs of firms to make precise decisions about people); PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW 310 (1996) (“To identify prospective customers and design products tailored for those customers, direct marketing depends on the collection of massive quantities of personal information.”); DIRECT MARKETING ASSOC., CUSTOMER RELATIONSHIP MANAGEMENT, A SENIOR MANAGEMENT GUIDE TO TECHNOLOGY FOR CREATING A CUSTOMER-CENTRIC BUSINESS EXECUTIVE SUMMARY, at <http://www.the-dma.org/library/publications/customerrelationship.shtml> (“Information about how customers interact with a company and use its products and services resides in data available from every customer interaction. That information is valuable - in fact, vital - in marketing, sales, service, organizational efficiency, and overall profitability.”). For a discussion on how use of predictive models may have an adverse impact on certain segments of the population,

profiles that are used to predict response rates to various promotional offers.<sup>57</sup> For example, credit card firms can provide pre-approved credit without exposing themselves to significant default risk because targeted individuals have been selected based on substantial amounts of pre-screened information. Similarly, banks can make better lending decisions without having to first establish a long-term relationship with each individual customer.<sup>58</sup> Such ready availability of information not only decreases the cost of doing business, but also increases companies' effectiveness at raising revenues. Furthermore, information is valuable in its own right. Information itself is a product that has monetary value. Some firms that profile their consumers will use the same data to compile marketing lists. These lists are then sold to other merchants to augment traditional sources of income.<sup>59</sup>

Clearly, demand for information is high. And yet, despite this intense demand, supply comes at a relatively cheap price. The costs for collecting, manipulating, storing, and transmitting electronic data are low.<sup>60</sup> The price of computers has declined<sup>61</sup> while advances in technology have significantly improved computing ability to process and store enormous amounts of data.<sup>62</sup> These advances have made information more readily accessible.<sup>63</sup> Databases facilitate rapid searches and organizations can locate a

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see Oscar H. Gandy, *Legitimate Business Interest: No End in Sight? An Inquiry into the Status of Privacy in Cyberspace*, 1996 U. CHI. LEGAL F. 77, 90 (1996).

57. Gandy, *supra* note 56, at 89.

58. Three national credit bureaus, Equifax, Experian, and Trans Union, provide firms with information to make business decisions regarding individuals. See SCHWARTZ & REIDENBERG, *supra* note 56, at 286.

59. BRANSCOMB, *supra* note 51, at 22. For example, credit card company American Express records their customers' buying habits in order to compile marketing lists that it sells to other merchants. *Id.* Also, direct marketing companies compile marketing lists and sell the personally identifiable information "to anyone who believes he or she might be able to use such information to turn a profit." *Id.* at 4.

60. CATE, *supra* note 51, at 1-2. This does not mean that information-processing systems are inexpensive. Instead, they perform services at a far lower cost than would be possible without them. *Id.* at 14-15. See also Gandy, *supra* note 56, at 81 ("advances in information technology serve to reduce the cost of transforming raw data into strategic intelligence").

61. WILLIAM C. BRAINARD & GEORGE L. PERRY, BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1:2000 128 (2000) (reporting that in 1990-1995, the price of computers dropped 15% annually, and that between 1995-1998, the price decline accelerated to nearly 28%).

62. Schwartz, *supra* note 51, at 1335.

63. RULE ET AL., *supra* note 56, at 11 ("The new technologies . . . lead people to collect, store, and use all sorts of personal information which previously could not be

specific entry from volumes of records in fractions of a second.<sup>64</sup> Furthermore, in a networked society, the information in databases can be “seamlessly combined with other data sources to generate ever more comprehensive records of individual attributes and activities.”<sup>65</sup>

This ability to selectively cull and collect information, as well as the capacity to correlate existing information, has been described as effectively being able to “create” new information.<sup>66</sup> As such, “personally-identified information is profligate.”<sup>67</sup> It is this ubiquitous dissemination of information that has many people concerned about their privacy rights.<sup>68</sup>

## B. The Right to Privacy

There is no single meaning behind the phrase “right to privacy.”<sup>69</sup> Rather, the right has been invoked in a wide spectrum of issues. It ranges from protection for the most intimate of matters to protection for data. As-

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treated in these ways.”). See also REGAN, *supra* note 54, at 69 (“[w]ith computerization[,] more information would be collected and retained and then disclosed or exchanged.”).

