

**Congressional Internet Caucus Advisory Committee Privacy Task Force
Briefing Book Submission
April 19, 2001**

SUBMITTED BY: The Competitive Enterprise Institute

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SECTION: Approaches to Consumer Consent/Choice

SUBSECTION: The Benefits & Costs to Consumers of Consent/Choice Options

**A Brief Answer to “If Information Sharing is Beneficial,
Why Not Let Consumers Opt-In?”**

If the first step in the privacy debate was to propose mandatory opt-in, and the second step the reply that opt-in would reduce beneficial information-sharing, the next question is to ask, if information-sharing is really beneficial, why not give consumers the chance to opt-in? This is a good question. The answer, in a nutshell, is that there is no particular reason to have opt-in; another problem is that most of the benefits of information-sharing are too complex to easily explain to consumers.

Why not opt-in? Instead, ask why. The question should be, when it comes to imposing slow and restrictive regulatory processes on fast-moving, experimental high-tech, not “why not,” but “why?” When one asks “why opt-in?” instead, it is very difficult to find a good answer. The use of consumer information is not generally harmful to consumers, and specific real harms like identity theft are better addressed by other means.

The right and wrong of the matter. If the question is still, “why not?” one might very well answer, because it is not the right thing to do. Opt-in creates a strong version of a broad new property right in information that is inconsistent with the U.S. legal tradition of the free flow of information. Opt-in acts as restriction on companies exchanging truthful information about real people and events, for no particularly good reason.

Indirect and diffuse Benefits. An additional “why not?” is because it would be very burdensome to persuade consumers to opt-in to those benefits of information-sharing that are “public goods.” This is partly because most people tend to leave their computer settings on default and would not take the time to read an additional education blurb about information sharing. But it would be difficult even for those who did take the time to read.

Sometimes, the benefits of information-sharing would be passed on directly to consumers in the form of a discount price or coupons (although some privacy advocates would argue that this “discriminates” against those who opt out). But many of the benefits to consumers are diffuse in nature, cannot easily be quantified, and would not necessarily be passed on to the individual in the form of a direct payback. These benefits include things such as the use of information to prevent fraud; the company could not guarantee to any particular individual that possession of information about him or her would allow the company to prevent that particular person from being defrauded. It is having everybody’s information in an anti-fraud system that is valuable, not just one person’s. (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—if the database were run on an “opt-in” basis—of, for that matter—on an opt-out basis-- it would have gaps and holes that would render it useless).

Other examples of indirect benefits to consumer not easily explained or translated into a direct payback to the consumer include

- Cost savings to consumer from using information for inventory control, to target marketing, and so on.
- New products developed by using information to discover underserved markets (such as the market for medium tall women’s clothing).
- Enhanced competition from new companies created using lists purchased in the secondary market, such as a new magazine for tropical fish enthusiasts able to send its first subscription offers to buyers of tropical fish supplies.

Finally, if an information gatherer is interested in developing a product that stores negative information about some consumers—people who have committed fraud in online auctions, for example—the benefits are not to those whose information goes into the system (the fraudsters) but rather to their victims. But a perpetrator of fraud will not “opt in” to help his victims.

Many of the benefits of information-sharing go to consumers generally, but not necessarily to any particular individual or company. In that sense, opt-in, or even opt-out, essentially would set up a situation in which the individual consumer might well decide to free ride, depending upon others to give up their information but refusing to do so himself. With enough free riders, none of the benefits would be available to anybody.