64. REGAN, *supra* note 54, at 70.

65. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1374 (2000). See also BRANSCOMB, *supra* note 51, at 3 (“[I]nformation that formerly resided in encoded scribbles on sheets of paper in dispersed locations, difficult to find, laborious to collect, and virtually impossible to correlate, can now be collected easily . . . Collections of data now wind their way as patterns of electronic impulses into vast database where, by virtue of their comprehensive nature and instant cross-accessibility, they become commodities more valuable than the sum of their independent parts.”); DAVID SADOFSKY, THE QUESTION OF PRIVACY IN PUBLIC POLICY 35 (1993) (“As computer technology advances, the ability to join . . . files [of the IRS, private credit agencies, criminal justice administrations, banks, telephone companies, and medical institutions] grows.”).

66. A. Michael Froomkin, *Regulation and Computing and Informational Technology: Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & COM. 395, 488 (1996) (quoting COLIN BENNETT, REGULATING PRIVACY: DATA PROTECTION AND PUBLIC POLICY IN EUROPE AND THE UNITED STATES 18 (1992)). It is important to note that the ability to create new information can lead to gathering data for the sake of gathering data. Joel R. Reidenburg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 FED. COMM. L.J. 195, 203 (1992) (“Often, information may be gathered ‘because it’s there.’”).

67. Cohen, *supra* note 65, at 1382.

68. See *infra* note 113.

69. There is no consensus on the concept of privacy. See JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 3 (1992) (“[W]e find chaos; the [legal and philosophical] literature lacks an accepted account of privacy’s definition and value.”); ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967) (“Few values so fundamental to society as privacy have been left so undefined in social theory or have been the subject of such vague and confused writing by social scientists.”).

sertions extend from the right to make personal choices regarding contraception, marriage, and abortion<sup>70</sup> to the right to be free from government trespass.<sup>71</sup> Underlying these claims is the concept of the “right to be let alone.”<sup>72</sup> Courts and legislatures, however, have declined to grant such sweeping protection.<sup>73</sup>

Currently, no single comprehensive privacy law exists.<sup>74</sup> Instead, general privacy rights stem from disparate sources. The U.S. Constitution,<sup>75</sup> state constitutions,<sup>76</sup> federal and state statutes,<sup>77</sup> and common law<sup>78</sup> all

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70. The Supreme Court addressed the right to privacy in the following cases: *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down state statute that made it illegal for married persons to purchase contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state statute that prohibited interracial marriage); *Roe v. Wade*, 410 U.S. 113 (1973) (striking down Texas state law that prohibited all abortions except those necessary to protect the life of the mother).

71. U.S. CONST. amend. IV. For a discussion on the Fourth Amendment and the right to privacy, see DARIEN A. MCWHIRTER & JON D. BIBLE, *PRIVACY AS A CONSTITUTIONAL RIGHT* 92-93 (1992).

72. See Charles M. Horn, *Financial Services Privacy at the Start of the 21<sup>st</sup> Century: A Conceptual Perspective*, 5 N.C. BANKING INST. 89, 90-92 (2001). See also REGAN, *supra* note 54, at 34 (noting that privacy is “a common term denoting the ways in which one’s ‘right to be let alone’ could be invaded”).

73. For example, in *Bowers v. Hardwick*, the Supreme Court held that the right to privacy does not include the right for consenting adults to engage in homosexual oral or anal sexual activity, even in the privacy of their home. 478 U.S. 186 (1986).

74. CATE, *supra* note 51, at 98.

75. While the U.S. Constitution does offer limited privacy protection, see *supra* note 70, the Constitution does not provide an express right to privacy. CATE, *supra* note 51, at 98. Furthermore, the Constitution applies only to government action. *Id.* at 50.

76. The state constitutions of Alaska, California, Hawaii, Montana, South Carolina, Washington, Massachusetts, Rhode Island, and Arizona provide a general right to privacy. Scott A. Sundstrom, *You’ve Got Mail! (And the Government Knows It): Applying the Fourth Amendment to Workplace E-Mail Monitoring*, 73 N.Y.U. L. REV. 2064, 2076-77 (1998).

77. See, e.g., ALA. CODE § 41-9-642 (2001) (“Disclosure of criminal histories or other information that may directly or otherwise lead to the identification of the individual to whom such information pertains may not be made to any person, agency, corporation or other legal entity that has neither the ‘need to know’ nor the ‘right to know’ as determined by the commission . . . .”); CAL. CIV. CODE § 1798.53 (2001) (“Any person, other than an employee of the state or of a local government agency acting solely in his or her official capacity, who intentionally discloses information, not otherwise public, which they know or should reasonably know was obtained from personal information maintained by a state agency. . . shall be subject to a civil action, for invasion of privacy, by the individual to whom the information pertains.”); IOWA CODE § 235A.12 (2001) (“The general assembly finds and declares that a central registry is required to provide a single source for the state-wide collection, maintenance and dissemination of child abuse information. . . . The purposes of this section . . . [is] to facilitate the identification of victims or potential victims of child abuse by making available a single, statewide source of

provide some level of privacy rights depending on the competing interests involved. Without a broad right to privacy, however, protection is area-specific and narrow in scope.

In the area of informational privacy, the private sector lacks a set of privacy rights that addresses the acquisition, storage, disclosure, and use of all personally identifiable information.<sup>79</sup> Without a comprehensive privacy regime, regulations controlling the use of personal information in the private sector respond to narrowly tailored issues.<sup>80</sup> This narrow tailoring “presents an inherent limitation for thorough data protection.”<sup>81</sup> While federal and state laws provide targeted protection for individuals in answer to defined problems, this issue-specific approach ignores the fact that information gathered in a given context often has substantial uses in other contexts. Such specific regulations, therefore, fail to address secondary uses of information.<sup>82</sup>

Privacy opponents have also invoked their First and Fifth Amendment rights.<sup>83</sup> In asserting freedom of speech rights, such users of information have argued that a right to informational privacy would prevent such users

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child abuse data . . . and to provide maximum safeguards against the unwarranted invasions of privacy which such a registry might otherwise entail.”)

78. Long before the U.S. Supreme Court decided that the federal constitution provides some privacy protection, the right to privacy was derived from common law. *See supra* note 70. In a famous law review article, attorneys Samuel Warren and Louis D. Brandeis (later a Supreme Court justice) argued that common law principles dictated that everyone should own the “facts relating to his private life.” *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

79. Reidenberg, *supra* note 66, at 208. This reluctance to broadly regulate industry stems from the deep-seeded “fear of government intervention into private activities.” *Id.* at 209.

80. *See id.*

81. SCHWARTZ & REIDENBERG, *supra* note 56, at 215. This targeted approach leads to “a patchwork of uneven, inconsistent, and often irrational privacy protection.” CATE, *supra* note 51, at 80 (1997). *See also* JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 149 (1997) (“[T]he patchwork of legal protections is peculiar.”). For example, there is stronger legal protection for information regarding a customer’s video rentals than medical records. CATE, *supra* note 51, at 80-81. The Video Privacy Act of 1988 makes it illegal for video stores to disclose their customers’ names, addresses, and the specific videotapes rented. Video Privacy Act of 1988, 18 U.S.C. § 2710 (2001). For a general discussion regarding privacy protection for medical information, see RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW 198-227 (1999).

82. SCHWARTZ & REIDENBERG, *supra* note 56, at 270 (1996).

83. *See* Cohen, *supra* note 65. The First Amendment limits the government’s regulation of speech. U.S. CONST. amend. I. The Fifth Amendment prohibits the government from taking private property without just compensation. U.S. CONST. amend. V.

from disseminating information, a protected form of speech.<sup>84</sup> Also, companies argue that because information is needed to reach their target audience, privacy restrictions hamper their “right to communicate with consumers.”<sup>85</sup> In response, courts have acknowledged that the First Amendment does provide some protection for commercial speech.<sup>86</sup> To reinforce their position, companies have argued that they actually own the information. The Supreme Court has acknowledged the validity of this claim by extending the takings clause to protect stored data,<sup>87</sup> thus recognizing the property status of information. Consequently, opponents claim that government prohibitions that “substantially interfere with a private party’s use of data that have been collected or processed, may require compensation under the Fifth Amendment.”<sup>88</sup> Such arguments have contributed to the difficulty in limiting the use of personal information.

### III. DISCUSSION

Though the GLBA provided Congress with an opportunity to revisit informational privacy, the GLBA clearly erred on the side of economic efficiency. At the same time, the GLBA can still be viewed as a partial victory for privacy advocates. How well this partial victory will fare in today’s climate of increased concerns over national security remains to be seen. Nevertheless, the GLBA’s privacy protections are not insignificant, as outlined below.

#### A. The GLBA Provides Some Privacy Protection

This Note defines informational privacy as “an individual’s claim to control the terms under which personal information—information identifiable to the individual—is acquired, disclosed, and used.”<sup>89</sup> This Note sug-

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84. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1050-51 (2000).

85. Gandy, *supra* note 56, at 98. For an in-depth analysis of First Amendment implications, see Cohen, *supra* note 65, at 1409 (explaining that the flaw in asserting First Amendment principles is that it “assum[es] that the collection, processing, and exchange of personally-identified data are ‘speech’”).

86. *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

87. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

88. CATE, *supra* note 51, at 72.

89. Information Infrastructure Task Force, *Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information* (1995), available at [http://www.iitf.nist.gov/ipc/ipc/ipc-pubs/niiprivprin\\_final.html](http://www.iitf.nist.gov/ipc/ipc/ipc-pubs/niiprivprin_final.html). This definition is consistent with other proposed definitions. *See* WESTIN, *supra* note 69, at 7 (defining

gests that because an individual does not effectively control the terms under which his financial information is used, the claim to financial information privacy is a weak legal right at best.<sup>90</sup> The lack of protection becomes clear when we examine the problems that riddle Subtitle A of the GLBA: (1) The definition of nonpublic information is unclear; (2) Merely receiving information about a firm's privacy policy does not provide consumers with privacy protection; (3) Consumers cannot prevent disclosure of information to affiliates; (4) Consumers have limited control over the dissemination of information to third parties; and (5) Individuals have no recourse for violations.

1. *Nonpublic Information Does Not Necessarily Mean Private Information*

Many privacy advocates note that “[t]he boundaries between what is considered to be public information and what is considered to be private have been moving targets for several generations now.”<sup>91</sup> This boundary is especially important because the Act does not restrict firms from sharing publicly available information.<sup>92</sup> In promulgating their rules, federal agencies<sup>93</sup> agree that information is “publicly available” if a financial institution has a “reasonable basis” to believe it is lawfully available to the general public from government records and widely distributed media.<sup>94</sup> In recognizing that media includes the Internet, the Federal Trade Commission acknowledged that information obtained from an Internet site can be considered public if the site is available to the general public. With the increasing breadth of the Internet, the line between private and public will continue to shift.

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informational privacy as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”); REGAN, *supra* note 54, at 70 (characterizing informational privacy as “the rights of individuals to control information about themselves”); Horn, *supra* note 72, at 91 (defining personal financial privacy as “the right of an individual to control the collection, disclosure and use of personal information concerning his or her financial transactions and affairs”).

90. *But see* CATE, *supra* note 51, at 23 (proposing that general informational privacy is merely a social value rather than a legal right). However, even before the GLBA's enactment, Congress has provided some degree of informational privacy. *See supra* note 38.

91. BRANSCOMB, *supra* note 51, at 8.

92. Subtitle A expressly deals with only nonpublic personal information. Pub. L. No. 106-102, §§ 501-10, 113 Stat. 1338, 1436-45 (1999).

93. *See supra* note 41.

94. *See* Horn, *supra* note 72, at 108. A more restrictive definition of “publicly available” would have required that information have actually been obtained from a public source.

## 2. *Consumers are Not Empowered by Receiving Access to a Firm's Privacy Policy*

As noted earlier, section 503 requires that financial institutions provide consumers with their privacy policy.<sup>95</sup> During congressional hearings, proponents emphasized that the bill forces financial institutions to establish a privacy policy and to disclose that policy for the first time in U.S. history.<sup>96</sup> Proponents stressed that the required disclosures give consumers the most powerful tool that exists in a free society in protecting privacy: "if you do not like the bank's policy, you can take your business somewhere else."<sup>97</sup> There are glaring loopholes, however. Nothing in the Act, for example, prevents firms from sharing information about a former customer. Nor does the Act prohibit companies from changing their privacy policies after a consumer has signed on. Should an existing customer be dissatisfied with his firm's privacy policy, taking his business elsewhere does not prevent the old firm from sharing the information that they have already gathered about him with other affiliated firms.

## 3. *Consumers Cannot Prevent Disclosure of Information to Affiliates*

Even though Congress explicitly directs each financial institution to "respect the privacy of its customers,"<sup>98</sup> customers cannot opt-out of information sharing between affiliates. Allowing a single company to engage in banking, securities, and insurance activities increases the secondary uses of such information. For example, once a banking division obtains nonpublic personal information, there is no legal roadblock to prevent it from sharing that information with its insurance and securities divisions. As noted earlier, these affiliates can correlate existing data to create new information.<sup>99</sup> These exchange opportunities severely restrict an individual's ability to control access to his personal financial information.

This problem is further exacerbated by the fact that the GLBA fosters mergers among financial institutions.<sup>100</sup> Even without mergers, the mere existence of financial supermarkets and the resulting cross-sharing of in-

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95. Pub. L. No. 106-102, § 503, 113 Stat. 1338, 1439 (1999).

96. *Id.* § 503(a). While privacy policies must be disclosed at the time of establishing customer relationships for future customers, the Act does not address the concerns of existing customers who are dissatisfied with their companies' privacy policies.

97. 145 CONG. REC. S13,883, 13,913 (1999) (statement of Sen. Gramm).

98. Pub. L. No. 106-102, § 501, 113 Stat. 1338, 1436-37 (1999).

99. *See supra* notes 66-67 and accompanying text.

100. *See supra* note 30.

formation significantly decreases privacy.<sup>101</sup> Allowing and encouraging mergers only aggravates an already precarious situation since a merger will most likely result in a broader customer base from which to gather information.

Although individuals can take precautions to prevent this cross-sharing of information, such safeguards are not foolproof. An individual can choose to use separate entities for his financial needs. However, separate entities may use joint agreements<sup>102</sup> or contract out to third parties to service the individual's needs. Thus, information sharing may be unavoidable.

#### 4. *Consumers Have Only Limited Control Over the Dissemination of Information to Third Parties*

As noted earlier, firms can share information if consumers fail to opt-out or if the purpose of the sharing falls under one of the many statutory exceptions. Failing to opt-out is remarkably easy. Due to the extensive use and value of information, companies have little or no incentive to facilitate the opt-out process. Privacy advocates describe the notices as "deceptive"<sup>103</sup> and argue that the opt-out language is buried in "legalese."<sup>104</sup> Furthermore, the GLBA does not provide any guidelines or standards for the opt-out process. As a result, each process is likely to include unique hurdles, requiring consumers to muddle through a different opt-out process for each firm. Moreover, many opt-out procedures are cumbersome. For example, some companies require their customers to first request an opt-out form, wait for the form to arrive by post, and then return the opt-out form by post.<sup>105</sup>

Additionally, even the statutory exceptions provide firms with significant discretion. Since firms are allowed to share information for proposed mergers or acquisitions,<sup>106</sup> the existence of a mere proposal is typically

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101. See *supra* notes 66-67 and accompanying text.

102. See *supra* note 46 and accompanying text.

103. Eric Roston, *How to Opt Out of Database Sharing; Who's Got your Number?*, TIME, July 2, 2001, at 46.

104. Don Oldenburg, *Protecting Your Financial Privacy*, WASH. POST, June 27, 2001, at C12.

105. Kathy Kristof, *Choice words for opting out; Consumers run into trouble with privacy forms*, CHI. TRIB., Aug. 7, 2001, at 7N. See also Robert MacMillan, *Few Net Banks Offer Clear Privacy Protections*, NEWSBYTES, Aug. 29, 2001 (stating that The Center for Democracy and Technology had reported that less than one-third of banks offer an online opt-out and some firms require customers to first call to request an opt-out form that would be sent via U.S. mail).

106. Pub. L. No. 106-102, § 502(e)(7), 113 Stat. 1338, 1438 (1999).

enough to allow companies to trade nonpublic information on their respective consumers. Also, even if an individual specifically avoided financial supermarkets and took his business to several different firms, there is no guarantee that someday these separate entities will not become part of a larger financial conglomerate. Maybe the most disconcerting exception is the “disclosure of nonpublic information for required institutional risk control.”<sup>107</sup> Congress not only failed to define “institutional risk” control in this section, but failed to discuss it anywhere in the Act. This exception seems to allow broad discretion for information sharing.

#### 5. *Firms Have Little Incentive to Comply*

Finally, the GLBA does not provide any remedies for individuals should a firm fail to comply with any of the disclosure provisions. Various federal regulators, state insurance authorities, and the Federal Trade Commission have responsibility for enforcing these provisions.<sup>108</sup> However, according to Section 505(b)(1), enforcement equates to implementation of standards.<sup>109</sup> As one commentator pointed out, “the law establishes . . . overlapping regulatory supervisory enforcement mechanisms to identify and correct abusive policies and practices rather than to remedy or resolve individual rights affected by specific infractions. The structure is thus somewhat illusory, lacking in any recourse for an individual to remedy the infringement of his or her privacy.”<sup>110</sup> Without the threat of monetary remuneration, adherence to these privacy provisions may not be a high priority for firms faced with a barrage of economic pressures. This lack of remedies further compromises the individual’s right to privacy.

### **B. The Trade-off between Privacy and Efficiency**

The natural conclusion from the above analysis is that the GLBA does not create a strong right to informational privacy because of the inherent trade-off between efficiency and privacy. There is no question that information spawns efficiency. According to former President Clinton’s Information Infrastructure Task Force “[i]nformation is one of the nation’s most critical economic resources.”<sup>111</sup> Even privacy advocates agree that

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107. *Id.* § 502(e)(3)(C).

108. *Id.* § 505.

109. *Id.* § 505(b)(1).

110. David W. Roderer, *Tentative Steps Toward Financial Privacy*, 4 N.C. BANKING INST. 209, 213 (2000).

111. Information Infrastructure Task Force, *National Information Infrastructure Agenda for Action*, at <http://www.ibiblio.org/nii/NII-Agenda-for-Action.html>. See also BRANSCOMB, *supra* note 51, at 7 (“the most developed economies have become information-dependant”); OFFICE OF TECHNOLOGY ASSESSMENT, *COMPUTER-BASED NATIONAL*

“[i]nformation is the lifeblood that sustains political, social, and business decisions.”<sup>112</sup> Under the GLBA, financial supermarkets can more easily correlate information, thereby fostering efficient business decisions. At the same time, there is no question that people want privacy. Surveys show that people are concerned about their growing lack of privacy.<sup>113</sup> Therefore, the issue is when, if ever, does the interest in privacy trump the need for information.

Clearly, privacy does not trump the need for information under the GLBA. Congress could have provided stronger privacy protection. For example, the GLBA could have required firms to affirmatively obtain the consumer’s consent to information sharing between third parties by requiring opt-in rather than opt-out. However, companies would have had to expend resources to obtain express consent. This would have come at the sacrifice of efficiency. The GLBA could have also imposed stronger limitations on information sharing among firms. This could be accomplished in two ways: 1) by requiring financial supermarkets to establish walls between databases that hold banking, securities, and insurance information;<sup>114</sup> and 2) by allowing consumers to opt-out of information sharing between affiliates, rather than limiting it to nonaffiliated sharing. Restricting the use of this information in these ways, however, would also have come at the sacrifice of efficiency. By providing consumers only limited control over dissemination of information to third parties and by pro-

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INFORMATION SYSTEMS 47 (1981) (“The more complex a society, the more central information is to its economic activities.”), at <http://www.wws.princeton.edu/~otaf/ns20/alphaf.html>.

112. Anne W. Branscomb, *Global Governance of Global Networks: A Survey of Transborder Data Flow in Transition*, 36 VAND. L. REV. 985, 987 (1983).

113. Privacy Rights Clearinghouse, *Public Attitudes About the Privacy of Information*, at <http://www.privacyrights.org/ar/invasion.htm>. The 1997 Money Magazine Poll reports that 74% of the public are somewhat or very concerned about threats to their privacy and that 64% are more worried now than 5 years ago. *Id.* In a 1998 survey done by AARP’s Public Policy Institute, 81% of respondents opposed the sharing of personal and financial information by affiliates. *Id.* Despite consumer concern regarding privacy, industry reports indicate that only 5% of people opted-out. W.A. Lee, *Opt-Out Notices Give No One a Thrill*, THE AMERICAN BANKER, July 10, 2001, at 1. Companies assert that people are not as concerned about privacy as originally thought. *See id.* However, privacy advocates argue that the notices explaining the opt-out procedures are confusing. *See supra* notes 103-105 and accompanying text. Furthermore, many consumers may not have even read the notices. *See supra* note 104 (reporting that according to a recent American Bankers Association Survey, 41 percent of respondents said they could not recall receiving any privacy notices, 22 percent said they received the notices but did not read them, and 36 percent said they had read the notices they received).

114. *See supra* note 35.

hibiting consumers from seeking recourse for privacy violations, Congress has clearly ruled that efficiency is paramount in today's economy.

### C. The GLBA is Still A Partial Victory For Privacy Advocates

Despite the inherently weak nature of privacy restrictions in the GLBA, their inclusion should be viewed as a partial victory for privacy advocates for three reasons. First, the laws do increase privacy protection to a certain extent. Prior to the GLBA, firms were able to utilize information without any real limits.<sup>115</sup> Subsequent to the GLBA, firms further depend on information to make strategic decisions about customers, but the use and exchange of such information is regulated by the government.

Second, inclusion of these privacy provisions represents a notable and significant victory over the business lobby. These privacy provisions were included over strong objections by lobbyists. As the first legislation to impose a federal standard of privacy for financial information on private companies,<sup>116</sup> the GLBA represents a partial victory for privacy advocates. Although companies now have increased access to information, they also bear a corresponding responsibility for ensuring certain levels of privacy of such information.

Third, and finally, the GLBA does not preempt state privacy laws. Privacy advocates are not barred from lobbying states to enact greater privacy protection.<sup>117</sup> To achieve more substantial victories, however, privacy advocates will have to justify trade-offs that would likely result in decreased efficiency.<sup>118</sup>

## IV. CONCLUSION

Under the GLBA, companies still have the upper hand in controlling financial information. Many in Congress, however, have already attempted to pass amendments that would provide stronger privacy protec-

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115. See *supra* note 38. See also note 59 and accompanying text.

116. See *supra* note 38.

117. Pub. L. No. 106-102, § 507, 113 Stat. 1338, 1442 (1999). However, this may prove problematic because "a system of fifty different legal regimes for privacy is ill-suited to a marketplace such as the Internet, where geographic borders are essentially irrelevant." Robert E. Litan, *Law and Policy in the Age of the Internet*, 50 DUKE L.J. 1045, 1066 (2001) (discussing the interaction between the GLBA and the Internet, and arguing that different standards of privacy imposed by states will increase transaction costs).

118. For a discussion proposing decreasing reliance on information, see RULE ET AL., *supra* note 56, at 153-64.

tion.<sup>119</sup> Yet, the momentum for increased privacy rights may have come to a halt in light of the new public concern over national security.<sup>120</sup> With recent terrorist attacks on the U.S. and the need for greater national security, the government and lobbyists alike have both slowly backed away from privacy legislation. For example, the Federal Trade Commission recently announced that it would no longer pursue stronger consumer privacy laws.<sup>121</sup> Despite these developments, many still believe that the GLBA did not strike the proper balance between efficiency and privacy. Nevertheless, in a society that values information, any substantial trade-off that leads to decreased efficiency may be difficult to defend.

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119. For example, prior to recessing this past August, Reps. Edward Markey (D-Mass) and Joe Barton (R-TX) introduced H.R. 2720 which would require an opt-in process rather than the more troublesome opt-out process. Robert MacMillan, *Bills Would Alter Financial Privacy Protections*, NEWSBYTES, Aug. 29, 2001.

120. With the terrorist attacks of September 11, 2001, advocating the need for increased privacy may now be a difficult proposition. See JAMES F. HOGE, JR. & GIDEON ROSE, *HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR* 152-54 (2001) (proposing that the "traditional American reverence for privacy" imposes constraints on domestic intelligence operations and that loosening those constraints would have helped to avert the September 11 tragedies).

121. Associated Press, *FTC Chairman to Drop Call for New Internet Privacy Laws*, (Oct. 2, 2001). In response to the change in the administration's position, one privacy advocate stated, "[i]f the speech was delivered on Sept. 10, it would have been viewed as a negative event in the privacy community. Now that it's delivered after the 11th, it's a crisis. It looks like we've lost federal government support." *Id.*

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